Docket Number 3-06-0347

IN THE
APPELLATE COURT OF ILLINOIS
FOR THE THIRD DISTRICT

JOHN F. TAMBURO d/b/a MAN'S BEST FRIEND SOFTWARE, Plaintiff-Appellant, v. JAMES ANDREWS d/b/a K9PED, Defendant-Appellee.	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois. Case No. 06 L 51 Honorable Herman S. Haase, Presiding Judge. Date of Judgment: May 3, 2006

BRIEF AND ARGUMENT FOR
DEFENDANT/APPELLEE JAMES ANDREWS d/b/a K9PED

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

INTRODUCTION

This controversy involves a dispute between competitors of software created for use by pure bred dog, cat and horse breeders. John F. Tamburo d/b/a Man's Best Friend Software ("Plaintiff") brings this action because James Andrews d/b/a K9Ped ("Defendant") conveyed verifiable information about Plaintiff on the Internet. None of the information posted on the Internet was untrue, false or otherwise misleading. The Plaintiff brings this action in Illinois where personal jurisdiction does not exist over Defendant. In essence, the lawsuit underlying this appeal represents nothing more than an outlet for Plaintiff to harass Defendant. For the reasons stated below, the trial court correctly granted Defendant's Motion to Dismiss ("Defendant's Motion"), and this Court should affirm the trial court's order.

STATEMENT OF FACTS[1]

1. Defendant is a resident and citizen of Oregon. R. C27 (1st Am. Compl. ¶ 3); R. C157-58 (Andrews' Affidavit ¶¶ 2, 3, 7, 8, 9). He has minimal contacts, if any, with Illinois. Id.

2. In September 2001, Defendant became aware of repeated complaints involving Plaintiff's products and customer service. See R. C31 (1st Am. Compl. ¶¶ 18, 28).

3. In addition, Defendant learned that Plaintiff was involved in bankruptcy proceedings before the United States Bankruptcy Court for the Northern District of Illinois and that Plaintiff had previously filed for bankruptcy five times. See R. C28 (1st Am. Compl. ¶ 10).

4. Based on the information he learned, Defendant posted truthful statements about

[1] Defendant objects to Plaintiff's Statement of Facts as being argumentative, inaccurate, and undeniably subjective. See Appellant's Brief pp. 11-14. However, as many of the facts stated by Plaintiff are irrelevant to the issues on this appeal, Defendant declines to respond to each objectionable statement of fact within its supplemental Statement of Facts. Rather, the Defendant relies on citations to the record contained within the body of his memorandum below.

Plaintiff on the Internet. See R. C28-33 (1st Am. Compl. ¶¶ 10, 17, 18, 28, 30, 37).

5. In fact, none of the information posted on the Internet was untrue, false or otherwise misleading. See R. C28-33 (1st Am. Compl. ¶¶ 10, 17, 18, 28, 30, 37).

6. Plaintiff disliked the publication of the truthful statements and filed the underlying lawsuit against Defendant. R. C.

STANDARD OF REVIEW

A motion to dismiss under section 2-615 of the Illinois Code of Civil Procedure (the "Code") tests the legal sufficiency of the plaintiff's claim. 735 ILCS 5/2-615. A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the plaintiff's claim, but asserts certain defects or defenses outside the pleading that defeat the claim. 735 ILCS 5/2-619; see also Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 984 (Ill. 2002). When reviewing a lower court's dismissal of claims pursuant to sections 2-615 or 2-619, this Court applies a *de novo* standard. Ramos v. City of Peru, 333 Ill. App. 3d 75, 77, 775 N.E.2d 184, 186 (3rd Dist. 2002).

ARGUMENT

On May 3, 2006, the trial court granted Defendant's Motion to Dismiss Plaintiff's First Amended Complaint concluding that the court lacked personal jurisdiction over Defendant. R. C386-87 (Amended Order). Specifically, the trial court held that 1) Defendant lacked sufficient contacts with the State of Illinois for it to exercise personal jurisdiction over him; 2) Defendant's Motion to Dismiss Plaintiff's First Amended Complaint is granted upon this basis; 3) Plaintiff's First Amended Complaint is dismissed in its entirety; and 4) Plaintiff's request to file his Second Amended Complaint is denied as moot. Id. By this appeal, the Plaintiff seeks reversal of the trial court's order. Plaintiff also

argues the merits of his substantive claims, though the trial court did not rule upon them. Defendant responds to both of these arguments below. Despite Plaintiff's efforts, the law remains clear that Defendant lacks sufficient contacts with Illinois to be subject to personal jurisdiction under any statutory and due process analysis. Moreover, despite Plaintiff's unsupported assumptions about and its mischaracterization of tortious interference, defamation, and unfair competition law, Plaintiff's substantive claims completely lack any merit. For these reasons, the trial court's order dismissing the Plaintiff's First Amended Complaint must be affirmed.

I. THE TRIAL COURT'S ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION MUST BE AFFIRMED.

In his brief, Plaintiff raises both procedural and substantive arguments challenging the propriety of the trial court's order dismissing the First Amended Complaint for lack of personal jurisdiction over the Defendant.

A. Plaintiff's § 2-619.1 and § 2-301 Procedural Arguments Lack Merit.

Plaintiff first contends that Defendant's Motion does not comply with Section 2-619.1 of the Illinois Code of Civil Procedure ("Code"). See Appellant's Brief pp. 16-22. Specifically, Plaintiff contends Defendant did not properly combine his arguments on personal jurisdiction grounds with those relating to the deficiency of the underlying common law claims. This argument lacks merit. In his Motion to Dismiss, Defendant identified his arguments and bases for dismissal in three brief, distinct paragraphs. R. C120-21 (Defendant's Motion). The first such paragraph specifically refers to this Court's lack of personal jurisdiction over the Defendant and the corollary basis for dismissal pursuant to § 2-619. Id. The second paragraph identifies additional arguments relating to improper service by the Plaintiff, improper forum, and the expiration of certain claims under the

statute of limitations. Id. The final paragraph refers specifically to Defendant's argument that Plaintiff failed to state any claim upon which relief can be granted under § 2-615. Id. Moreover, the Defendant's Motion specifically incorporates and references the arguments in the accompanying memorandum filed in support thereof. R. C120-21 (Defendant's Motion). Finally, the memorandum and amended memorandum filed in support of Defendant's Motion both contained distinct sections limited to and made under each of §§ 2-615 and 2-619. Id.; R. C132, 147 (Defendant's Mem. in Supp. Mot. to Dismiss). Each section also clearly showed the "grounds relied upon under the Section upon which it is based." Id. Such a construction completely complies with the requirements pursuant to § 2-619.1 relating to combined motions. 735 ILCS 5/2-619.1. Consequently, Plaintiff's argument to the contrary is erroneous. See id.

Next, Plaintiff reverses his argument and contends that a motion to dismiss for lack of personal jurisdiction must be filed separately under § 2-301 of the Code. Consequently, Plaintiff argues that Defendant has waived his jurisdictional argument by purportedly failing to do so. See Appellant's Brief pp. 15-22. As with his prior argument, Plaintiff misunderstands the law. For, a party no longer needs to file a special appearance under § 2-301 to challenge personal jurisdiction. In re Marriage of Hoover, 314 Ill. App. 3d 707, 710, 732 N.E.2d 145, 147 (4th Dist. 2000); see also KSAC Corp. v. Recycle Free, Inc., 364 Ill. App. 3d 593, 595, 846 N.E.2d 1021, 1023 (2nd Dist. 2006). In essence, the 2000 amendments to § 2-301 eliminated the distinction between general and special appearances. Id. In addition, a "defendant [may now] combine a motion challenging jurisdiction with other motions seeking relief on different grounds." KSAC Corp., 364 Ill. App. 3d at 595, 846 N.E.2d at 1023; see also In re Marriage of Hoover, 314 Ill. App. 3d. at 710, 732 N.E.2d

at 147. Indeed, § 2-619.1 specifically provides for such combined motions. 735 ILCS 5/2-619.1. And, despite Plaintiff's contention that personal jurisdiction cannot be raised under 2-619, Illinois courts have consistently addressed motions to dismiss for lack of personal jurisdiction pursuant to Section 2-619.[2] In re Marriage of Hoover, 314 Ill. App. 3d. at 710, 732 N.E.2d at 147; W. Va. Laborers Pension Trust Fund v. Caspersen, 357 Ill. App. 3d 673, 675, 829 N.E.2d 843, 845 (1st Dist. 2005). Consequently, Defendant properly brought his motion to dismiss for lack of personal jurisdiction pursuant to Section 2-619 in combination with additional bases for dismissal. See KSAC Corp., 364 Ill. App. 3d at 595, 846 N.E.2d at 1023; In re Marriage of Hoover, 314 Ill. App. 3d at 710, 732 N.E.2d at 147; 735 ILCS §§ 5/2-301, 2-619, and 2-619.1. Thus, the trial court did not err in refusing to consider Plaintiff's arguments on this issue below. Id. Therefore, the trial court's ruling should not be reversed on these bases. Id.

B. The Trial Court Correctly Held That Plaintiff's Complaint Should Be Dismissed For Lack of Personal Jurisdiction.

The trial court properly ruled that it did not have personal jurisdiction over Defendant. Defendant lacks sufficient contacts for this Court to exercise either general or specific personal jurisdiction over him. Furthermore, exercising personal jurisdiction over Defendant would not comport with due process under either the federal or Illinois constitutions. For these reasons, this Court should affirm the trial court's order granting Defendant's Motion.

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[2] The same arguments apply to Plaintiff's contention that Defendant has waived improper service of process. See Safeco/American States Ins. Co. v. Hagler, 332 Ill. App. 3d 912, 916, 773 N.E.2d 1255, 1258 (5th Dist. 2002).

1. Standard for Personal Jurisdiction in Illinois.

Section 2-619 of the Code provides for the dismissal of actions and claims where the Court lacks personal jurisdiction over the defendant. See 735 ILCS 5/2-619. Whether Illinois can exercise jurisdiction over a nonresident Defendant rests on the applicability of Illinois' long-arm statute. Kostal v. Pinkus Dermatopathology Laboratory, P.C., 357 Ill. App. 3d 381, 384, 827 N.E.2d 1031, 1035 (1st Dist. 2005) (citing 735 ILCS 5/2-209). The Illinois long-arm statute is codified at § 2-609. In 1989, the Illinois legislature amended § 2-609 to include a "catch-all" provision stating that a court "may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2-609(c). Consequently, the long-arm statute has become co-extensive with the due process requirements under the federal and Illinois constitutions. Keller v. Henderson, 359 Ill. App. 3d 605, 611-612, 834 N.E.2d 930, 936 (2nd District 2005) (citing Kostal, 357 Ill. App. 3d at 384, 827 N.E.2d at 1035). Thus, the focus of any personal jurisdiction inquiry must begin with whether the plaintiff has shown that federal and Illinois due process requirements have been met. Keller, 359 Ill. App. 3d at 612, 834 N.E.2d at 935. If these requirements have been met, the inquiry ends. See id.

In reviewing personal jurisdiction, the plaintiff bears the burden of establishing a valid basis for asserting jurisdiction over the defendant. See Kostal, 357 Ill. App. 3d at 383, 827 N.E.2d at 1035 (citing Morecambe Maritime, Inc. v. National Bank of Greece, S.A., 354 Ill. App. 3d 707, 710, 821 N.E.2d 780, 784 (1st Dist. 2004)). Although this Court must resolve conflicts between the Parties' affidavits in favor of Plaintiff, this Court must also accept as true any facts averred by Defendant that have not been contradicted by an affidavit submitted by Plaintiff. Cleary v. Philip Morris, 312 Ill. App. 3d 406, 411, 726 N.E.2d 770,

775 (1st Dist. 2000). "If plaintiff has failed to establish *a prima facie* case, the inquiry is at an end and the defendant's motion should be granted." Id.

2. Federal Due Process Precludes Personal Jurisdiction.

The standard with which personal jurisdiction must comport to satisfy federal due process requirements has been well established. As the Keller court explained, the defendant

> must have certain 'minimum contacts' with the forum state such that maintaining the suit there does not offend 'traditional notions of fair play and substantial justice.' In other words, "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.'" The minimum contacts required for personal jurisdiction "must be based on 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" The purposeful availment requirement exists so that an 'alien defendant will not be forced to litigate in a distant or inconvenient forum solely as a result of random, fortuitous, or attenuated contacts or the unilateral act of a consumer or some other third person'.

Keller, 359 Ill. App. 3d at 611-612, 834 N.E.2d at 936. An analysis under the federal due process requirements requires a three-prong inquiry; "whether (1) the nonresident defendant had 'minimum contacts' with the forum state such that there was 'fair warning' that the nonresident defendant may be haled into court there; (2) the action arose out of or related to

the defendant's contacts with the forum state; and (3) it is reasonable to require the defendant to litigate in the forum state." Id.

The analysis of these factors further depends upon whether a plaintiff seeks to establish general or specific jurisdiction over the defendant. Id. General jurisdiction is permitted where a defendant has "continuous and systematic general business contacts" with the forum. Where general jurisdiction has been established, a defendant "may be sued in the forum state for suits neither arising out of nor related to the defendant's contact with the forum state." Id. Not so with specific jurisdiction. Indeed, the key difference between general and specific jurisdiction is that specific jurisdiction requires that the suit *arise out of* or be *related to* the defendant's contact with the forum. Id. (citing Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 824 N.E.2d 1175 (3rd Dist. 2005)) (emphasis added).

a. General Jurisdiction is Inapplicable to Defendant Andrews.

The Plaintiff has not established that this Court can exercise general jurisdiction over Defendant. First, Plaintiff does not specifically allege general jurisdiction over Defendant.[3] Defendant does not argue anywhere in his brief that general jurisdiction applies to Defendant. See Appellant's Brief pp. 22-30. In fact, Plaintiff limits his jurisdiction argument to "specific jurisdiction in Illinois." Id. p. 22. Thus, Plaintiff has waived any general jurisdiction argument. See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997).

Assuming, *arguendo*, the Plaintiff has not waived a general jurisdiction argument,

3 Plaintiff confuses general jurisdiction and specific jurisdiction, alleging "*general* personal jurisdiction over Defendant pursuant to 735 ILCS 5/2-*209(a)(1)*", whereas subsection 209(a)(1) provides for specific, not general, jurisdiction. See R. C34 (1st Am. Compl. ¶ 40) (emphasis added) and Kostal, 357 Ill. App. 3d at 385, 827 N.E.2d at 1035. Thus, it is unclear whether Plaintiff asserts general jurisdiction, specific jurisdiction, or both. Defendant submits that Plaintiff has failed to properly assert general jurisdiction. Thus, Plaintiff has waived any general jurisdiction argument.

the Plaintiff cannot establish general personal jurisdiction over Defendant. In his First Amended Complaint, Plaintiff admits that Defendant resides in North Plains, Oregon and is not an Illinois resident. See R. C27 (1st Am. Compl. ¶ 3). Defendant has not had and does not have systematic, continuous or intense contacts in the State of Illinois. See R. C157 (Andrews Affidavit ¶ 3). To overcome this, Plaintiff alleges that Defendant is subject to Illinois "general personal jurisdiction" because Defendant operates a website which makes Defendant's software available online. See R. C28, 34 (1st Am. Compl. ¶¶ 8, 40). It is true that Defendant operates a website at www.k9ped.com. See R. C28 (1st Am. Compl. ¶ 8); R. C157 (Andrews' Affidavit ¶ 5). However, Defendant does not operate the website from Illinois; does not have the website hosted with an Internet server in Illinois; and does not have the website maintained from Illinois. See R. C157 (Andrews' Affidavit ¶ 8). Apart from counsel retained for this lawsuit, Defendant has not hired Illinois companies to perform services for him, his website or his business. Id. ¶ 9. Also, Defendant does not specifically target his website, including the advertising and marketing thereon, or his software to Illinois citizens. Id. ¶ 7.

Despite Defendant's lack of contact with Illinois, Plaintiff alleges that Defendant "has used the Web Site to solicit customers from and complete sales in Illinois, and has sold copies of his competing software to Illinois residents." See R. C28, 34 (1st Am. Compl. ¶¶ 8, 40). In fact, as of March 30, 2006, Defendant had only *one* customer with an Illinois mailing address. See R. C157 (Andrews' Affidavit ¶ 10). Although Plaintiff calls Defendant "a liar" for saying so without any basis, he does acknowledge that "[t]he truth of this matter is within Andrews' exclusive control." R. C252 (Plaintiff's Affidavit ¶ 4). In any case, merely entering into a contract with a single resident of Illinois is not sufficient by

itself to subject a nonresident to personal jurisdiction in Illinois. Hendry v. Ornda Health Corp., 318 Ill. App. 3d 851, 853, 742 N.E.2d 746, 748 (2nd Dist. 2000). Indeed, the business conducted by the nonresident must be carried on with a fair measure of permanence and continuity, not occasionally or casually. Id. Consequently, such nominal and sporadic contacts do not lend to business that is conducted with "a fair measure of permanence and continuity" sufficient for general jurisdiction. LaRochelle v. Allamian, 361 Ill. App. 3d 217, 226, 836 N.E.2d 176, 185 (2nd Dist. 2005) (citing Hendry v. Ornda Health Corp., 318 Ill. App. 3d 851, 853, 742 N.E.2d 746, 750 (2nd Dist. 2000)). Moreover, the mere possibility of sales to Illinois citizens through Defendant's website is insufficient to warrant general jurisdiction. See LaSalle National Bank v. Vitro, Sociedad Anonima, 85 F. Supp. 2d 857, 861 (N.D. Ill. 2000) (quoting Molnlycke Health Care AGB v. Dumex Medical Surgical Products Ltd., 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999)).

With respect to Defendant's website as a whole, it does not warrant exercising general jurisdiction in this instance. Obviously, websites, including Defendant's, can be accessed by Internet users *worldwide*. Consequently, it becomes even more essential for courts to analyze the question of jurisdiction arising from websites on a case-by-case basis. LaRochelle, 361 Ill. App. 3d at 222, 836 N.E.2d at 184-85 (citing Haubner v. Abercrombie & Kent International, Inc., 351 Ill. App. 3d 112, 119, 812 N.E.2d 704 (1st Dist. 2004)). For this reason, with regard to the Internet and personal jurisdiction, Illinois courts have adopted the "sliding scale" analysis to determine whether Internet activity is sufficient to establish personal jurisdiction. LaRochelle, 361 Ill. App. 3d at 225 (citing Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 1114, 824 N.E.2d 1175, 1180 (3rd Dist. 2005), for the analysis formulated in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D.

Pa. 1997)). At one end, jurisdiction does not attach where the nonresident maintains a passive website that merely provides information about the defendant's products or services. Id. At the other end, jurisdiction attaches where the defendant transacts business via an active website where contracts are completed online and the defendant derives profits directly from web-related activity. Id. Passive websites do not give rise to general jurisdiction. Fully active, commercial websites can give rise to general jurisdiction. Id.

A third type of interactive hybrid website exists between the "passive" and "active" websites. An "interactive" website allows customers to communicate and interact with a defendant regarding a defendant's products and services. See Infosys Inc. v. Billingnetwork.com, Inc., No. 03 C 2047, 2003 U.S. Dist. LEXIS 14808, at *9 (N.D. Ill. Aug. 27, 2003). The applicability of general jurisdiction to such a website depends on its level of commercial interactivity. However, "commercial" does not necessarily include all features designed to promote a business or product. See id. at *9-10 (comparing interconnectivity of a commercial nature such as "soliciting software resellers, medical sales representatives, and practice management consultants to join its 'network of qualified Value Added Resellers (VARS)'" to other "interconnectivity features of a lesser commercial nature" such as "an opportunity to subscribe to [the company's] periodic newsletter, and, on a separate page for investors, the website invites potential investors to fill out a form for more information 'about investment opportunities' in the company'"). Even still, courts have disagreed on the level of commercial interactivity sufficient to confer general jurisdiction. Id. n2, n3 (citing disagreeing opinions). An analysis of these cases, however, demonstrates that "cases conferring jurisdiction partly on the basis of Internet activity 'reflect that personal jurisdiction is typically determined based not only on the defendant's

Internet activities but also on its non-Internet activities.'" Id. (citing Watchworks, Inc. v. Total Time, No. 01 C 5711, 2002 U.S. Dist. LEXIS 4491, at *6 (N.D. Ill. Mar. 19, 2002) (emphasis added)). Indeed, "there is no case where general jurisdiction was conferred on the basis of an interactive website in the absence of non-website factors evidencing intent for a defendant's product or website to reach a particular state." Id. Therefore, non-Internet activities must exist apart from a hybrid or interactive website for there to be general jurisdiction over Defendant operator of the website. Id.

Here, Defendant's website is a "hybrid" or "interactive" -- it provides information about Defendant's software and is designed to sell Defendant's products. See R. C157 (Andrews' Affidavit ¶ 6). As indicated above, the Defendant lacks any non-Internet contacts sufficient to confer general jurisdiction. Consequently, there do not exist sufficient bases to warrant exercising general jurisdiction over Defendant. See Watchworks, Inc, 2002 U.S. Dist. LEXIS 4491, at *6; Infosys, Inc., 2003 U.S. Dist. LEXIS 14808, at *9.

For the reasons above, Plaintiff fails to allege that Defendant has continual and intense business contacts with Illinois companies or residents; and Defendant does not have such contacts. See R. C157-58 (Andrews Affidavit ¶¶ 1-10). Without such contacts with Illinois, the Defendant's website does not give rise to general personal jurisdiction. Thus, Defendant cannot be subject to personal jurisdiction based on a general jurisdictional analysis.

b. Specific Jurisdiction is Inapplicable to Defendant Andrews.

Similar to that of general jurisdiction, Plaintiff cannot establish that this Court has specific jurisdiction over Defendant. The main factor in specific jurisdiction analysis is foreseeability -- was it reasonably foreseeable to the defendant that its action could result in

litigation in the state in question. Birnberg v. Milk St. Residential Assocs. Partnership, No. 02 C 0978 and 02 C 3436, 2003 U.S. Dist. LEXIS 806, at *10 (N.D. Ill. January 17, 2003) (R. C164-178) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-74 (1985)). Contacts that are "random, fortuitous, or attenuated" are not sufficient to establish that a state's exercise of personal jurisdiction over the defendant was foreseeable. Id. (citing Heritage House Rests., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276, 283 (7th Cir. 1990)). Moreover, in examining the contacts in a specific jurisdiction analysis, the court cannot "simply aggregate all of the defendant's contacts with the state -- no matter how similar in terms of geography, time, or substance." Id. (citing RAR, 107 F.2d at 1277).

Plaintiff alleges specific jurisdiction over Defendant pursuant to 735 ILCS 5/2-209(a)(1) and (a)(2). See R. C33-34 (1st Am. Compl. ¶¶ 38, 40). Sections 209(a)(1) and (a)(2) provide for jurisdiction over a nonresident defendant for a cause of action arising from the "transaction of any business within" Illinois and the "commission of a tortious act within" Illinois, respectively. 735 ILCS 5/2-209(a). Specifically, Plaintiff contends that Defendant transacts business in Illinois, engaged in tortious activity that affected an Illinois citizen, and that his website gives rise to specific personal jurisdiction.

"Transaction of Business" Inapplicable

For specific jurisdiction to be applicable based upon transaction of business, Plaintiff's causes of action must *arise from* Defendant's "transaction of business" in Illinois. See 735 ILCS 5/2-209(a)(1); Kostal, 357 Ill. App. 3d at 385 (emphasis in original) (citing Kadala v. Cunard Lines, Ltd., 226 Ill. App. 3d 302, 314, 589 N.E.2d 802, 810 (1st Dist. 1992)); see also Bombliss, 355 Ill. App. 3d at 1112, 824 N.E.2d at 1179 ("Specific jurisdiction refers to jurisdiction over a defendant in a suit arising out of or related to the

defendant's contacts with the forum"). Plaintiff alleges that Defendant "transacted business" because Defendant's website "is an active web site, [sic] that facilitates the completion of sales transactions wholly online, including sales to Illinois residents." See R. C33 (1st Am. Compl. ¶ 39). Although Defendant has one customer with an Illinois mailing address, any such sales to this customer are irrelevant to the question of *specific* personal jurisdiction over Defendant. For, Plaintiff's claims of libel, unfair competition and tortious interference with prospective economic advantages have no relation to and did not arise out of any such sales. See generally R. C27-46 (1st Am. Compl). Rather, Plaintiff's allegations arise from Defendant's acts of posting alleged "disparagements" or statements about Plaintiff on his website. See generally R. C27-46 (1st Am. Compl.) As such, the instant circumstances differ significantly from Swissland Packing Co. v. Cox, 255 Ill. App. 3d 942, 944, 627 N.E.2d 686, 688 (3rd Dist. 1994) (holding that the defendant's conduct of negotiating the contract with plaintiff by telephone and mailing the contract to plaintiff in Illinois was sufficient to submit the defendant to specific jurisdiction of the Illinois courts) and Kalata, 312 Ill. App. 3d at 768, 728 N.E.2d at 654 (holding that the defendant's telephone and mail communications to negotiate and execute the joint venture agreement with plaintiff satisfied the long arm-statute). Because Plaintiff's allegations of libel, unfair competition and tortious interference do not *arise from* Defendant's alleged sales to Illinois citizens, there cannot be any specific jurisdiction over Defendant based on such alleged conduct under the "transacting business" theory. See Kostal, 357 Ill. App. 3d at 385, 827 N.E2d at 1035 (emphasis in original) (citing Kadala v. Cunard Lines, Ltd., 226 Ill. App. 3d 302, 314, 589 N.E.2d 802, 810 (1st Dist. 1992)); see also Bombliss, 355 Ill. App. 3d at 1112, 824 N.E.2d at 1179.

"Tortious Act" Inapplicable

Plaintiff next contends that specific jurisdiction arises from Defendant's alleged tortious acts. As with the "transacting business" specific jurisdiction analysis, the Plaintiff's claims must relate to or arise from the tortious acts. Keller, 359 Ill. App. 3d at 611-612, 834 N.E.2d at 936; RAR, Inc., 107 F.3d at 1277-78; Spartan Motors v. Lube Power, Inc., 337 Ill. App. 3d 556, 561, 786 N.E.2d 613, 618 (2nd Dist. 2003). For this purpose, Plaintiff alleges two sets of acts he contends give rise to personal jurisdiction: accessing a federal court website and publishing statements about a competitor on one's own website. Each of these acts fails to give rise to personal jurisdiction in Illinois.

Plaintiff incredulously contends that Defendant entered into Illinois, with no purpose other than to damage Plaintiff, when he accessed a website operated by the federal courts, particularly that of the United States Bankruptcy Court for the Northern District of Illinois. See R. C33 (1st Am. Compl. ¶¶ 37, 38). Although courts have broadly construed the term "tortious act" to include acts beyond those which "create common law liability" such that "any act [constituting] a breach of duty to another imposed by law" committed within the state may give rise to personal jurisdiction, Vlasak v. Rapid Collection Sys., Inc., 962 F. Supp. 1096, 1100 (N.D. Ill. 1997); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 140 (N.D. Ill. 1977). Not surprisingly, Plaintiff fails to cite any authority supporting his claim that merely accessing a government website to obtain public court documents constitutes a tortious activity. Indeed, Defendant did not breach a duty to Plaintiff or anyone by accessing a federal court website. Additionally, Plaintiff fails to cite any authority supporting his claim that merely accessing a government website to obtain public court documents gives rise to personal jurisdiction. However, even if accessing an Illinois

court website constitutes "entering Illinois" and a tortious activity for purposes of specific jurisdiction, Plaintiff's claims do not arise from the accessing of the government's website. Thus, Defendant's interaction with the court's website has no application to specific jurisdiction analysis in this case. See RAR, Inc., 107 F.2d at 1272.

Plaintiff next contends that the act of publishing statements on a website about a competitor suffices to exercise jurisdiction over a nonresident defendant. Plaintiff is mistaken. Like the defendant in Bailey v. Turbine Design, Inc., Defendant here did not make statements about Plaintiff as an Illinois businessman or company. Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790, 796-797 (W.D. Tenn. 2000). Like Bailey, the alleged defamatory comments had nothing to do with the Plaintiff's state of residence. See id. Consequently, the alleged statements do not constitute actions "expressly aimed" at Illinois. As the court explained in Barrett v. Catacombs Press:

> It is certainly foreseeable that some of the harm would be felt in [the forum state] because Plaintiff lives and works there, but such foreseeability is not sufficient for an assertion of jurisdiction. While we agree that [forum] residents are among the recipients or viewers of such defamatory statements, they are but a fraction of other worldwide Internet users who have received or viewed such statements. The mere allegations that the Plaintiff feels the effect of the Defendant's tortious conduct in the forum because the Plaintiff is located there is insufficient to satisfy the effects test of Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1984). Unless [the forum state] is deliberately or knowingly targeted by the tortfeasor, the fact that harm is felt in [the forum state] from conduct occurring outside [it] is never sufficient to satisfy due

process.

44 F. Supp. 2d 717, 731 (E.D. Pa. 1999). Other courts have reached consistent results. Reynolds v. International Amateur Ath. Fed'n, 23 F.3d 1110, 1120 (6th Cir. 1994) ("the fact that the defendant could foresee that the statements would be circulated and have an effect in [the forum state] is not, in itself, enough to create personal jurisdiction."); see also Neogen Corp. v. VICAM, No. 5:96-CV-138, 1997 U.S. Dist. LEXIS 3331, at *5-7 (W.D. Mich. Feb. 20, 1997). Thus, jurisdiction over the Defendant should not be exercised merely based on the fact that some of the harm caused by the alleged tortious conduct occurred in Illinois. See Barrett, 44 F. Supp. 2d at 731. Therefore, the statements alone do not give rise to specific personal jurisdiction. See id.

Websites Revisited

Finally, the Defendant's website does not warrant exercising specific personal jurisdiction over the Defendant. Although Plaintiff arguably asserts specific jurisdiction as to Defendant's website, the Defendant's website was not specifically targeted toward Illinois or Illinois residents. Moreover, the Defendant's website is wholly passive to the portions of the website at issue in this litigation. Specifically, the statements about Plaintiff constitute purely passive information on the website. As such, the passive nature of this content cannot give rise to specific personal jurisdiction over the Defendant. See LaRochelle, 361 Ill. App. 3d at 225, 836 N.E.2d at 186; Bombliss, 355 Ill. App. 3d at 1114, 824 N.E.2d at 1175; Zippo Mfg. Co., 952 F. Supp. at 1123-24. This Court cannot consider portions of the Defendant's website unrelated to the Plaintiff's claims in a specific jurisdiction analysis. See Haemoscope Corporation v. Pentapharm AG, et al, No. 02 C 4261, 2002 U.S. Dist. LEXIS 23387, at *22 (N.D. Illinois December 6, 2002) (citing RAR,

Inc., 107 F.3d at 1277 ("in minimum contacts analysis for specific jurisdiction, court may consider only defendant's contacts that relate to the suit; it may not aggregate all of defendant's contacts with a forum")). Therefore, with respect to the Defendant's statements Plaintiff finds troubling, Defendant's website is "a passive website which cannot satisfy the minimum contacts requirement." Id.

3. Illinois Due Process Precludes Personal Jurisdiction.

Although Illinois due process requirements theoretically could diverge at some point from federal due process requirements, federal courts have held that "because Illinois courts have not elucidated any 'operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction,' the two constitutional analyses collapse into one." Allied Van Lines, Inc. v. Gulf Shores Moving & Storage, Inc., No. 04-C-6900, 2005 U.S. Dist. LEXIS 6244, slip op. at 5 (N.D. Illinois February 23, 2005) (quoting Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 715 (7th Cir. 2002)). That being said, "[d]ue process under the Illinois Constitution requires that it be 'fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.'" Keller, 359 Ill. App. 3d at 619, 834 N.E.2d at 942 (quoting Rollins v. Ellwood, 141 Ill.2d 244, 275, 565 N.E.2d 1302 (Ill. 1990)); RAR, Inc., 107 F.3d at 1276. As demonstrated above, the subjection of the nonresident Defendant to jurisdiction in Illinois to defend this case would not be "fair, just and reasonable." See id. Consequently, the Illinois due process requirements cannot tolerate exercising personal jurisdiction against Defendant. See id.

4. Defendant Is Not Subject to Jurisdiction in Illinois.

For the foregoing reasons, the Plaintiff has failed to make a prima facie case sufficient to warrant the exercise of personal jurisdiction over Defendant. Even if the Plaintiff did establish a prima facie case, the Defendant has demonstrated that exercising personal jurisdiction over him would not comport with the due process requirements under the federal and Illinois constitutions. Because neither general nor specific jurisdiction is applicable, the trial court correctly ruled that it did not have personal jurisdiction over Defendant. Therefore, this Court should affirm the trial court's ruling and dismiss Plaintiff's claims for lack of jurisdiction.

II. PLAINTIFF FAILS TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

Although the trial court dismissed Plaintiff's First Amended Complaint on personal jurisdictional grounds only, Plaintiff has also introduced arguments in his Appellate brief on the underlying claims of his First Amended Complaint.[4] See Appellant's Brief p. 30. Plaintiff both raises a procedural issue and argues that he has sufficiently stated claims upon which relief can be granted. Consequently, on the possibility that this Court may consider Plaintiff's arguments with respect to his claims, Defendant now responds to them. For the reasons below, Plaintiff has failed to state claims for Tortious Interference, Defamation, and Unfair Competition.

[4] Although the record does not contain any ruling by the trial court on the underlying claims in Plaintiff's First Amended Complaint or any substantial discussion of same at the hearing on Defendant's Motion to Dismiss, the Plaintiff views the presence of arguments related thereto as providing a possible additional basis upon which this Court might affirm the trial court's order dismissing the First Amended Complaint.

A. Plaintiff Was Not Prejudiced by Defendant's Affirmative Defenses and Introduction of Evidentiary Material.

Plaintiff contends that affirmative defenses and evidentiary material cannot be introduced in a § 2-615 motion. See Appellant's Brief p 34. Specifically, Plaintiff asserts that Defendant submitted evidentiary material to support his arguments seeking dismissal of Plaintiff's Tortious Interference with Prospective Economic Advantage and Defamation claims. This is proper and permissible under a section 2-619 motion. Barrett v. Fonorow, 343 Ill. App. 3d 1184, 1189, 799 N.E.2d 916, 920 (2nd Dist. 2003) ("A motion to dismiss made under § 2-619 admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or that are established by external submissions acting to defeat the allegations of the complaint."). As to these claims, Defendant's arguments perhaps should have been more appropriately labeled as arising under § 2-619 rather than § 2-615. However, this does not provide Plaintiff with a basis for reversal.

As the First District has held, the mislabeling of motion as arising under § 2-615 rather than § 2-619 does not require a reversal where there is no indication of prejudice arising therefrom. Advocate Health & Hospitals Corp. v. Bank One, N.A., 348 Ill. App. 3d 755, 758, 810 N.E.2d 500, 504 (1st Dist. 2004). Here, like in Advocate Health, Plaintiff has not shown any portion of the record that exhibits such prejudice. In fact, there has been no prejudice to Plaintiff. For one, the trial court did not even rule upon the Defendant's arguments with respect to tortious interference and defamation. R. C386-87 (Amended Order). Additionally, like in Advocate Health, the Plaintiff recognized and argued this issue in the trial court. Advocate Health, 348 Ill. App. 3d at 758, 810 N.E.2d at 504. Consequently, the Plaintiff has not been prejudiced by Defendant's use of affirmative

defenses or evidentiary evidence. See id. Thus, this Court should not decline to address the arguments related to Plaintiff's underlying claims on this basis alone. See id. Likewise, should this Court exercise its discretion to consider and rule upon the underlying claims, the Defendant contends this Court should consider his arguments as to Plaintiff's claims for tortious interference with prospective economic advantage and defamation as brought pursuant to § 2-619.[5]

B. Plaintiff's Defamation Claims Have No Merit.

Plaintiff fails to state claims for defamation *per se* in Counts Two and Ten and defamation *per quod* in Counts Four and Five.[6] These claims should be dismissed based on the affirmative defenses of substantial truth and opinion.

1. The Illinois Defamation Standard.

To state a defamation claim, a plaintiff must allege facts tending to demonstrate that the defendant made a false statement of fact about the plaintiff, that there was an unprivileged publication of the false statement to a third party by the defendant, and that the publication damaged the plaintiff. Popko v. Continental Casualty Co., 355 Ill. App. 3d 257, 261, 823 N.E.2d 184, 188 (1st Dist. 2005). In Illinois, a "statement is defamatory if it impeaches a person's reputation and thereby lowers that person in the estimation of the community or deters third parties from associating with that person." Schivarelli v. CBS, Inc., et al., 333 Ill. App. 3d 755, 759, 776 N.E.2d 693, 696 (1st Dist. 2002). Defamatory

[5] If this Court reverses on jurisdictional grounds, Defendant requests leave to replead these arguments as arising under section 2-619.

6 Plaintiff titles Counts Two, Four, Five and Ten "Libel Per Se", "Libel Per Quod", "Libel Per Quod II", and "Libel Per Se II", respectively. See R. C35, 37, 38, 44 (1st Am. Compl.) Plaintiff alleges "Libel Per Se" in Count Two relative to the first and fifth disparagements; "Libel Per Quod" in Count Four relative to the second disparagement; "Libel Per Quod II" in Count Five relative to the third disparagement; and "Libel Per Se II" in Count Ten relative to the sixth disparagement. See generally R. C27-46 (1st Am. Compl.) To defray confusion, Defendant will address all four Counts (II, IV, V and X) collectively as Plaintiff's "Libel Claims".

statements may be classified as either defamatory *per se* or defamatory *per quod*. Id. To constitute a statement that is defamatory *per se*, a statement must fit into one of five categories that Illinois recognizes as being "so obviously and naturally harmful to the person to whom it refers that injury to his reputation may be presumed." Id. These five categories include those statements (1) imputing the commission of a criminal offense; (2) imputing infection with a loathsome communicable disease; (3) imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) imputing a lack of ability or prejudicing a party in one's trade, profession, or business; and (5) imputing adultery or fornication. Id. In such cases, a plaintiff need not allege or prove special damages. Van Home v. Muller, 185 Ill.2d 299, 307, 705 N.E.2d 898, 903 (Ill. 1998).

Should statements not fall into one of the *per se* categories, the statements could still be defamatory *per quod*. To succeed on a defamation *per quod* claim, a plaintiff must demonstrate that a defendant "made a false statement concerning [the] plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by [the] defendant, and that [the] plaintiff was damaged" from the publication. Cianci v. Pettibone Corp., 298 Ill. App. 3d 419, 424, 698 N.E.2d 674, 678 (1st Dist. 1998). Extrinsic facts must be alleged showing the defamatory nature of the language. Anderson v. Vanden Dorpel, 172 Ill.2d 399, 406, 416-417, 667 N.E.2d 1296, 1303-04 (Ill. 1996). Moreover, one must allege specific special damages. Indeed, failure to plead specific damages is a fatal deficiency to any defamation *per quod* claim. Schivarelli, 333 Ill. App. 3d at 759, 776 N.E.2d at 696. General allegations that the alleged defamatory statements caused a plaintiff emotional distress, embarrassment or economic loss are insufficient. Anderson, 172 Ill.2d at 416-417, 667 N.E.2d at 1303-04. Finally, Plaintiff must allege with specificity the

statements it claims were defamatory. Lykowski v. Bergman, 299 Ill. App. 3d 157, 163, 700 N.E.2d 1064, 1069 (1st Dist. 1998) (holding that a plaintiff must set forth the words alleged to be defamatory "clearly and with particularity" and that it is not enough for the plaintiff to merely state that a defendant generally accused the plaintiff of committing improper or unethical conduct).

2. The "Substantial Truth" Defense Is Alive, Well, and Applicable.

The Plaintiff's claims for defamation fail because the Defendant made truthful statements. Truth is a defense to a defamation action that may be raised by a motion to dismiss. Emery v. Kimball Hill, Inc., 112 Ill. App. 3d 109, 112, 445 N.E.2d 59, 61 (2nd Dist. 1983); American Int'l Hosp. v. Chicago Tribune Co., 136 Ill. App. 3d 1019, 1022-23, 483 N.E.2d 965, 968 (1st Dist. 1985). While ordinarily the determination of whether substantial truth exists remains a question for a jury to decide, the question becomes one of law where no reasonable jury could find that substantial truth had not been established. Parker v. House O'Lite Corp., 324 Ill. App. 3d 1014, 1026, 756 N.E.2d 286, 296 (1st Dist. 2001). In raising truth as a defense, a defendant need only demonstrate the "substantial truth" of the allegedly defamatory material. Lemons v. Chronicle Publishing Co., 253 Ill. App. 3d 888, 890, 625 N.E.2d 789, 791 (4th Dist. 1993); Farnsworth v. Tribune Co., 43 Ill.2d 286, 293-94, 253 N.E.2d 408, 412 (Ill. 1969). "Substantial truth" requires only that a defendant demonstrate the truth of the "gist" or "sting" of the defamatory material. Kilbane v. Sabonjian, 38 Ill. App. 3d 172, 175, 347 N.E.2d 757, 761 (2nd Dist. 1976); American Int'l Hosp., 136 Ill. App. 3d at 1022, 483 N.E.2d at 968. Further, allegedly defamatory statements need not be technically accurate in every detail to avoid being actionable. See

Parker, 324 Ill. App. 3d at 1026, 756 N.E.2d at 296.[7] Here, Defendant posted truthful information on his website about Plaintiff. See R. C157-58 (Andrews' Affidavit).

a. Count Two and the "First Disparagement".

Plaintiff first complains of the "First Disparagement" by Defendant in Count Two. Although the Plaintiff fails to incorporate any prior allegations into his Count Two, the First Disparagement reads:

> Please use caution when purchasing any unreleased software products. John Tamburo, d/b/a Mans Best Friend Software, has declared bankruptcy. Although it is actively being marketed on the web sire [sic], in one of his court documents Mr. Tamburo stated that 'I lack the funds required to complete the programs [CompuPed millennium] [sic]. For a pdf copy of the court document please see: http://www.k9ped.com/mbfsbankruptcy.pdf [sic].

R. C28 (1st Am. Compl. ¶ 10). This statement contains no defamatory material. Plaintiff does not dispute he was in bankruptcy. Id. Moreover, the Plaintiff does not dispute making the statement that he lacked funds to complete his software programs. Rather, Plaintiff claims his statement made to the United States Bankruptcy Court has been "misinterpreted." See R. C269 (Pl.'s Opp. Memo. p. 14). Plaintiff admits that he made this statement "in an effort to cause the court to grant [Plaintiff's] pending motion to convert [sic] from Chapter 7 to Chapter 13." Id. Here, in a different venue and for a different purpose, Plaintiff attempts to qualify the statement by suggesting that he did not entirely mean what he said. Indeed, he now contends that he then meant only that "if the conversion were not granted, [Plaintiff] would not be able to afford to complete [the program]." See R. C269 (Pl.'s Opp. Memo. p.

[7] Plaintiff also contends Defendant imputed that Plaintiff violated specific criminal statutes. See Appellant's Brief p. 35. Plaintiff has chosen to construe his conduct as criminal. Defendant did not impute such violations. Consequently, Defendant clearly should not be liable for Plaintiff's construction.

14). In any case, nothing in the "first disparagement" is untrue. Consequently, the first disparagement cannot give rise to a claim for defamation based on its substantial truth. Emery, 112 Ill. App. 3d at 112, 445 N.E.2d at 61; American Int'l Hosp., 136 Ill. App. 3d at 1022-23, 483 N.E.2d at 968.

Additionally, the statement warning readers of purchasing unreleased software products constitutes an opinion. In Illinois, a "statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion', but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993); see also Sullivan v. Conway, 157 F.3d 1092, 1097 (7th Cir. 1998) (Illinois law); Bryson v. News America Publications, 174 Ill. 2d 77, 100, 672 N.E.2d 1207, 1220 (Ill. 1996). Indeed, "[w]hen a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts." Stevens v. Tillman, 855 F.2d 394, 400 (7th Cir. 1988) (citing Horowitz v. Baker, 168 Ill. App. 3d 603, 608, 523 N.E.2d 179, 182 (3d Dist. 1988); Stewart v. Chicago Title Insurance Co., 151 Ill. App. 3d 888, 892, 503 N.E.2d 580, 582 (4th Dist. 1987)). In other words, an opinion cannot provide a basis for liability by itself where an individual discloses the truthful facts upon which the opinion is based. Id. Here, the Defendant's warning constituted an opinion supported by factual and truthful statements to which the Plaintiff admits. Moreover, it constitutes an opinion as to future events that cannot be actionable as "a prediction as to future events can neither be true nor false." Uline, Inc. v. JIT Packaging, Inc., 437 F. Supp. 2d 793, 803 (N.D. Ill. 2006). Consequently, the warning or opinion cannot give rise by

itself to liability for defamation. Id.; Haynes, 8 F.3d at 1227; see also Sullivan, 157 F.3d at 1092; Bryson, 174 Ill. 2d at 100, 672 N.E.2d at 1220; Stevens, 855 F.2d at 400; Horowitz, 168 Ill. App. 3d at 608, 523 N.E.2d at 182; Stewart, 151 Ill. App. 3d at 892, 503 N.E.2d at 582.

Finally, even if the statement is not a protectable opinion, the statement is subject to an innocent construction. Under Illinois law, a statement is not defamatory if it is "reasonably capable of an innocent construction." Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 726 (7th Cir. 2004) (citing Kolegas v. Heftel Broad. Corp., 154 Ill. 2d 1, 8, 607 N.E.2d 201, 206 (Ill. 1992). Whether a statement is subject to an innocent construction is for a court to decide. Kolegas, 154 Ill.2d at 8, 607 N.E.2d at 207. Arguably, the statement inferred that Plaintiff may have difficulty completing its software product. See R. C28 (1st Am. Compl. ¶ 10). However, this statement occurred in the context of documents filed with the United States Bankruptcy Court and statements made by Plaintiff in such documents. Id. Consequently, the statement of which Plaintiff complains is subject to an innocent construction that a party in bankruptcy that states it does not have funds to complete a software product may not be able to complete the software product in the future. Consequently, it cannot give rise to liability. See Uline, Inc., 437 F. Supp. 2d at 803.

b. Count Four and the "Second Disparagement".

Plaintiff next complains of the "Second Disparagement" in Count Four. Although the Plaintiff fails to incorporate any prior allegations into his Count Four, the Second Disparagement reads

> K9-Ped is pedigree research software. It is intended for personal use. It does not contain the features required for the management of a breeding kennel. If

> you are a commercial breeding kennel and looking for software to manage your kennel please purchase software designed for this purpose. Caution, when purchasing any 'commercial use only' software, like all of the products from Man's Best Friend Software™, you may forfeit all your consumer protection rights.

See R. C29 (1st Am. Compl. ¶ 17). This statement contains no defamatory material. K9-Ped is Defendant's product. Id. at ¶ 17. Consequently, the claims as to it cannot be considered defamatory of Plaintiff. As to the reference to Plaintiff's software as "commercial use only," Plaintiff does not deny this characterization. See R. C37 (1st Am. Compl. ¶ 70). In fact, he explicitly states that "[t]here is no 'personal use' for animal pedigree research software." Id. And, "neither K9-Ped nor any of John's products have any valid personal use – they are business software products." See R. C37 (1st Am. Compl. ¶ 71). Despite Plaintiff's interpretation to the contrary, the statement does not state that Plaintiff's products would be compatible with a commercial breeding kennel. Rather, it states that Plaintiff's products are for commercial use only – a fact Plaintiff admits. See R. C29, 37, 38 (1st Am. Compl. ¶¶ 17, 71. 73). Finally, as to "consumer protection rights," Plaintiff does not contend Defendant falsely represents that one will lose such rights when purchasing Plaintiff's products. Rather, he disagrees with Defendant that anyone has consumer protection rights to begin with. See R. C38 (1st Am. Compl. ¶ 72) (Defendant "lies in the second disparagement by stating that purchasers of John's software have 'consumer rights' to forfeit."). If anything, this merely represents a disagreement among lay individuals on legal issues. Again, there exists nothing on the face of the "Second Disparagement" that is untruthful. Consequently, the "Second Disparagement" cannot give

rise to a claim for defamation. Emery v. Kimball Hill, Inc., 112 Ill. App. 3d 109, 112, 445 N.E.2d 59, 61 (2nd Dist. 1983); American Int'l Hosp., 136 Ill. App. 3d at 1022-23, 483 N.E.2d at 968.

c. Count Five and the "Third Disparagement".

Plaintiff next complains of the Fifth Disparagement in Count Five. Although the Plaintiff fails to incorporate any prior allegations into his Count Five, the Third Disparagement reads:

> Don't get tricked by sale prices and specials. Don't lock yourself into a lifetime of high priced upgrades. Many other programs charge outrageous amounts to upgrade to new versions. Changing to K9-Ped now rather than upgrading other programs most likely will be cheaper in the long run. For example, three upgrades of The Breeder's Standard™ costs [sic] more than the program. Even with the $15.00 discount for orders received before the first Windows version of CompuPed™ is released, all of the CompuPed™ DOS to Windows version upgrades are over $50.00 and some are over $99.00.

See R. C29 (1st Am. Compl. ¶ 18). This statement contains no defamatory material. Nowhere in the First Amended Complaint does Plaintiff dispute that (a) "three upgrades of The Breeder's Standard™ costs more than the program" and (b) "all of the CompuPed™ DOS to Windows version upgrades are over $50.00 and some are over $99.00 even with the $15.00 discount for orders received before the first Windows version of CompuPed™ is released." See generally R. C27-46 (1st Am. Compl.) Rather, Plaintiff complains of the Defendant's characterization of "outrageous amounts to upgrade to new versions" and the

warning to avoid being "tricked by sale prices and specials." See R. C38-39 (1st Am. Compl. ¶¶ 77-79).

The statements of which Plaintiff complains do not themselves refer to the Plaintiff. See R. C29 (1st Am. Compl. ¶ 18). Assuming, *arguendo*, the statements can be construed as referring to Plaintiff, they still remain unactionable as protectable opinion. In Illinois, a "statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion', but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993); see also Sullivan, 157 F.3d at 1097 (Illinois law); Bryson, 174 Ill. 2d at 100, 672 N.E.2d at 1220. Indeed, "[w]hen a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts." Stevens, 855 F.2d at 400 (citing Horowitz v. Baker, 168 Ill. App. 3d 603, 608, 523 N.E.2d 179, 182 (3d Dist. 1988); Stewart v. Chicago Title Insurance Co., 151 Ill. App. 3d 888, 892, 503 N.E.2d 580, 582 (4th Dist. 1987)). In other words, an opinion cannot provide a basis for liability by itself where an individual discloses the truthful facts upon which the opinion is based. Id.

Here, Defendant explained the basis for his opinions as to "outrageous amounts" and being "tricked by sales prices and specials" using the Plaintiff as an example with specific dollar amounts. See R. C29 (1st Am. Compl. ¶ 18). Plaintiff does not dispute the facts, but rather disagrees with the opinions of Defendant arising therefrom. This cannot give rise to any liability. Stevens, 855 F.2d at 400; Horowitz, 168 Ill. App. 3d at 608, 523 N.E.2d at 182; Stewart, 151 Ill.App. 3d at 892, 503 N.E.2d at 582. Indeed, "[a]lthough a reader might

arch an eyebrow at [Plaintiff's outrageous prices], an allegation of greed is not defamatory; sedulous pursuit of self-interest is the engine that propels a market economy." Wilkow v. Forbes, Inc., 231 F.3d 552, 557 (7th Cir. 2001). Consequently, the "Third Disparagement" cannot give rise to a claim for defamation. Id.; Stevens, 855 F.2d at 400; Horowitz, 168 Ill. App. 3d at 608, 523 N.E.2d at 182; Stewart, 151 Ill.App. 3d at 892, 503 N.E.2d at 582.

d. Count Ten and the "Sixth Disparagement".

Plaintiff next complains of the Sixth Disparagement in Count Ten. Although the Plaintiff fails to incorporate any prior allegations into his Count Ten, the Sixth Disparagement reads:

> Previously I have warned potential purchasers to use caution when purchasing any unreleased software products. This remains good advice. John Tamburo, d/b/a Man's Best Friend Software (MBFS), has informed me that the long awaited CompuPed Millennium™ has recently been released. I was also informed that MBFS is no longer in bankruptcy. The trustee's final report and account indicates that the bankruptcy was in fact dismissed, without confirmation and a 180 day ban on refiling, on 8/22/2005 after 15 months without any payment to creditors. http://k9ped.com/mbfsfinal.pdf. K9-Ped is pedigree research software. It is intended for personal or 'hobby' use. It does not contain the features required for the business of managing a kennel or the business of breeding animals. If you need these features and do not mind purchasing business only software that specifically excludes your use of any consumer protection laws you may want to consider CompuPed™ or The Breeder's Standard™.

See R. C.32 (1st Am. Compl. ¶ 30). Plaintiff limits his objection to the statement that his bankruptcy had been dismissed after 15 months without any payment to creditors.[8] See R. C44 (1st Am. Compl. ¶ 120). In his First Amended Sworn Complaint, he characterizes that statement as the "creditor libel" and states that the "creditor libel" is false. See R. C44 (1st Am. Compl. ¶ 121). In doing so, the Plaintiff seeks to hide behind "absolute truth." However, as stated above, a defendant need only demonstrate the "substantial truth" or "gist" or "sting" of the allegedly defamatory material to raise truth as a defense. Lemons, 253 Ill. App. 3d at 890, 625 N.E.2d at 791; Farnsworth, 43 Ill.2d at 293-94, 253 N.E.2d at 412. Kilbane, 38 Ill. App. 3d at 175, 347 N.E.2d at 761; American Int'l Hosp.,136 Ill. App. 3d at 1022, 483 N.E.2d at 968.

In his affidavit, Defendant has stated that he verified with the bankruptcy court through the trustee's final report that the Plaintiff had not made a payment to his creditors for 15 months. See R. C157-58 (Andrews' Affidavit ¶ 20). In the First Amended Sworn Complaint, the Plaintiff includes reference in the Sixth Disparagement to the Defendant's website from which one can still access the trustee's final report that demonstrates the substantial truth to Defendant's statement (in essence, from a list of all known creditors over the course of ten pages, the absence of any payments to anyone but the Office of the US Trustee, the Plaintiff's attorney, the Trustee, and the refund to Plaintiff). Consequently, this statement cannot under any circumstance give rise to liability for defamation because the

[8] Although the Plaintiff limits his objection to a single statement in the Sixth Disparagement for purposes of Count Ten, he later references the Sixth Disparagement generally in other Counts (e.g. Count Eleven). The Sixth Disparagement contains no false statements. As to the first paragraph, Defendant merely updates the website with accurate information obtained from the Plaintiff and the trustee's report filed in Plaintiff's most recent bankruptcy proceeding. As to the second paragraph, the statements characterize the Defendant's own software as being appropriate for "hobby" or "personal" use; recommend Plaintiff's software for business use (a characterization of which Plaintiff admits); and, articulate Defendant's opinion as to the absence of consumer protection laws for business software (a characterization of which Plaintiff admits). Each of these has been previously addressed. See *supra*, II.B.2.b.

statement is substantially true, if not absolutely true. See Lemons, 253 Ill. App. 3d at 890, 625 N.E.2d at 791; Farnsworth, 43 Ill.2d at 293-94, 253 N.E.2d at 412. Kilbane, 38 Ill. App. 3d at 175, 347 N.E.2d at 761; American Int'l Hosp., 136 Ill. App. 3d at 1022, 483 N.E.2d at 968.

3. Conclusion as to Defamation

For the foregoing reasons, the Plaintiff's claims for defamation in Counts Two, Four, Five, and Ten fail to state a claim.

C. Plaintiff Fails To State a Claim for Tortious Interference with Prospective Economic Advantage.

Plaintiff fails to state a claim for tortious interference with prospective economic advantage in Counts One, Eight, and Eleven.[9]

1. Plaintiff Fails to Properly Allege the Elements.

In Counts One, Eight, and Eleven, the Plaintiff fails to properly allege the elements necessary to successfully plead a claim for tortious interference with prospective economic advantage. To sufficiently allege such a claim, a plaintiff must allege: (a) a reasonable expectancy of entering into a valid business relationship; (b) the defendant's knowledge of such expectancy; (c) an intentional and unjustifiable interference by defendant with the third-party that induced or caused a breach or termination of the expectancy; and, (d) damage to the plaintiff resulting from defendant's alleged interference. Anderson, 172 Ill.2d at 416-417, 667 N.E.2d at 1303. Further, a Plaintiff must allege that the defendant engaged in a specific action against the party with whom the plaintiff expected to do business.

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9 Plaintiff titles Counts One, Eight, and Eleven "Tortious Interference with Prospective Economic Advantage," "Tortious Interference with Prospective Economic Advantage II," and "Tortious Interference with Prospective Economic Advantage III," respectively. See R. C34, 42, 44 (1st Am. Compl.). For each of the first, fourth and sixth "disparagements" in his First Amended Complaint, he creates separate counts. See generally R. C27-46 (1st Am. Compl.) This being the only difference and because the same deficiency applies to all three counts, the Defendant will address these counts collectively.

Schuler v. Abbott Laboratories, 265 Ill. App. 3d 991, 994, 639 N.E.2d 144, 147 (1st Dist. 1993). Moreover, the plaintiff must allege a business expectancy with a specific third party and not merely allege a general expectation of future business. Id. Finally, the plaintiff must plead, and eventually prove, purposeful interference that connotes impropriety. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 485, 693 N.E.2d 358, 371 (Ill. 1998). Indeed, there will be no liability for interference with a prospective contractual relation where the defendant merely conveys truthful information. Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 399 (7th Cir. 2003) (citing Soderland Bros. v. Carrier Corp. 278 Ill. App. 3d 606, 620, 663 N.E.2d 1, 28 (1st Dist. 1995)); see also Kempner Mobile Elecs., Inc. v. Southwestern Bell Mobile Sys., 428 F.3d 706, 716 (7th Cir. 2005).

Here, Plaintiff has failed to allege any specific third parties with whom he expected to enter a valid business relationship. See generally R. C27-46 (1st Am. Compl.). Rather, the Plaintiff merely states that Plaintiff "has a reasonable expectancy to do business with dog, cat and horse breeders, and the exhibitors thereof." R. C34 (1st Am. Compl. ¶ 41). This is clearly insufficient. See Schuler, 265 Ill. App. 3d at 994, 639 N.E.2d at 147; Anderson, 172 Ill.2d at 407-408; 667 N.E.2d at 1303. To save his claim, Plaintiff, in a cursory fashion, cites to O'Brien v. State Street Bank & Trust for the proposition that a plaintiff properly alleges an expectancy if "a class of identifiable third persons, past and future customers, has been alleged." O'Brien v. State Street Bank & Trust, 82 Ill. App. 3d 83, 85, 401 N.E.2d 1356, 1358 (4th Dist. 1980). Plaintiff's reliance on O'Brien is misguided. O'Brien involved an identifiable class of third parties arising from the plaintiff's *existing business relationships* that included "contracts, accounts and obligations" among his customers and suppliers that he could specifically identify for purposes of constituting

prospective business relations. Id. (emphasis added). Consequently, O'Brien does not support Plaintiff's reliance on an ambiguous, general expectation of future business. Id. With O'Brien having been clarified, Plaintiff has not and cannot cite to any Illinois authority holding that ambiguous allegations of general, hopeful expectations of future business suffice for this claim. See generally R. C27-46 (1st Am. Compl.). In fact, Plaintiff never demonstrates that "a class of identifiable third persons has been alleged." See id. Thus, Plaintiff fails to plead an identifiable class of third parties. See O'Brien, 82 Ill. App. 3d at 85, 401 N.E.2d at 1358.

Having determined that the Plaintiff has failed to allege any third parties or identifiable class of third persons with whom he had a reasonable expectancy of entering into a valid business relationship, Plaintiff also necessarily fails to allege Defendant's knowledge of any such expectancies. See generally R. C27-46 (1st Am. Compl.). Moreover, because Defendant could not and did not know of any such expectancies, Plaintiff has failed to sufficiently allege that Defendant intentionally interfered with any such business expectancy. Id.; see also R. C.157-58 (Andrews' Affidavit). Finally, Plaintiff cannot sufficiently allege damages with respect to third persons, business expectancies, and intentional interference that simply have not been alleged and did not exist. O'Brien, 82 Ill. App. 3d at 85, 401 N.E.2d at 1358; Anderson, 172 Ill.2d at 406-407, 667 N.E.2d at 1303; Schuler, 265 Ill. App. 3d at 994, 639 N.E.2d at 147.

2. Defendant Conveyed Truthful Information.

Even if Plaintiff has identified third parties or an identifiable class of third persons, the Plaintiff has failed to allege any impropriety giving rise to a claim for tortious interference with business expectancy. Merely conveying truthful information does not give

rise to liability for interference with a prospective contractual relation. Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; see also Kempner Mobile Elecs., Inc., 428 F.3d at 716.

a. Count One and the First and Fifth Disparagements.

Plaintiff complains of the First and Fifth Disparagement in Count One. Although the Plaintiff fails to incorporate any prior allegations into his Count One, the Plaintiff contends that the First and Fifth Disparagements constituted tortious interference with prospective economic advantage. See R. C34-35 (1st. Am. Compl. ¶¶ 41-54).

As discussed *supra*, the First Disparagement contains truthful statements to which the Plaintiff admits. See *supra* II.B.2.a. As such, the First Disparagement does not give rise to liability for tortious interference with prospective economic advantage. Id.; see Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; Kempner Mobile Elecs., Inc., 428 F.3d at 716. As to the Fifth Disparagement, it reads:

> According to recent bankruptcy documents filed by Mr. Tamburo he doesn't pay his taxes nor is he able to finish the CompuPed Millennium product.
> His court documents show he owes the IRS over $160,000.00 and his sworn statemts [sic] include 'The Millennium edition of CompuPed is almost done, but I lack the funds to pay to complete the programs.'
> The shocker is he is still pre-selling CompuPed Millennium licenses over five months after telling the court he will not be able to complete the program.
> Remember, he is the one who has "All sales are final" to make sure his customers don't cheat him.

R. C31 (1st Am. Compl. ¶ 28). Plaintiff does not dispute the truth of these statements.

Rather, Plaintiff argues that the statements upon which Andrews relied to make the Fifth Disparagement were "months old." See R. C31 (1st Am. Compl. ¶ 29). Because the statements in the Fifth Disparagement represent truthful statements, the Fifth Disparagement does not give rise to liability for tortious interference with prospective economic advantage. See Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; Kempner Mobile Elecs., Inc., 428 F.3d at 716. Therefore, Count One must be dismissed.

b. Count Eight and the Fourth Disparagement.

Plaintiff next complains of the Fourth Disparagement in Count Eight. Although the Plaintiff fails to incorporate any prior allegations into his Count Eight, Plaintiff contends that through the Fourth Disparagement Defendant personally told numerous people "that John was to be imminently liquidated, and product support for John's software would be discontinued or extremely difficult to obtain." R. C30-31 (1st Am. Compl. ¶ 26). In the context of Plaintiff's bankruptcy proceedings, this statement again is subject to innocent construction. See Uline, Inc., 437 F. Supp. 2d at 803. Consequently, the Fourth Disparagement is not actionable. See Kolegas, 180 Ill.2d at 313, 607 N.E.2d at 207. Therefore, Count Eight must be dismissed.

c. Count Eleven and the Sixth Disparagement.

In Count Eleven, the Plaintiff complains that the "Sixth Disparagement" gives rise to a claim for tortious interference with prospective economic advantage, despite failing to incorporate any prior allegations. See R. C44-45 (1st Am. Compl. ¶¶ 126-135). As discussed *supra*, the Sixth Disparagement contains statements that, if not entirely true, clearly represent the substantial truth. See *supra* II.B.2.d. As such, the Sixth Disparagement does not give rise to liability for tortious interference with prospective

economic advantage. Id.; Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; see also Kempner Mobile Elecs., Inc., 428 F.3d at 716. Consequently, Count Eleven must be dismissed.

3. *Conclusion as to Tortious Interference.*

For the foregoing reasons, Plaintiff has failed to state a claim for Tortious Interference with Prospective Economic Advantage. Therefore, Counts One, Eight, and Eleven must be dismissed.

D. Plaintiff's Claims Against Defendant for Unfair Competition are Erroneous and Misguided.

Plaintiff fails to state claims in Counts Three, Six, Seven and Nine in which he alleges unfair competition.[10] Common law unfair competition has been codified as the Illinois Uniform Deceptive Trade Practices Act ("UDTPA"), 815 ILCS § 510/1, *et seq.* MJ & Partners Restaurant Ltd. Pshp. v. Zadikoff, 10 F. Supp.2d 922, 929 (N.D. Ill. 1998). As the Custom Business Systems Court explained:

> The plaintiff's brief suggests in its form a distinction between the common law tort of unfair competition and a course of action based on the Uniform Deceptive Trade Practices Act, and we are not inclined to dispute that there may be a cause of action under certain aspects of the common law which are not covered by the Uniform Deceptive Trade Practices Act. However, the plaintiff does not set out in its brief a distinct theory under the common law which would entitle it to judgment separate and apart from issues cognizable under the Uniform Deceptive Trade Practices Act, and as the plaintiff admits

10 Plaintiff titles Counts Three, Six, Seven, and Nine "Unfair Competition", "Unfair Competition II", "Unfair Competition III", and "Unfair Competition IV". See R. C36, 39, 41, 43 (1st Am. Compl.). Defendant will address all four counts (III, VI, VII and IX) collectively as Plaintiff's claim for "Unfair Competition."

> in its brief, while over the years 'the courts of Illinois and other states have consistently expanded and developed the scope of this tort * * * the case law which has come out of this development has not spelled out in well defined terms the elements necessary to state a cause of action for unfair competition. It was no doubt for this reason that the legislature enacted the Uniform Deceptive Trade Practices Act which, as the plaintiff acknowledges in its brief, "was quickly recognized by the courts of Illinois as being a codification of the common law tort of unfair competition." **Since the plaintiff's brief does not point out any aspect of this case which constitutes a separate common law tort, in addition to the allegations of violation of the Uniform Deceptive Trade Practices Act, we are not inclined to search out the ramifications of a common law action, which might establish grounds for relief in addition to the elements of unfair competition recognized under the Act.** We are inclined, therefore, as did the trial court, to consider the sufficiency of the complaint on the basis of the Uniform Deceptive Trade Practices Act.

Custom Business Systems, Inc. v. Boise Cascade Corp., 68 Ill. App. 3d 50, 52-53, 385 N.E.2d 942, 944 (2nd Dist. 1979) (emphasis added). While a cause of action for common law unfair competition *may* exist separate from the UDTPA, a plaintiff alleging such a claim must demonstrate its distinctiveness fro m the provisions of the UDTPA. Id. at 52-53.

Here, Plaintiff has failed to demonstrate how his common law claims for unfair competition "constitute a separate common law tort" by providing remedies unavailable

under the UDTPA. In his attempt to do so, Plaintiff invokes the Restatement (Third) of Unfair Competition ("Restatement"). See Appellant's Brief pp. 39-40. Yet, he cites no Illinois authority adopting the Restatement. Id. In fact, a search for case law among Illinois state court opinions that reference the Restatement in any context found only one case that cited § 42 of the Restatement in the context of trade secrets. See Abel v. Fox, 274 Ill. App. 3d 811, 820, 654 N.E.2d 591, 597 (4th Dist. 1995). Given the clear codification of unfair competition under the UDTPA and the absence of any authority adopting the Restatement to supplement the UDTPA, the Restatement has not been adopted in Illinois in this context.

Assuming, *arguendo*, the Restatement has been adopted in Illinois, Plaintiff cites sections that are inapplicable to the instant action. Specifically, the sections cited by the Plaintiff relate to representations made by a defendant about the defendant's *own* products or services, not a *plaintiff's* products or services. See Appellant's Brief pp. 39-40. Here, the alleged statements by Defendant of which Plaintiff complains were made about Plaintiff's products. Consequently, §§ 2 and 3 of the Restatement have no application to the allegations in Plaintiff's Amended Complaint.[11] See REST. (3RD) UNFAIR COMPETITION §§ 2-3. Consequently, as Plaintiff has provided no authority even suggesting the Restatement governs his purported common law claims and because Plaintiff rests his entire basis for such claims on the Restatement, he has failed to articulate any grounds for relief that should be recognized in addition to the UDTPA. Consequently, this Court should decline "to search out the ramifications of a common law action, which might establish grounds for relief in addition to the elements of unfair competition recognized under the" UDTPA. Id.

[11] Although Plaintiff cites Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6 (7th Cir. 1992) and Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272 (2nd Cir. 1981), neither case is applicable to the case at bar. Abbott Laboratories involved an appeal from the Southern District of Indiana relating to the denial of a preliminary injunction motion and the Lanham Act. Vidal Sassoon, Inc. involved an appeal from the Southern District of New York relating to the denial of a preliminary injunction motion and the Lanham Act.

As Plaintiff's claims for common law unfair competition need not be addressed separately from those of the UDTPA, they most certainly should be dismissed. McGraw-Edison Co. v. Walt Disney Productions, 787 F.2d 1163, 1173-74 (7th Cir. 1986). For, Plaintiff has failed to sufficiently plead a cause of action under the UDTPA. Particularly, he fails to allege or identify any specific provisions and/or language provided by the UDTPA that Defendant purportedly violated. See R. C36-37, 39-41, 43-44 (1st Am. Compl.). Indeed, Plaintiff plainly announces that he has not alleged the specific provision of the UDPTA that Defendant is alleged to have violated. See Appellant's Brief p. 39. "John cannot locate any reported Illinois case where a complaint was dismissed for failing to allege the specific provision of the UDTPA that the Defendant is alleged to have violated." Id. Thus, Plaintiff fails to sufficiently allege unfair competition under the UDTPA. See 815 ILCS § 510/1, *et seq.*; MJ & Partners, 10 F. Supp.2d at 929. As Plaintiff's claim fails under the UDTPA, it must also fail as common law competition. See id.; Mars, Inc. v. Curtiss Candy Co., 8 Ill. App. 3d 338, 344, 290 N.E.2d 701, 704 (1st Dist. 1972).

Even assuming, *arguendo*, Plaintiff has pled viable common law claims for unfair competition, the claims arise from the truthful statements made by Defendant on his website. See *supra* R. C36-37, 39-41, 43-44 (1st Am. Compl.); see also generally R. C157-58 (Andrews' Affidavit). Consequently, there is no basis for Plaintiff's unfair competition claims, and as such, Plaintiff's claims must again fail.

For the foregoing reasons, Plaintiff has failed to state a cause of action for unfair competition in Counts Three, Six, Seven, and Nine of his First Amended Complaint. Therefore, the claims must be dismissed. See 815 ILCS § 510/1, *et seq.*; MJ & Partners, 10 F. Supp.2d at 929; Custom Business Systems, Inc., 68 Ill. App. 3d at 52-53, 385 N.E.2d at 944.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court affirm the trial court's dismissal of the Plaintiff's First Amended Complaint in its entirety.

Dated: Chicago, Illinois
September 20, 2006

Respectfully submitted,

DEFENDANT,
JAMES ANDREWS d/b/a K9PED.

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CERTIFICATE OF MAILING AND PROOF OF SERVICE

The undersigned hereby certifies that nine (9) copies of the DEFENDANT-APPELLEE BRIEF were mailed to the Clerk of this Court, and that three (3) copies were served upon each of the following:

Mr. John Tamburo
655 North LaGrange Road
Suite 209
Frankfort IL 60423

by enclosing them in envelopes properly addressed, with first class postage fully prepaid, and depositing the envelopes in the United States Mail in Chicago, Illinois, on the 20th day of September, 2006.

Charles Lee Mudd Jr.

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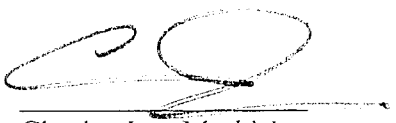
Dated: September 20, 2006
Chicago, Illinois

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix, is 50 pages.



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Dated: September 20, 2006
Chicago, Illinois

Docket Number 3-06-0347
IN THE APPELLATE COURT OF ILLINOIS
FOR THE THIRD DISTRICT

JOHN F. TAMBURO d/b/a MAN'S BEST FRIEND SOFTWARE,	)	
	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois.
Plaintiff-Appellant,	)	
	)	Case No. 06 L 51
v.	)	
	)	Honorable Herman S. Haase, Presiding Judge.
JAMES ANDREWS d/b/a K9PED,	)	
Defendant-Appellee.	)	Date of Judgment: May 3, 2006

APPENDIX TO APPELLEE'S BRIEF

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LEXSEE 2005 U.S. DIST. LEXIS 6244

ALLIED VAN LINES, INC., Plaintiff, vs. GULF SHORES MOVING & STORAGE, INC., NADINE PFEIFFER, WARREN C. PFEIFFER, and REBECCA DAFFRON, Defendants.

Case No. 04 C 6900

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2005 U.S. Dist. LEXIS 6244

February 23, 2005, Decided

SUBSEQUENT HISTORY: Motion granted by, Dismissed by *Allied Van Lines v. Gulf Shores Moving & Storage, Inc., 2005 U.S. Dist. LEXIS 20209 (M.D. Fla., May 2, 2005)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff van line alleged that defendant, one of its agents, failed to pay monies pursuant to an agreement for the van line to receive a specified portion of the revenue generated from the agent's moving business. The van line further alleged that the agent, two of the agent's officers, and the guarantor of the agent's contractual obligations converted funds owed to the van line. The agent moved to dismiss and, in the alternative, for transfer.

OVERVIEW: The van line was a large interstate moving company that conducted its business through a network of independent trucking companies contracted as agents. The minimum contacts in the forum state by the agent's alleged commission of a tort--conversion--caused injury to the van lines. Though Illinois was the van line's chosen forum, the material events took place in Florida. Illinois lacked a significant relationship with the parties' underlying dispute in the present case, because the material events took place in Florida. The agent provided moving services from its sole place of business in Florida. The funds that the van line claimed that it was owed and those that were allegedly converted were all generated by the agent's work providing moving services from its Florida base of operations. It was true that any harm to the van line took place in Illinois. But the events that gave rise to that alleged injury occurred in Florida. It was overwhelmingly likely that evidence of the revenues generated by the agent's activities was situated in Florida, and that the testimony regarding what the agent did or did not do would come largely from witnesses in that state.

OUTCOME: The court denied the agent's motion to dismiss for lack of personal jurisdiction. The court granted the motion to transfer.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
[HN1] When a court considers a motion to dismiss for lack of personal jurisdiction, the facts alleged by the plaintiff in the complaint are taken as true unless they are contradicted by affidavits submitted by the defendant. If the parties submit conflicting affidavits, the conflicts are resolved in the plaintiff's favor.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > General Overview
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN2] The plaintiff bears the burden of proving the existence of personal jurisdiction by a preponderance of the evidence.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

[HN3] The Illinois long-arm statute allows Illinois courts to assert personal jurisdiction to the maximum extent permitted by the Illinois and United States Constitutions. 735 Ill. Comp. Stat. 5/2-209(c). Because Illinois courts have not elucidated any operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction, the two constitutional analyses collapse into one.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview

[HN4] Due process permits a court to exercise jurisdiction when the defendant has had "minimum contacts" with the forum state such that the defendant could reasonably anticipate being haled into court there, and when the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Copyright Law > Civil Infringement Actions > General Overview

Torts > Business Torts > Commercial Interference > Prospective Advantage > General Overview

Torts > Procedure > Commencement & Prosecution > General Overview

[HN5] A tort takes place at the site where injury occurs.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts

[HN6] Where defendants have purposefully established minimum contacts with the forum state, the court must determine whether exercising establishing personal jurisdiction over them would violate "traditional notions of fair play and substantial justice." This requires analysis of the burden on the defendant, the interest of the forum state in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief.

Civil Procedure > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Venue > Federal Venue Transfers > Improper Venue Transfers

[HN7] Under 28 U.S.C.S. § 1404(a), a court may transfer a suit for the convenience of parties and witnesses, in the interest of justice to any other district or division where it might have been brought; 28 U.S.C.S. § 1406(a) similarly permits transfer "in the interest of justice." The same considerations govern transfer under these parallel provisions.

Civil Procedure > Venue > Federal Venue Transfers > General Overview

[HN8] To prevail, a party seeking transfer must establish that the transferee forum is clearly more convenient. Factors affecting convenience include the plaintiff's choice of forum, the situs of the material events, the relative ease of access to sources of proof, the convenience of the parties and the convenience of witnesses.

Civil Procedure > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Federal & State Interrelationships > Choice of Law > Significant Relationships

[HN9] Though a plaintiff's choice of forum is ordinarily granted deference, there are situations where it is not granted great weight, such as when the forum lacks significant relationship with the underlying dispute.

COUNSEL: [*1] For Allied Van Lines, Inc., a Delaware Corporation, Plaintiff: Dennis E. French, Jonathan Patrick Stringer, Raymond G. Garza, Dombroff & Gilmore, Chicago, IL.

For Gulf Shore Moving & Storage, Inc., Nadine Pfeiffer, Warren C Pfeiffer, Rebecca P Daffron, Defendants: Joel H. Steiner, Paul Anthony Gajewski, Axelrod, Goodman, Steiner & Bazelon, Chicago, IL.

JUDGES: MATTHEW F. KENNELLY, District Judge.

OPINION BY: MATTHEW F. KENNELLY

OPINION:

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Plaintiff Allied Van Lines, Inc. is a large interstate moving company that conducts its business through a network of independent trucking companies contracted as agents. Allied alleges that one of its agents, defendant Gulf Shores Moving & Storage, Inc., of failing to pay $ 134,237.50 pursuant to their agreement for Allied to receive a specified portion of the revenue generated from Gulf Shores' moving business. Allied further alleges that Gulf Shores, two Gulf Shores officers, and the guarantor of Gulf Shores' contractual obligations have converted funds owed to Allied. Defendants have moved to dismiss

for lack of personal jurisdiction, lack of venue, and failure to state a claim. [*2] In the alternative, they have asked that the case be transferred to the Middle District of Florida, where all the defendants reside and do business.

For the reasons stated below, the Court denies the motion to dismiss for lack of personal jurisdiction but grants the request to transfer venue.

Facts

[HN1] When a court considers a motion to dismiss for lack of personal jurisdiction, the facts alleged by the plaintiff in the complaint are taken as true unless they are contradicted by affidavits submitted by the defendant. *Saylor v. Dyniewski, 836 F.2d 341, 342 (7th Cir. 1988).* If the parties submit conflicting affidavits, the conflicts are resolved in the plaintiff's favor. *Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987).*

According to the complaint, Allied is incorporated in Delaware with its principal place of business in Westmont, Illinois. Gulf Shores is incorporated in Florida with its principal place of business in Fort Myers, Florida. Defendants Warren Pfeiffer and Rebecca Daffron, who are officers and part owners of Gulf Shores, are residents of Florida. Defendant Nadine Pfeiffer, who guarantied Gulf Shores' obligations, is also a Florida [*3] resident.

Allied and Gulf Shores signed two agency agreements that did not substantially differ. Under both contracts, Gulf Shores promised to pay Allied a portion of the revenue generated by its moving business. In return, Gulf Shores obtained the right to use Allied's name and trademarks. Allied also agreed to perform "certain home office functions" for Gulf Shores' benefit. According to the contract, these included, among other tasks, billing clients and agents, insuring against lost and damaged items, and national advertising. Cmpl., Ex. 1, 2002 Contract § 1,1997 Contract § 1.

Allied alleges that Gulf Shores failed to pay around $ 134,000 that it was allegedly obligated to pay under the contract. It alleges that the failure to pay constituted a breach of the contract. Allied also alleges that under the contract, Allied had an unconditional right to immediate payment of its share of the revenues generated by each shipment made by Gulf Shores, and that Gulf Shores, by accepting payment in cash and other means, and by secreting its collections, converted some $ 10,000 in funds that allegedly belonged to Allied. Allied also contends that the individual defendants are individually [*4] liable for the conversion, though the complaint does not describe their alleged involvement. Allied has also sued Nadine Pfeiffer on her guaranty of Gulf Shores' contractual obligations. Finally, Allied alleges that Gulf Shores improperly terminated the contract unilaterally, contrary to certain contractual requirements, and it asserts that Gulf Shores should be required to pay Allied its lost profits for the post-termination period.

In support of their motion to dismiss, the defendants assert, and Allied does not deny, that the defendants do not transact any business, own any real estate, or have a registered agent in Illinois. In addition, none of the individual defendants has traveled to Illinois at any time relevant to this lawsuit. Allied points out, however, that the parties arranged for the contract and guaranty to be served in Illinois, set up payment of the contract in Illinois, and agreed in the contract that Illinois law would govern their disputes.

Discussion

A. Personal Jurisdiction

[HN2] As the plaintiff, Allied bears the burden of proving the existence of personal jurisdiction by a preponderance of the evidence. *See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997);* [*5] *Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987).* Because this is a diversity suit, jurisdiction is only proper in the Northern District of Illinois if an Illinois court would have jurisdiction. *See, e.g., Michael J. Neuman & Associates, Ltd. v. Florabelle Flowers, Inc., 15 F.3d 721, 724 (7th Cir. 1994).*

[HN3] The Illinois long-arm statute allows Illinois courts to assert personal jurisdiction to the maximum extent permitted by the Illinois and United States Constitutions. *735 ILCS 5/2-209(c).* Because Illinois courts have not elucidated any "operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction," the two constitutional analyses collapse into one. *Hyatt Int'l Corp. v Coco, 302 F.3d 707, 715 (7th Cir. 2002).*

[HN4] Due process permits a court to exercise jurisdiction when the defendant has had "minimum contacts" with the forum state such that the defendant could reasonably anticipate being haled into court there, and when the maintenance of the suit does not "offend traditional notions of fair play and substantial justice." *RAR, 107 F.3d at 1277;* [*6] *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).* To establish the propriety of jurisdiction over Gulf Shores, Allied must point to some act or transaction by which Gulf Shores created a connection with Illinois, such that it purposefully availed itself of the privilege of conducting activities in this state. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).*

Gulf Shore's contacts with Illinois are similar to the types of contacts with the forum that the Supreme Court found sufficient to establish personal jurisdiction in *Burger King*. In *Burger King*, the plaintiff, which was based in Florida, filed suit in that state against of one of its Michigan franchisees. The Supreme Court found that jurisdiction over the franchisee in Florida was proper even though the defendant had never set foot in that state. The Court found that personal jurisdiction in Florida was supported by the fact that the parties' dispute arose from a contract that had a substantial connection with Florida; the defendant had negotiated with a Florida corporation to enter into a long-term relationship that provided the defendant with significant benefits from affiliation [*7] with the Florida entity; the contract contemplated an extended relationship involving continuing and wide-ranging contacts with the Florida entity, including the making of payments to the plaintiff's Florida headquarters and ongoing monitoring by and communication with the plaintiff's Florida office; and the parties had agreed that Florida law would govern their disputes. *Id. at 479-82*.

Similar facts are at play here. First, Gulf Shores entered an agency agreement with Allied, an Illinois corporation, that contemplated a long-lasting relationship, and that lasted at least five years. Second, as in *Burger King*, Gulf Shores benefitted from its affiliation with Allied, as it was permitted to use Allied's trademarks, and Allied agreed to conduct national advertising for the benefit of all its agents. Third, similar to the defendant in *Burger King*, Gulf Shores agreed to pay a portion of its revenues to Allied in Illinois, and Allied agreed in return to provide operational support from its Illinois offices. Fourth, the parties agreed that Illinois law would govern their disputes. *See* Cmpl., Ex. 1, 2002 Contract § 3.18.

In sum, Gulf Shores formed an "interdependent [*8] relationship," *see Burger King, 471 U.S. at 482*, with an Illinois entity. This, along with the agreement that Illinois law would govern the parties' disputes, "reinforced [Gulf Shores'] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." *Id. See also, e.g., Continental Bank, N.A. v. Everett, 964 F.2d 701, 703 (7th Cir. 1992)* (loan and guarantee contract that were substantially connected with Illinois, was to be repaid in Illinois, and under which Illinois law governed supported jurisdiction over out-of-state contracting parties).

The individual defendants established minimum contacts in Illinois by allegedly committing a tort -- conversion -- that caused injury here. [HN5] A tort takes place at the site where injury occurs. *See Janmark Inc. v. Reidy, 132 F.3d 1200 (7th Cir. 1997)*. In *Janmark*, an Illinois maker of grocery carts accused a California competitor of tortious interference with prospective economic advantage by making false claims of copyright infringement. The California company sent threatening letters to the Illinois company's customers, leading a New Jersey customer [*9] to cancel an order. The court found that personal jurisdiction in Illinois was properly asserted over the California company because the cancellation of the order completed a tort that caused an injury in Illinois. *Id. at 1202*. Similarly, here the individual defendants allegedly converted funds for their own use that were to be paid to Allied in Illinois and thus injured Allied in Illinois. If Allied's allegations regarding conversion are true, the individual defendants foresaw and contemplated that their acts would impact an Illinois entity. Under *Janmark*, they established the requisite minimum contacts in this state.

[HN6] Because each of the defendants purposefully established minimum contacts with Illinois, the Court must determine whether exercising establishing personal jurisdiction over them would violate "traditional notions of fair play and substantial justice." *Int'l Shoe, 326 U.S. at 316*. This requires analysis of the burden on the defendant, the interest of Illinois in adjudicating the dispute, and Allied's interest in obtaining convenient and effective relief. *Id. at 320*; *see also, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)*. [*10]

Although it no doubt burdens a non-Illinois resident to litigate in this state, each of the defendants reasonably could anticipate being sued in Illinois. *See, e.g., Interlease Aviation Investors II v. Vanguard Airlines, Inc., 262 F. Supp. 2d 898, 911 (N.D. Ill. 2003)*. Furthermore, Illinois has an interest in adjudicating the suit, because Allied is an Illinois company that claims to have suffered an injury in this state. *Id.* Finally, Allied has a strong interest in obtaining convenient and effective relief for the loss of over $ 144,000 due to defendants' alleged actions. For these reasons, the exercise of jurisdiction in this District does not violate traditional notions of fair play and substantial justice.

B. Venue / Transfer

The parties dispute whether venue is proper here, but the Court need not resolve this question in order to decide the defendants' motion to transfer the case to the Middle District of Florida. It is undisputed that venue would be proper in that District. If venue is proper here, *28 U.S.C. § 1404(a)* permits transfer in an appropriate case; if venue is improper here, *28 U.S.C. § 1406(a)* [*11] permits transfer.

[HN7] Under *§ 1404(a)*, a court may transfer a suit "for the convenience of parties and witnesses, in the interest of justice . . . to any other district or division where it might have been brought"; *§ 1406(a)* similarly permits

transfer "in the interest of justice." The same considerations govern transfer under these parallel provisions, *see Wild v. Subscription Plus, Inc., 292 F.3d 526, 530 (7th Cir. 2002)*.

[HN8] To prevail, the party seeking transfer must establish "that the transferee forum is clearly more convenient." *Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219-20 (7th Cir. 1986)*. Factors affecting convenience include the plaintiff's choice of forum, the situs of the material events, the relative ease of access to sources of proof, the convenience of the parties and the convenience of witnesses. *See, e.g., Amoco Oil Co. v. Mobil Oil Corp., 90 F. Supp. 2d 958, 959 (N.D. Ill. 2000)*.

Though Illinois is Allied's chosen forum, the material events took place in Florida. [HN9] Though the plaintiff's choice of forum is ordinarily granted deference, there are situations where it is not granted great weight, such as when the [*12] forum 'lacks significant relationship with the underlying dispute. *See, e.g., D'Ancona & Pflaum LLC v. M2 Software, Inc., 2001 U.S. Dist. LEXIS 11375, No. 00 C 7150, 2001 WL 873021, *2 (N.D. Ill. Aug. 2, 2001)*. Illinois lacks a significant relationship with the parties' underlying dispute in this case, because the material events took place in Florida. Gulf Shores provides moving services from its sole place of business in Florida. The funds that Allied claims it is owed and those that were allegedly converted were all generated by Gulf Shores' work providing moving services from its Florida base of operations. It is true that, as noted earlier, any harm to Allied took place in Illinois. But the events that gave rise to that alleged injury occurred in Florida.

The other factors in the transfer analysis weigh in favor of transfer or are neutral. The issue of relative convenience is a wash. The parties have not specifically discussed what sources of proof may be needed at trial. But it is overwhelmingly likely that evidence of the revenues generated by Gulf Shores' activities is situated in Florida, and that the testimony regarding what Gulf Shores and the individual defendants did or did not do [*13] will come largely from witnesses in that state, where the relevant activities occurred.

Allied argues that the interests of justice will be served by keeping the case in this District, where the average time from the filing of a complaint to its disposition is shorter than in the Middle District of Florida. But this statistic is skewed by the significant percentage of this District's cases that consist of mortgage foreclosures, which are heard in significant numbers in few other districts, and nearly all of which resolve within 90 to 120 days of filing. The average time from filing to trial is a much better gauge of the relative pace of cases in the two districts. Cases move from filing to trial more quickly in Middle District of Florida (20.2 months) than they do in the Northern District of Illinois (26 months). Pl. Resp., Ex. 4; Administrative Office of the U.S. Courts, Federal Court Management Statistics 2003: District Courts, available at http://www.uscourts.gov/cgi-bin/cmsd2003.pl. In short, the interests of justice favor transfer.

Conclusion

For the reasons stated above, the Court denies the defendants' motion to dismiss for lack of personal jurisdiction [docket [*14] # 3]. The Court grants defendants' motion to transfer. The Clerk is directed to transmit the records and files of this case to the Clerk of the Middle District of Florida, Fort Myers Division. Defendants' motion to dismiss for lack of venue is denied as moot. Defendants' motion to dismiss for failure to state a claim remains for decision by the transferee court.

MATTHEW F. KENNEDY

United States District Judge

Date: February 23, 2005

LEXSEE 2003 U.S. DIST LEXIS 806

CARL BIRNBERG and JACOB MOSKOVIC, on behalf of themselves and all others similarly situated, Plaintiffs, v. MILK STREET RESIDENTIAL ASSOCIATES LIMITED PARTNERSHIP, LEND LEASE REAL ESTATE INVESTMENTS, INC., BOSTON FINANCIAL TECHNOLOGY GROUP INC., LAKE MICHIGAN ASSOCIATES, LLC, LMA GP LLC, CLARK ENTERPRISES, INC. AND CLARK ONTERIE, L.L.C., Defendants. CARL BIRNBERG and JACOB MOSKOVIC, on behalf of themselves and all others similarly situated, Plaintiffs, v. BOSTON FINANCIAL GROUP, LIMITED PARTNERSHIP, AND BOSTON FINANCIAL GROUP, INC., Defendants.

02 C 0978, 02 C 3436 (Consolidated Proceedings)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2003 U.S. Dist. LEXIS 806

January 17, 2003, Decided
January 21, 2003, Docketed

SUBSEQUENT HISTORY: Magistrate's recommendation at *Birnberg v. Milk St. Residential Assocs., 2003 U.S. Dist. LEXIS 9097* (N.D. Ill., May 28, 2003)

PRIOR HISTORY: *Birnberg v. Milk St. Assocs., Ltd. P'ship, 2002 U.S. Dist. LEXIS 9321* (N.D. Ill., May 22, 2002)

DISPOSITION: [*1] Defendants' motions to dismiss granted in part and denied in part.

COUNSEL: For CARL BIRNBERG, JACOB MOSKOVIC, plaintiffs: Lawrence P Kolker, Wolf, Haldenstein, etal, New York, NY.

For CARL BIRNBERG, JACOB MOSKOVIC, plaintiffs: Adam J. Levitt, Wolf, Haldenstein, Adler, Freeman & Herz LLC, Chicago, IL.

For CARL BIRNBERG, JACOB MOSKOVIC, plaintiffs: Scott J Farrell, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY.

For MILK STREET RESIDENTIAL ASSOCIATES LIMITED PARTNERSHIP, LEND LEASE REAL ESTATE INVESTMENTS, INC., BOSTON FINANCIAL TECHNOLOGY GROUP, INC., LAKE MICHIGAN ASSOCIATES LLC, LMA GP LLC, CLARK ENTERPRISES, INC., CLARK ONTERIE, L.L.C., defendants: Jeffrey L. Willian, Wendy [*2] Lynn Bloom, Nathanael M. Cousins, Kellye L Fabian, Kirkland & Ellis, Chicago, IL.

JUDGES: BLANCHE M. MANNING, U.S. DISTRICT COURT JUDGE.

OPINION BY: BLANCHE M. MANNING

OPINION:

MEMORANDUM AND ORDER

Plaintiffs Carl Birnberg and Jacob Moskovic brought the instant diversity actions, on behalf of themselves and a proposed class, for breach of fiduciary duty, breach of contract, breach of implied covenant of good faith and fair dealing, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, intentional interference with contractual relations, fraud, and negligent misrepresentation against: (1) Milk Street Residential Associates Limited Partnership ("Milk Street"), a Massachusetts limited partnership; (2) Lend Lease Real

Estate Investments, Inc. ("Lend Lease"), a Delaware corporation; (3) Boston Financial Technology Group, Inc. ("BFTGI"), a Massachusetts corporation; (4) Lake Michigan Associates LLC ("Lake Michigan"), a Delaware limited liability company; (5) LMA GP LLC ("LMA"), a Delaware limited liability company, (6) Clark Enterprises, Inc. ("Clark Enterprises"), a Maryland corporation; (7) Clark Onterie, LLC ("Clark Onterie"), a Maryland corporation; (8) Boston Financial [*3] Group, Limited Partnership ("BFGLP"), a Massachusetts limited partnership; and (9) Boston Financial Group, Inc. ("BFGI"), a Massachusetts corporation.

The instant matter comes before the Court on Defendants BFGI, BFTGI, Clark Enterprises, and Clark Onterie's Motions to Dismiss Under Rule 12(b)(2) For Lack of Jurisdiction [36-1 and 9-1] and Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, LMA, Clark Enterprises, and Clark Onterie's Motions to Dismiss Under Rule 12(b)(6) For Failure to State a Claim [37-1, 36-1, 9-1, and 7-1]. n1

n1 Milk Street has not filed or joined in any of the motions to dismiss.

For the reasons that follow, the Rule 12(b)(2) motion is GRANTED as to BFTGI and DENIED with regard to BFGI, Clark Enterprises, and Clark Onterie, while the Rule 12(b)(6) motion is GRANTED in part and DENIED in part.

BACKGROUND n2

n2 The facts in the Background section are taken from Plaintiffs' Complaints.

[*4]

This matter stems from a partnership dispute arising out of the Franklin Building Associates Limited Partnership ("the Franklin Partnership"). Plaintiffs, two of the limited partners, who reside in Illinois and Minnesota, brought this action against the general partners and several companies allegedly affiliated with the general partners.

The Franklin Partnership was formed by BFTGI in 1984 to own units in Onterie Associates, an Illinois limited partnership, which was created to own and operate the Onterie Center, a 60 story residential and commercial building in Chicago, Illinois. Plaintiffs were among 174 limited partners who bought an interest in the Franklin Partnership. Defendant Milk Street was the general partner of the Franklin Partnership from 1984 until December of 1999.

Unfortunately, the Onterie Center, and thus the Franklin Partnership, was not a financial success, and as a result, the Onterie Center defaulted on one of its loans and the limited partners did not receive any return on their investments.

As a result of the poor financial condition of the Onterie Center, Plaintiffs allege that Defendants created a scheme to unlawfully enrich themselves at the expense [*5] of the limited partners. On February 23, 1999, Defendants mailed the limited partners a memorandum outlining a plan to acquire the limited partners' interests and substitute LMA for Milk Street as the general partner. Plaintiffs alleged that this memorandum was "false and misleading" in that it: (1) misrepresented Onterie's value in order to induce the Limited Partners to grant their consents; (2) failed to disclose pervasive conflicts of interest which were part of the buy-out scheme; and (3) left out pertinent and fundamental information which Defendants were required to disclose.

As a result of the February 23rd memorandum and other actions by Defendants, Plaintiffs allege that Defendants were able to purchase the limited partners' interests in the Franklin Partnership. Plaintiffs allege that Defendants breached their fiduciary duty to the limited partners, breached the Franklin Partnership agreement, breached the implied covenant of good faith and fair dealing, violated the Illinois Consumer Fraud and Deceptive Business Practices Act, intentionally interfered with the limited partners' contractual relations, defrauded the limited partners, and made several negligent misrepresentations [*6] in offering to buy the limited partners' interests.

After taking limited discovery on jurisdictional issues, Defendants moved to dismiss for lack of personal jurisdiction, pursuant to Rule 12(b)(2), and for failure to state a claim, under Rule 12(b)(6). The Court will discuss each of these motions in turn.

ANALYSIS

I. Motion to Dismiss for Lack of Personal Jurisdiction

In ruling on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the court may consider matters outside the pleadings, such as affidavits and other materials submitted by the parties. *O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971)*. The plaintiffs bear the burden of establishing personal jurisdiction by a preponderance of the evidence. *Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987)*. The court must resolve any factual disputes in the plaintiffs' favor, and accept the allegations in the plaintiffs' complaints as true only to the extent that they are not controverted by other evidence in the record. Id. The court must also accept uncontested jurisdictional facts presented by the defendants as true. *Connolly v. Samuelson, 613 F. Supp. 109, 111 (N.D. Ill. 1985)*. [*7]

A federal court sitting in diversity has personal jurisdiction over nonresident defendants only if jurisdiction would be proper in the state in which the federal court sits. *Michael J. Neuman & Assocs., Ltd. v. Florabelle Flowers, Inc., 15 F.3d 721, 724 (7th Cir. 1994)*. The Illinois long-arm statute contains a "catch-all" provision that allows Illinois courts to assert personal jurisdiction to the maximum extent permitted by the Illinois and United States Constitutions. *735 ILCS 5/2-209(c)*. n3 Thus, jurisdiction is coextensive with federal due process requirements. See *RAR, Inc. v. Turner Diesel Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997)*. Therefore, to determine whether personal jurisdiction is proper, the court must examine whether personal jurisdiction comports with Illinois and federal due process guarantees. Id.

n3 The Illinois long-arm statute also gives Illinois courts jurisdiction over nonresident defendants "doing business" in Illinois, if the claims arise from their "transactions" in Illinois, if the defendants committed a "tortious act" within Illinois, or if they own real property in Illinois. *735 ILCS 5/2-209(a)* & (b).

[*8]

Unfortunately, Illinois courts "have given little guidance as to how state due process protection differs from federal protection in the context of personal jurisdiction." Id. As a general rule, "'jurisdiction [under the Illinois constitution] is to be asserted only when it is fair, just, and reasonable . . . considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.'" Id. (quoting *Rollins v. Ellwood, 141 Ill. 2d 244, 565 N.E.2d 1302, 1316, 152 Ill. Dec. 384 (Ill. 1990)*). Without specific guidance from Illinois courts, federal courts sitting in diversity in Illinois focus on federal due process in determining if Illinois due process guarantees are satisfied. See *Mors v. Williams, 791 F. Supp. 739, 743 (N.D. Ill. 1992)*. Consequently, absent a clear indication that exercise of jurisdiction here violates the Illinois Constitution, this Court will rely on its federal analysis of jurisdiction to determine if personal jurisdiction comports with Illinois due process.

To assert personal jurisdiction consistent with federal due process, the defendants must have: (A) "certain [*9] minimum contacts with the forum state" such that (B) the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*.

The court's assessment of minimum contacts depends on whether "general" or "specific" jurisdiction is at issue. *RAR, 107 F.3d at 1277*. Specific jurisdiction refers to jurisdiction over a defendant in a suit "arising out of or related to the defendant's contacts with the forum." Id. The court may exercise specific jurisdiction over defendants if they "purposefully established minimum contacts within the forum state" and those contacts "make personal jurisdiction fair and reasonable under the circumstances." Id. In examining a defendant's contacts with a particular state, the court must determine whether the defendant "purposefully availed itself of the privilege of conducting activities" in the forum state so that it "should reasonably anticipate being haled into court there." Id. In other words, the focus of the court's inquiry must be on the "relationship among the defendant, the forum, and the litigation. [*10] " *Heritage House Rests., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276, 283 (7th Cir. 1990)*. The main factor in specific jurisdiction analysis is foreseeability -- was it reasonably foreseeable to the defendant that its action could result in litigation in the state in question. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-74, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*. Contacts that are "random, fortuitous, or attenuated" are not sufficient to establish that a state's exercise of personal jurisdiction over the defendant was

foreseeable. *Heritage House, 906 F.2d at 283.* Moreover, in examining the contacts in a specific jurisdiction analysis, the court cannot "simply aggregate all of the defendant's contacts with the state -- no matter how similar in terms of geography, time, or substance." *RAR, 107 F.3d at 1277.*

In contrast to specific jurisdiction, general jurisdiction is applicable when the lawsuit neither arose nor was related to the defendant's contacts with forum state. Id. Such jurisdiction is permitted only where the defendant has "continuous and systematic general business contacts" with the state. [*11] Id. The general jurisdiction standard is "a fairly high standard requiring a great amount of contacts." *Jamik, Inc. v. Days Inn of Mount Laurel, 74 F. Supp. 2d 818, 822 (N.D. Ill. 1999).* Factors courts examine in determining whether general jurisdiction exist include: (1) whether and to what extent the defendant conducts business in the forum state; (2) whether the defendant maintains an office or employees within the forum state; (3) whether the defendant sends agents into the forum state to conduct business; (4) whether the defendant advertises or solicits business in the forum state; and (5) whether the defendant has designated an agent for service of process in the forum state. See *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984).*

If the court finds that it has either specific or general jurisdiction, the court must still ensure that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co., 326 U.S. at 316.* Under this determination, the court examines: (1) the interest of the state in providing a forum [*12] to the plaintiff; (2) the interest of the state in regulating the activity involved; (3) the burden of defense in the forum on the defendant; (4) the relative burden of prosecution elsewhere on the plaintiff; (5) the extent to which the claim is related to the defendant's local activities; and (6) the avoidance of a multiplicity of suits on conflicting adjudications. See *Asahi Metal Inds. Co. v. Super. Ct. of Cal., 480 U.S. 102, 115, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987); Burger King, 471 U.S. at 472-73, 476-77.* Because no one factor is dispositive, this Court must balance all of the factors. *Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824, 840 (N.D. Ill. 2000).* However, the most important factors to consider are the interests of the forum and the relative convenience of the defendant in litigating in that forum. *Kohler Co. v. Kohler Int'l, Ltd., 196 F. Supp. 2d 690, 700 (N.D. Ill. 2002).* It is well-settled, however, that a party that has directed its activities at the forum state bears the burden of presenting a "compelling case" that these other considerations make jurisdiction in the forum [*13] unreasonable. *Burger King, 471 U.S. at 477.*

Here, BFTGI, BFGI, Clark Enterprises, and Clark Onterie contend that Plaintiffs "cannot demonstrate that personal jurisdiction is satisfied under either the general jurisdiction or specific jurisdiction standard." The Court will thus examine whether it has jurisdiction over each of these Defendants.

A. Boston Financial Technology Group, Inc.

BFTGI has presented evidence showing that on March 31, 1986, it changed its name to BFGI and ceased to exist as a business entity. See Gladstone Decl. at 2 (Def. BFGI's Mot. to Dismiss, Ex. A); Articles of Amendment (Id., Ex. B) (certificate stating name change). Because Plaintiffs have not contested this assertion, the Court accepts this fact as true for the purposes of this motion. *Connolly, 613 F. Supp. at 111.* Therefore, because the relevant time period regarding the dispute over the Franklin Partnership stems from January 1, 1997 to December 21, 2001, see *Birnberg v. Milk Street, 2002 U.S. Dist. LEXIS 9321, 2002 WL 1162848,* at *6 (N.D. Ill. May 24, 2002), this Court finds that BFTGI did not have minimum contacts with Illinois during the relevant time period, [*14] and therefore, the Court GRANTS BFTGI's Motion to Dismiss Under Rule 12(b)(2) for Lack of Jurisdiction.

B. Boston Financial Group, Inc.

Plaintiffs contend that a number of mailings by BFGI to the limited partners, many of whom lived in Illinois, are sufficient contacts to enable this Court to assert jurisdiction over BFGI. Before discussing these mailings, however, the Court will examine whether documents mailed to residents of Illinois satisfy the minimum contacts requirement.

Generally, mail from a foreign defendant to individuals within the forum state is insufficient by itself to provide a basis for the exercise or personal jurisdiction. *Greenberg v. Miami Children's Hosp. Research Inst., Inc., 208 F. Supp. 2d 918, 926 (N.D. Ill. 2002).* Where, however, the communication constitutes a "tortious act," it is sufficient to establish minimum contacts. See

Heritage House Restaurants, Inc. v. Continental Funding Group, Inc., 906 F.2d 276, 282 (7th Cir. 1990). The Illinois long-arm statute provides in relevant part that:

> Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts [*15] hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts: (2) The commission of a tortious act within this State.

735 ILCS 5/2-209(a)(2). Under section 2-209(a)(2), "a single tortious act occurring in Illinois will establish jurisdiction in Illinois, even though the defendant has no other contact in Illinois and has never been to Illinois." *Mergenthaler Linotype Co. v. Leonard Storch Enter. Inc., 66 Ill. App. 3d 789, 383 N.E.2d 1379, 1384, 23 Ill. Dec. 352 (Ill. App. Ct. 1978).* Courts have broadly construed the term "tortious act" to include acts beyond those which "create common law liability" to include "any act that constitutes a breach of duty to another imposed by law." *Vlasak v. Rapid Collection Sys., Inc., 962 F. Supp. 1096, 1100 (N.D. Ill. 1997).* See also *Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 140 (N.D. Ill. 1977)* ("the word 'tortious' . . . is not restricted to the technical definition of a tort, but also includes any act committed within the state which involves a breach of duty to [*16] another and makes the actor liable for damages").

Applying the above principles, courts have held that mailings by non-resident defendants which constitute a tort and are sent to Illinois residents and affect interests in Illinois are sufficient to confer jurisdiction over the non-resident defendant under section 2-209. See *Cross v. Simons, 729 F. Supp. 588, 592 (N.D. Ill. 1989); McClub Serv., Inc. v. Stovall, 714 F. Supp. 370, 373 (N.D. Ill. 1989).* In *McClub, 714 F. Supp. at 371,* in a diversity action against a Texas defendant for breach of contract, fraud, and fraudulent inducement, the defendants moved to dismiss for lack of personal jurisdiction based on the grounds that its only contact with Illinois was a few telephone calls and mailings to the plaintiff, an Illinois resident. Applying Illinois law, the court held that "the mailing of . . . messages into Illinois that constitutes part of the tortious conduct, coupled with an intent to affect Illinois interests, satisfies the requirements of [section 2-209(a)(2)]." Id. Denying the motion, the court found that the plaintiff met requirements of section 2-209(a)(2) by alleging [*17] that the tortious conduct consisted of mailing the fraudulent statements into Illinois, which were intended to and did result in economic injury to Illinois residents. Id.

With these factors in mind, the Court now examines the mailings which Plaintiffs contend establish personal jurisdiction in Illinois under section 2-209. On February 23, 1999, the limited partners received a memorandum in the mail ("the February Memorandum") which proposed a buy-out of the Franklin Partnership whereby LMA would replace Milk Street as the Franklin Partnership's general partner, acquire the limited partners' interests, and ultimately acquire the Onterie Center. The memorandum sought the limited partners' written consent for the proposed acquisition. Enclosed with the memorandum were a consent, proxy, special power of attorney, a certificate of non-foreign status, and a release for LMA and Milk Street (which would be signed only if the above transactions were completed).

The February Memorandum listed BFGI as an attorney for the Franklin Partnership and included a power of attorney which stated that the signee

> irrevocably constitutes and appoints each of the Attorneys, in each case with [*18] full power of substitution, the true and lawful attorney-in-fact of the Principal, in his name, place, and stead, to make, execute, consent to, swear to, acknowledge, publish, record and file: All such instruments as the Attorneys or any of them may deem necessary or desirable to carry out the provisions of the sale, as discussed in the Memorandum, in accordance with its terms.

In support of its contention that BFGI was one of the entities which mailed the February Memorandum, Plaintiffs point to the Cooperation Agreement of May 25, 1999, which was signed by Milk Street, BFGI, BFTGI, and LMA. (Pls.' Mem. in Opp'n, Ex. F.) The Cooperation Agreement states that "BFGI, as successor to [BFTGI], has certain rights pursuant to the Second Amended and Restated Agreement and Certificate of Limited Partnership of Onterie." Paragraph five states that:

> BFGI hereby represents that it sent the [February] Memorandum to all Investor Limited Partners in Franklin of record as of the dates of the three documents constituting the [February] Memorandum and received the document entitled Consent, Power of Attorney and Proxy from Investor Limited Partners in Franklin holding more than sixty-eight [*19] percent of the Investor Limited Partner interests in Franklin.

Based on this document, it would appear that BFGI sent out the allegedly deceptive and fraudulent February Memorandum and that it received the documents enclosed therein from the limited partners. n4

> n4 Additionally, Plaintiffs cite to a number of other correspondences which were sent to the limited partners which purport to be updates on the purposed purchase of the limited partners' interests in the Franklin Partnership. (See Pls' Mem. in Opp'n, Exs. C, D, E and F.) Each of these correspondences state that they are from "Boston Financial."

To rebut the contention that BFGI mailed the February Memorandum to the limited partners, BFGI relies on the deposition testimony of Michael Gladstone, former vice-president of BFGI and a limited partner of BFGLP. (See Defs' Reply, Ex. D.) According to Gladstone, by 1992, BFGI "pretty much ceased to operate as an operating company" because "virtually" all of its assets, rights, and responsibilities [*20] were transferred to BFGLP for tax purposes. (Id. at 15, 20-21.) After 1992, BFGLP "became our operating entity" and BFGI's "primary purpose was to serve as general partner of a couple of real estate limited partnerships." (Id. at 16-17.) Because BFGI "was not all operating entity at the time," Gladstone testified that it was not involved in the buy-out of the limited partners in 1998. (Id. at 57.) Gladstone stated that the reference to BFGI in the Cooperation Agreement was "careless on our part in preparing the document . . . . When this document was being drafted, we were probably not all that focused on what entity was referred to in Paragraph 5. We were merely trying to make the representation that the investor memos had been sent to all limited partners, and we were not focused on the abbreviation BFGI." (Id. at 88.) Gladstone further asserted that the reference to "Boston Financial" in the various other correspondences mailed to the Limited Partners actually referred to BFGLP not BFGI. (Id. at 60, 63, 65.) Consequently, relying on Gladstone's deposition testimony, BFGI contends that "though this Court may have jurisdiction over [BFGLP] due process simply [*21] does not permit jurisdiction over [BFGI]."

Despite Mr. Gladstone's testimony, this Court finds that whether BFGI sent the February Memorandum is a factual dispute which this Court must resolve in Plaintiffs' favor. *Turnock, 816 F.2d at 333.* This finding is supported not only by the plain language of the February Memorandum and the Cooperation Agreement, but by the fact that Mr. Gladstone signed the Cooperation Agreement on behalf of BFGI. Mr. Gladstone testified that BFGI "pretty much" ceased to operate after 1992. If, however, BFGI, was not an operating entity after 1992, then it is unclear why Mr. Gladstone would have signed the Cooperation Agreement on its behalf on May 25, 1999. Therefore, for purposes of determining only whether this Court can assert jurisdiction over BFGI at this time, this Court finds that the February Memorandum was mailed by BFGI.

Even though Plaintiffs have established that BFGI mailed the February Memorandum to Illinois, to establish jurisdiction under section 2-209(a)(2), Plaintiff must still show that the mailing of the February Memorandum constituted a tort which was intended to and did cause injury to an Illinois resident. Plaintiffs [*22] allege that Defendants devised a plan to fraudulently buy-out the limited partners. As part of this plan, BFGI allegedly sent the February Memorandum which was "false and misleading" in that it: (1) "misrepresented Onterie's value in order to induce the Limited Partners to grant their consents"; (2) failed to disclose "pervasive conflicts of interest" which were part of the buy-out scheme; and (3) left out pertinent and fundamental information which Defendants were required to disclose. As a result of the misrepresentations in the February Memorandum, Plaintiff allege that Defendants improperly acquired the limited partners' interests "for far less than their true value" and caused the limited partners to unnecessarily incur "huge tax liabilities."

Consequently, for the purposes of this motion, the

Court finds that the Complaint sufficiently alleges that the February Memorandum was mailed as to Illinois residents, constituted a "tortious act," and caused injuries to Illinois residents. The Court thus holds that it has jurisdiction over BFGI under *735 ILCS 5/2-209(a)(2)*.

Although this Court has jurisdiction over BFGI under the Illinois long-arm statute, federal due process also requires [*23] that the exercise of personal jurisdiction over a nonresident defendant be reasonable. *Int'l Shoe, 326 U.S. at 316*. Illinois has a strong interest in adjudicating injuries that occur within its borders. *Coolsavings.com, Inc. v. IQ.Commerce Corp., 53 F. Supp. 2d 1000, 1005 (N.D. Ill. 1999)*. This interest is especially strong in cases involving torts within Illinois' borders. *M/H Group v. Macsoft, Inc., 1987 U.S. Dist. LEXIS 1821*, No. 86 C 8163, *1987 WL 7823*, at *3 (N.D. Ill. March 9, 1987) (states have a special interest in exercising jurisdiction over those who commit torts within its jurisdiction). An individual injured in Illinois need not go to another state to seek redress from persons who, though remaining in that other state, knowingly committed a tort causing an injury in Illinois. See *Calder v. Jones, 465 U.S. 783, 790, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)*.

Moreover, it would not be unduly burdensome for BFGI to litigate in Illinois. *Euromarket Designs, Inc. v. Crate & Barrel, Ltd., 96 F. Supp. 2d 824, 840 (N.D. Ill. 2000)*(unless the inconvenience of having to litigate in the forum is so great as to deprive the defendant [*24] of due process, it will not overcome clear justifications for the exercise of jurisdiction). Traveling from Massachusetts, where BFGI is incorporated and has its principal place of business, to Illinois is not oppressive. See id. (modern advances in transportation and communication make it more reasonable to litigate in a foreign forum). Therefore, this Court holds that it would not be unreasonable to exercise personal jurisdiction over BFGI.

Accordingly, because BFGI has minimum contacts with Illinois and it is not unreasonable to exercise jurisdiction over it, this Court holds that it has personal jurisdiction over BFGI.

C. Clark Enterprises and Clark Onterie

Plaintiffs also contend that the following contacts enable this Court to assert specific jurisdiction over Clark Enterprises and Clark Onterie: (1) travel to Illinois by their representatives; and (2) ownership of the Onterie Center. n5 The Court will discuss each of these contacts in turn.

> n5 Plaintiffs also contend that this Court has general jurisdiction over Clark Enterprises and Clark Onterie. Because this Court finds that it has specific jurisdiction, it will not discuss the general jurisdiction contention.

[*25]

1. Travel to Illinois

To establish specific jurisdiction based on the defendant's travel to the forum state, the travel must have been significantly related to the dispute at issue. See *Wis. Elec. Mfg. Co. v. Pennant Prods., Inc., 619 F.2d 676, 678 (7th Cir. 1980)* (holding that two trips to Illinois which "were significant in the formation of the contract and [the defendant's] efforts to have it satisfactorily performed" were sufficient contacts to create specific jurisdiction). See also *RAR, 107 F.3d at 1278* ("unless their contacts are continuous and systematic enough to rise to the level of general jurisdiction, individuals and corporations must be able to conduct interstate business confident that transactions in one context will not come back to haunt them unexpectedly in another"); *LaSalle Nat'l Bank v. Vitro, Sociedad Anonima, 85 F. Supp. 2d 857, 861 (N.D. Ill. 2000)* ("the claims in the complaint must relate to, or arise out of, the contacts with the forum").

Here, Plaintiffs assert that representatives of Clark Enterprises traveled to Illinois several times within the past few years. These trips include: (a) a trip [*26] by Lawrence Nussdorf to meet with potential attorneys for litigation involving Chandra Jha, one of the general partners in Onterie Associates; (b) a trip by Nussdorf and A.J. Clark to view the Onterie project and meet with the building engineer and Jha; (c) a trip by Nussdorf to meet with Northwestern Memorial Hospital in connection with its lease at the Onterie Center; (d) a trip by Rebecca Owen to meet with three Chicago-based law firms to interview legal counsel for the Jha litigation; and (e) a trip by Robert Flanagan to meet with individuals involved in business matters with an affiliate of Clark Enterprises.

Plaintiffs, however, have failed to explain how Clark

Enterprises' contacts regarding the Jha litigation are related to the instant litigation. Similarly, Plaintiffs have not showed how Mr. Flanagan's meeting with Clark Enterprises' affiliate for "business matters" was connected with the instant suit. Plaintiffs have also failed to show that the trips that Clark Enterprise executives took to Chicago regarding the Onterie Center are related to this litigation -- e.g., the misrepresentations made to the limited partners and the purchase of the limited partners' interests [*27] in the Franklin Partnership. The fact that Clark Enterprise executives took trips to Chicago regarding the general business of the Onterie Center is not sufficient minimum contact for this Court to assert specific jurisdiction over Clark Enterprises.

Plaintiffs also contend that representatives of Clark Onterie's manager, Clark Realty Capital, L.L.C. ("Clark Realty"), traveled to Chicago regarding Clark Onterie's investment in Lake Michigan. This contention is based on Clark Onterie's responses to interrogatories. In response to this admission, Margery Silberstein, assistant general counsel of Clark Enterprises and Defendants' Rule 30(b)(6) deponent on jurisdictional issues, testified that Clark Onterie's response to this interrogatory was "not 100% accurate" because Clark Really took these trips on behalf of Lake Michigan not Clark Onterie. This statement, however, was contradicted by other testimony given by Ms. Silberstein. For example, she testified that one of Clark Realty's managers traveled to Chicago in connection with the Onterie Center to sign the closing statement on behalf of Clark Onterie. Additionally, several other managers of Clark Realty traveled to Chicago for which [*28] Clark Onterie was billed for the travel. Consequently, because there is conflicting evidence on this point, this Court must resolve any factual disputes in the plaintiffs' favor. *Turnock, 816 F.2d at 333.* Therefore, for jurisdictional purposes, this Court will assume that these trips were made on behalf of Clark Onterie. n6

> n6 As explained below, the Court finds that the actions of Clark Realty can be attributed to Clark Onterie for jurisdictional purposes

2. Ownership of the Onterie Center

Plaintiffs further contend that this Court has jurisdiction because Clark Enterprises and Clark Onterie own real property in Illinois (the Onterie Center). Plaintiffs are correct that they can establish jurisdiction by showing that Clark Enterprises and Clark Onterie own real estate in Illinois. See *735 ILCS 5/2-209(a)(3)* ("any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts enumerated, thereby submits such person . . . to the jurisdiction [*29] of the courts of this State as to any cause of action arising from the doing of any of such acts: . . . (3) The ownership, use, or possession of any real estate situated in this State").

There is, however, a problem with this contention. As Defendants correctly point out, Clark Enterprises and Clark Onterie do not directly own real estate in Illinois. Instead, they own the Onterie Center indirectly through their ownership in affiliated companies.

Generally, jurisdiction over a subsidiary is insufficient to confer jurisdiction over a nonresident parent. *LaSalle Nat'l Bank, 85 F. Supp. 2d at 864.* However, "if the parent sufficiently controls the subsidiary, then courts will impute the acts of the subsidiary to the parent." Id. The general rule assumes that there will be some control in a normal parent-subsidiary relationship. Id. Illinois courts have recognized two methods for establishing jurisdiction over a foreign corporation based on the activities of its subsidiary. *Gruca v. Alpha Therapeutic Corp., 19 F. Supp. 2d 862, 866 (N.D. Ill. 1998).* Under the first method, the plaintiff must provide evidence that justifies piercing the corporate [*30] veil of the parent company. Id. Under the second method, the plaintiff must show that the parent substantially controls the activities of a subsidiary doing business in Illinois. Id.

Under Illinois law, a corporation's veil may be pierced if there is: (1) such unity of interest and ownership that the separate personalities of the corporation and the subsidiary would no longer exist; and (2) adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. Id. To determine if there is a sufficient "unity of interest and ownership" between two corporations, Illinois courts look to four factors: (1) the failure to maintain adequate corporate records or to comply with corporate formalities; (2) the commingling of funds or assets; (3) undercapitalization; and (4) one corporation treating the assets of another as its own. Id.

Under the second approach, which is "more

flexible," the court must determine "whether the parent has substantially controlled the subsidiary." *LaSalle Nat'l Bank, 85 F. Supp. 2d at 864-65.* Precisely how much control the parent must have is "hard to state with precision," in part because there will [*31] always "be some control in the normal parent/subsidiary relationship." Id. See aslo *Gruca, 19 F. Supp. 2d at 868* ("it is an economic fact of life that subsidiaries are subject to the overall direction of the parent, with a unity of interest and common objective").

The court in Gruca identified several factors to consider in determining if a parent is so closely linked to its subsidiary that jurisdiction over the subsidiary creates jurisdiction over the parent: (1) whether the parent arranges financing for and capitalization of the subsidiary; (2) whether separate books, tax returns, and financial statements are kept; (3) whether officers or directors are the same; (4) whether the parent holds its subsidiary out as an agent; (5) the method of payment made to the parent by the subsidiary; (6) and how much control is exerted by the parent over the daily affairs of its subsidiary. *Gruca, 19 F. Supp. 2d at 867.*

Here, after examining the deposition testimony of Ms. Silberstein, Defendants' responses to interrogatories, and the organizational/ownership chart of the Onterie Center, LP, this Court makes the following findings of fact for the purposes [*32] of the instant motion to dismiss for lack of personal jurisdiction.

Dissecting the corporate structure of the entities and indivduals who actually own the Onterie Center is no easy task. Although Clark Enterprises indirectly owns the Onterie Center, its ownership interest is four tiers away from the Onterie Center. Clark Enterprises owns a 35% interest in Clark LMA, LLC, who in turn owns a 75% interest in LMA, LLC, who in turn has a 100% interest in LMAGP, LLC, who in turn is a 98.5% owner of Onterie Center, LP, which actually owns the Onterie Center. Likewise, Clark Onterie owns an interest in the Onterie Center through its ownership interest in LMA, LLC.

Simply looking at the wed of ownership, however, does not tell the whole story. A close examination of the corporate structure of the Clark entities -- Clark Enterprises, Clark LMA, and Clark Onterie -- reveals that they are joined at the hip. Many of Clark Enterprises' directors and officers are also managers of Clark Realty, which manages Clark Onterie, the LMA entities, and Clark LMA. The operating agreement of each of these entities specifically state that they cannot take any action on their own, only through Clark Realty. [*33] Moreover, the same executives and directors of Clark Enterprises, who also manage Clark Realty, also own interests in Clark Onterie and Clark LMA. In fact, overall, including the interests of its executives and directors in Clark LMA, Clark Enterprises has over a 60% interest in Clark LMA.

Based on this incestuous corporate structure, it is not surprising that Ms. Silberstien testified that Clark LMA, the LMA entities, and Clark Onterie "exist solely for the purpose of owning an interest in the Onterie Center," and that they do not have any employees, directors, or officers. (Silberstien Dep. at 49.)

In response, Clark Enterprises and Clark Onterie contend that Plaintiffs have not proffered any evidence relating to many of the factors discussed above such as whether Clark LMA, LLC and the LMA entities keep their own books, tax returns and financial statements. The reason for this lack of evidence, however, is due to Ms. Silberstien's lack of knowledge on these issues. Ms. Silberstien was designated by Clark Enterprises as its Rule 30(b)(6) deponent for a deposition on jurisdictional discovery, and therefore, she should have had knowledge of these issues. *Smithkline Beecham Corp. v. Apotex Corp., 2000 U.S. Dist. LEXIS 667, 2000 WL 116082,* at *8-9 (N.D. Ill. Jan. 24, 2000) [*34] . At her deposition, however, Ms. Silberstien lacked knowledge to answer questions on these issues. Therefore, this Court finds that these issues are questions of fact, which for the purposes of this motion are to be decided in Plaintiffs' favor. See *Fed. R. Civ. Pro. 37(b)(2)(A).*

Therefore, based on this evidence, this Court finds that Clark LMA, LLC and the LMA entities were simply shells created so that Clark Enterprises and Clark Onterie would have an ownership interest in the Onterie Center, which is located in Illinois.

This decision is supported by the holding in *Wesleyan Pension Fund, Inc. v. First Albany Corp., 964 F. Supp. 1255 (S.D. Ind. 1997),* which is factually similar to the present case. The plaintiff in Wesleyan, a pension fund, brought an action for fraud to recover losses it suffered after investing in several real estate limited partnerships with the non-resident defendants, *Id. at 1257.* The defendants, who consisted of three individuals, nine closely held corporations, and three limited partnerships, brought a motion to dismiss for lack of

personal jurisdiction pursuant to Rule 12(b)(2). [*35] Id.

In denying the Rule 12(b)(2) motion, the court rejected the defendants' contention that the plaintiff must demonstrate that each defendant had minimum contacts with the forum. *Id. at 1261.* Instead, the court held that, for purposes of determining jurisdiction, it would treat the defendants as a "single entity." Id. The court noted that the presumption that a subsidiary is independent from its parent may be overcome by evidence that "the parent has greater control over the subsidiary, than normally associated with common ownership and directorship or where the subsidiary is merely an empty shell." *Id. at 1262.* See also *APS Sports Collectibles, Inc. v. Sports Time, Inc., 299 F.3d 624, 631 (7th Cir. 2002)* (applying Illinois law, the court held that a plaintiff may pierce the corporate veil by "showing that one corporation is really a dummy or sham for another"); *YKK USA, Inc. v. Baron, 976 F. Supp. 743, 747 (N.D Ill. 1997)* (plaintiff may pierce the corporate veil by "by alleging that the corporation was a mere shell utilized by the individual defendant for his own personal benefit").

Applying the above principles, [*36] the court in Wesleyan held that "it would be entirely reasonable to attribute any contacts of the eight subsidiary corporations to the [parent] . . . on the grounds either that [the parent] exerted greater than normal control over its subsidiaries, or that the subsidiaries acted as agents, or that the subsidiaries were merely empty shells." *964 F. Supp. at 1261.* The court based this decision on the fact that the parent and the subsidiaries had the same principal place of business and phone number and shared the same executives, directors, and shareholders. Id.

Accordingly, this Court finds that Clark Enterprises and Clark Onterie, through their ownership interest in the shell companies have an ownership interest in real property located in Illinois, and therefore, this Court has jurisdiction over Clark Enterprises and Clark Onterie under *735 ILCS 5/2-209(a)(3).* Additionally, as explained in more detail above, this Court holds that it would not be unreasonable to exercise personal jurisdiction over Clark Enterprises and Clark Onterie.

In sum, this Court DENIES the Motion to Dismiss Under Rule 12(b)(2) For Lack of Personal Jurisdiction as to BFGI, Clark Enterprises [*37] and Clark Onterie and GRANTS the motion with respect to BFTGI.

II. Motion to Dismiss for Failure to State a Claim

In addition to the 12(b)(2) motion, Defendants have moved to dismiss, pursuant to Rule 12(b)(6), for failure to state a claim. n7

> n7 Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, Clark Enterprises, and Clark Onterie have moved to dismiss all claims, while LMA has only moved to dismiss Counts II, IV, V, and VI.

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all facts alleged in the pleadings, construing allegations liberally and viewing them in the light most favorable to the non-moving party. See, e.g., *McMath v. City of Gary, 976 F.2d 1026, 1031 (7th Cir. 1992); Gillman v. Burlington N. R.R. Co., 878 F.2d 1020, 1022 (7th Cir. 1989).* Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. [*38] *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Kunik v. Racine County, Wis., 946 F.2d 1574, 1579 (7th Cir. 1991)* (citing *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)).*

The court will accept all well-pled factual allegations in the complaint as true. *Miree v. DeKalb County, 433 U.S. 25, 27 n.2, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977).* In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. *Craigs, Inc. v. General Electric Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993).* However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims. *Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992).*

Before discussing the merits of Defendants' Rule 12(b)(6) motion, however, this Court must first determine which state's substantive law applies to Plaintiffs' claims. Federal courts sitting in diversity jurisdiction apply the choice-of-law [*39] rules of the state in which the court sits. *Midwest Grain Prods. of Ill., Inc. v. Productization, Inc., 228 F.3d 784, 787 (7th Cir. 2000).* n8 Accordingly, this Court will apply Illinois choice-of-law rules to determine which state's law applies to the claims at issue.

n8 Plaintiffs unfortunately overlooked this basic principle in their choice of law argument. The cases they cited in their brief apply the choice-of-law rules of Massachusetts, *McAdams v. Mass. Mut. Life Ins. Co., 2002 U.S. Dist. LEXIS 9944, 2002 WL 1067449* (D. Mass. May 15, 2002), and California, *Nibeel v. McDonald's Corp., 1998 U.S. Dist. LEXIS 13425, 1998 WL 547286 (N.D. Ill. Aug. 1998)* (the court applied California choice-of-law rules because the case was transferred from California). Consequently, the cases cited by plaintiff are inapposite.

The parties here agree that the law of Massachusetts applies to Plaintiffs' breach of contract claim (Count III) because the Franklin Partnership Agreement ("the Agreement") contains a choice-of-law provision [*40] which states that: "this Agreement shall be construed and enforced in accordance with the law of the State [Massachusetts]." The litigants, however, disagree on how broadly or narrowly this Court should apply the Agreement's choice-of-law provision. Plaintiffs contend that the provision applies to all of their claims, while Defendants assert that it only applies to the breach of contract claim. Applying Illinois choice-of-law rules, this Court finds that the answer lies between both parties' positions.

In determining the breadth of a contractual choice-of-law provision under Illinois law, courts apply a two part analysis. *Medline Indus. Inc. v. Maersk Med. Ltd., 2002 U.S. Dist. LEXIS 22244, 230 F. Supp. 2d 857, 2002 WL 31557181,* at *3-4 (N.D. Ill. Nov. 14, 2002); *Precision Screen Mach. Inc. v. Elexon, Inc., 1996 U.S. Dist. LEXIS 12487, 1996 WL 495564,* *2-3 (N.D. Ill. Aug. 28, 1996).

First, the court should examine the language of the contract's choice-of-law clause to determine if the parties "intended [it] to govern all claims between them." *Medline Indus. Inc., 230 F. Supp. 2d 857, 2002 U.S. Dist. LEXIS 22244, 2002 WL 31557181,* at *3-4. In making this determination, it must be clear that the parties intended to [*41] apply the choice-of-law provision "to all disputes related" to the contract. *Union Oil Co. of Ca. v. John Brown E&C, 1994 U.S. Dist. LEXIS 13930, 1994 WL 535108,* at *3 (N.D. Ill. Sept. 30, 1994). See also *Kuehn v. Children's Hosp. of Los Angeles, 119 F.3d 1296, 1302 (7th Cir. 1997)*(a contractual choice-of-law provision "will not be construed to govern tort as well as contract disputes unless it is clear that is what the parties intended"). In *Union Oil Co., 1994 U.S. Dist. LEXIS 13930, 1994 WL 53108,* at *1, 3, the court held that a choice-of-law provision, which stated that "this contract shall be construed, interpreted, and enforced in accordance with the law and jurisprudence of the State of California," did not demonstrate that the parties clearly intended to apply California law to claims not related to the contract. Similarly, in *Precision Screen Mach. Inc., 1996 U.S. Dist. LEXIS 12487, 1996 WL 495564,* *2-3, the court held that a choice-of-law provision, which stated that the contract "shall be governed and construed in accordance with, the internal laws of the State of New Jersey," did not indicate a clear intent to apply New Jersey law to all disputes.

Here, the choice-of-law provision states [*42] that "this Agreement shall be construed and enforced in accordance with the law of the State [Massachusetts]." Based on this language, the Court finds that the parties did not clearly intend the Agreement's choice-of-law provision to broadly apply to all disputes arising out of the Agreement.

The parties' intent, however, is not determinative. "Tort claims that are dependent upon the contract are subject to [the] contract's choice-of-law clause[,] regardless of the breadth of the clause." *Medline Indus. Inc., 230 F. Supp. 2d 857, 2002 U.S. Dist. LEXIS 22244, 2002 WL 31557181,* at *3. See also *Precision Screen Mach. Inc, 1996 U.S. Dist. LEXIS 12487, 1996 WL 495564,* *2-3 (noting that under Illinois law, courts have applied contractual choice-of-law provisions to tort claims, where that tort "was dependent on the contract"). In determining whether a tort claim is dependent upon the contract, courts examine whether: (1) "the [claim] alleges a wrong based upon interpretation and construction of the contract," *Medline Indus. Inc., 230 F. Supp. 2d 857, 2002 U.S. Dist. LEXIS 22244, 2002 WL 31557181,* at *3; (2) the "tort claims [are] closely related to the parties' contractual relationship," *Miyano Mach. USA, Inc. v. Zonar, 1994 U.S. Dist. LEXIS 6772, 1994 WL 233649,* at *2 (N.D. Ill. May 23, 1994); [*43] and (3) the tort claim "could exist without" the contractual agreement which contains the choice-of-law provision, *Precision Screen Mach. Inc, 1996 U.S. Dist. LEXIS 12487, 1996 WL*

495564, *2-3.

After examining each of Plaintiffs' claims, this Court finds that the claims for breach of fiduciary duty, breach of good faith and fair dealing, and intentional interference with contractual relations are dependent on the Agreement. The breach of fiduciary duty claim (Count I) alleges that based on the Agreement, Defendants, as general partners, owed Plaintiffs, as limited partners, a fiduciary duty of trust, loyalty, due care, candor, and fidelity. (See Compl. at PP 13-16.) Likewise, the claim for breach of good faith and fair dealing (Count IV) alleges that this duty originates from the Agreement. (See id. at P 91.) Thus, without the existence of the Agreement, Defendants would not have owed Plaintiffs a fiduciary duty or a duty of good faith and fair dealing, and thus, these claims could not have existed without the contract and are based upon and closely related to the contract.

Similarly, Plaintiffs' claim for intentional interference with contractual relations [*44] (Count V) alleges that the Agreement is a valid and enforceable contract and that Defendants' actions interfered with Plaintiffs' legal rights under the Agreement. Therefore, the Court finds that this claim likewise could not have existed without the Agreement and is based upon and closely related to the Agreement.

In contrast to these counts, the Court finds that Plaintiffs' claim under the Illinois Consumer Fraud Act (Count II), for negligent misrepresentation (Count VII), and for fraud (Count VI) are independent of the Agreement, and therefore, not governed by the Agreement's choice-of-law provision. All three of these claims are premised, not upon the Agreement, but on alleged misstatements and omissions which Defendants made to Plaintiffs in the February 23 Memorandum and in the course of the buy-out of the limited partners' interests in the Franklin Partnership. Thus, these claims, while related to the Agreement, are not based upon the interpretation of the Agreement and could exist without the Agreement. See *Chicago Printing Co. v. Heidelberg USA, Inc., 2001 U.S. Dist. LEXIS 15331, 2001 WL 1134862*, *3 (N.D. Ill. Sept. 25, 2001) (holding that a contractual choice-of-law provision did not [*45] apply to a claim for negligent misrepresentation because the claim was separate from the contract); *Mellon Bank, N.A. v. Miglin, 1995 U.S. Dist. LEXIS 681, 1995 WL 230492*, at *7 (N.D. Ill. Jan. 10, 1995) (holding that a claim for negligent misrepresentation "arose independently from the contract").

Accordingly, this Court will apply Massachusetts's law, per the Agreement's choice-of-law provision, to Counts I, IV, and V. As for Counts II, VI, and VII, this Court must apply Illinois choice of law rules in determining which jurisdiction's substantive law applies to these counts. See *Medline Indus., Inc., 230 F. Supp. 2d 857, 2002 U.S. Dist. LEXIS 22244, 2002 WL 31557181*, at *4 (holding that courts should follow the state's choice-of-law rules where the contractual choice-of-law provision does not apply).

In determining which substantive law to apply to tort claims, Illinois law requires courts to use the "most significant relationship test." Id. Under this test, courts examine four factors: (1) the place of injury; (2) the place of the tortious conduct; (3) the domicile of the parties; and (4) the place where the relationship between the parties is centered. Id. Generally, the "place of injury" controls unless another [*46] state has a more significant interest. Id.

Applying these factors to the present case, this Court finds that Illinois has the most significant relationship to Counts II, VI, and VII. The place of injury is where Plaintiffs live -- Illinois and Minnesota. As explained above, the relationship of the parties is centered around the Onterie Center which is located in Illinois. Likewise, the alleged tortious conduct took place in Illinois. Consequently, this Court finds that Illinois law governs Counts II, VI, and VII.

In sum, this Court will apply Massachusetts's law to Counts I, III, IV, and V and Illinois law to Counts II, VI, and VII. The Court will now discuss each of these claims in turn.

A. Breach of Fiduciary Duty (Count I)

Defendants contend that except for the two general partners -- Milk Street and LMA -- Plaintiffs have failed to state a claim for breach of fiduciary duty because the other Defendants, who were not general partners, did not owe Plaintiffs a fiduciary duty. In response, Plaintiffs argue that the non-general partner Defendants owed them a fiduciary duty because they owned and/or controlled the general partners and assisted in and profited from the [*47] general partners' alleged wrong doing.

Under Massachusetts' law, a general partner owes the limited partners a "fiduciary duty of the 'utmost good faith and loyalty'" and must consider the limited partners' "welfare and refrain from acting for purely private gain." *Wartski v. Bedford, 926 F.2d 11, 13-14 (1st Cir. 1991)* (quoting *Cardullo v. Landau, 329 Mass. 5, 105 N.E.2d 843 (Mass. 1952)).*

While Massachusetts has not addressed the issue, several other states have held that limited partners may bring a breach of fiduciary claim against the parents and affiliates of the general partner where the limited partners allege that the parents and affiliates controlled the affairs of the general partner and caused or participated in the breach of the fiduciary duty. See *Wallace v. Wood, 752 A.2d 1175, 1181-82 (Del. Ch. 1999); Chase Pratt, LLC v. Aetna Life Ins. Co., 1999 Conn. Super. LEXIS 917, 1999 WL 229214,* at *6-7 (Conn. Super. Ct. Mar. 19, 1999).

Here, after examining the Complaints, this Court finds that Plaintiffs have sufficiently alleged that Defendants controlled the general partners (Milk Street and LMA) and participated in or caused the alleged [*48] wrongful conduct. For example, Plaintiffs allege that "the general and limited partners of Milk Street were all employees and owners of Boston Financial" (Compl. at P 23), and that the Boston Financial entities (BFTGI, BFGI, and BFGLP) controlled the Franklin Partnership. (Id. at P 6.) Plaintiffs also allege that through its control of Milk Street, the Boston Financial entities participated in the scheme to improperly get the limited partners to sell their interests in the Franklin Partnership. (See id. at PP 37-49, 48-51, and 66-72.) Plaintiffs further allege that Lend Lease owns and controls the Boston Financial entities, and that through its control of the Boston Financial entities, Lend Lease controlled Milk Street. (Id. P 6.) Consequently, this Court finds that Plaintiffs have sufficiently alleged that BFTGI, BFGI, BFGLP, and Lend Lease controlled Milk Street and participated in or caused the alleged wrongful conduct.

Likewise, Plaintiffs allege that the other general partner of the Franklin Partnership -- LMA -- is a "wholly owned subsidiary" of Lake Michigan and that Clark Onterie (a "wholly owned subsidiary of Clark Enterprises") is the majority owner of Lake Michigan. [*49] (Id. PP 9-12.) While Plaintiffs do not specifically allege that Lake Michigan, Clark Onterie, and Clark Enterprises caused or participated in the alleged wrongful conduct, Plaintiffs allege that all Defendants "aided, abetted, [or] assisted" the general partners in breaching their fiduciary duties. Consequently, construing the complaint liberally and viewing the allegations in the light most favorable to Plaintiffs, *Craigs, Inc., 12 F.3d at 688,* this Court finds that Plaintiffs have sufficiently alleged that Lake Michigan, Clark Onterie, and Clark Enterprises controlled LMA and participated in or caused the alleged wrongful conduct.

Accordingly, the Court DENIES the motion to dismiss as to Count I.

B. Illinois Consumer Fraud Act (Count II)

Defendants contend that Plaintiffs lack standing to bring a claim under the Illinois Consumer Fraud And Deceptive Business Practices Act ("ICFA") because they fail to allege that: (1) they were "consumers" under the ICFA; and (2) the transaction at issue implicated consumer protection concerns.

The ICFA defines "consumer" as "any person who purchases or contracts for the purchase of merchandise not for resale in the [*50] ordinary course of his trade or business but for his use or that of a member of his household." *815 ILCS § 505/1(e).* "Merchandise" is defined to include "any objects, wares, goods, commodities, intangibles, real estate . . ., or services." *815 ILCS § 505/1(b).* Illinois courts "liberally construe" the ICFA and "give a broad definition to consumer." *Randazzo v. Harris Bank Palatine, 104 F. Supp. 2d 949, 954 (N.D. Ill. 2000).* See also *Bell Enter. Venture Santanna Natural Gas Corp., 2001 U.S. Dist. LEXIS 23684, 2001 WL 1609417,* at *4 (N.D. Ill. Dec. 12, 2001) ("the ICFA broadly defines a consumer").

Although no Illinois court appears to have addressed whether the purchasers of an interest in a limited partnership, whose only asset is real property, are consumers within the ICFA, courts have held that purchasers of real estate, see *Randels v. Best Real Estate, Inc. 243 Ill. App. 3d 801, 612 N.E.2d 984, 184 Ill. Dec. 108 (Ill. App. Ct. 1993),* securities, *Wislow v. Wong, 713 F. Supp. 1103, 1107 (N.D. Ill. 1989),* and franchise licenses, *Bixby's Food Sys., Inc. v. McKay, 985 F. Supp. 802, 807 (N.D. Ill. 1997),* are "consumers" within [*51] the scope of the ICFA.

In *Bixby's Food Sys., Inc., 985 F. Supp. at 807,* a franchisee brought an ICFA claim against its franchisor. The defendant moved to dismiss on the grounds that the

plaintiff did not have standing because the franchisee was not a "consumer" under the ICFA. Id. Denying this motion, the court held that Illinois courts have "broadly defined" merchandise and that franchise rights could constitute "intangibles" under a broad construction of merchandise. Id.

Here, Plaintiffs purchased an interest in the Franklin Partnership, whose sole asset was the Onterie Center. Thus, Plaintiffs' purchase is akin to the purchase of both securities and real estate (such as a Real Estate Investment Trust). Given the broad construction of the ICFA, this Court finds that Plaintiffs have alleged sufficient facts at this time to fall within the ICFA's broad definition of consumer.

Defendants' second contention -- that the transaction at issue does not implicate consumer protection concerns -- is likewise unpersuasive. When the plaintiff itself is a consumer, the plaintiff does not need to show that the transaction implicates consumer protection concerns; this [*52] factor only comes into play when the purchaser is a business. See *Industrial Specialty Chems. v. Cummins Engine Co., 902 F. Supp. 805, 812 (N.D. Ill. 1995); Reshal Assoc., Inc. v. Long Grove Trading Co., 754 F. Supp. 1226, 1237 (N.D. Ill. 1990).* A plaintiff/consumer may bring a claim under the ICFA based upon a single, isolated injury, and [] need not [allege] wide-spread effect on consumers generally." *Indus. Specialty Chem., Inc., 902 F. Supp. at 812.* Here, Plaintiffs have alleged injury both to themselves and to the numerous other limited partners.

Accordingly, this Court finds that Plaintiffs have standing to bring an ICFA claim, and the Court therefore DENIES the motion to dismiss as to Count II.

C. Breach of Contract (Count III)

Defendants have also moved to dismiss the breach of contract claim, as to all of the Defendants who were not general partners, on the grounds that only the general partners -- Milk Street and LMA -- were parties/signatories to the Franklin Partnership Agreement. Defendants are correct in noting that it is well settled black letter law that only parties to a contract are bound by that [*53] contract. 17B CSJ Contracts § 630 (2002); *In re Tri-Star Tech. Co., Inc., 260 B.R. 319, 327 (Bankr. D. Mass. 2001).*

In an attempt to get around this rule, Plaintiffs contend that -- as they did in their breach of fiduciary argument -- the non-general partner Defendants are liable for breach of contract because they owned and/or controlled the general partners and assisted in and profited from the general partners' breach of contract. Plaintiffs, however, have failed to cite, and this Court has not found, any law which supports this unique argument. One of the cases discussed above, *Wallace, 752 A.2d 1175 at 1181-82,* which held that affiliates and parents could be liable for breach of fiduciary duty for controlling and causing the wrongful conduct of the general partner, also held that the parents and affiliates were not liable for breach of contract for a contract to which they were not parties -- only the signatory/general partner was liable for the breach. *Id. at 1180.*

Accordingly, this Court GRANTS the motion to dismiss Count III as to the non-general partner Defendants -- Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, Clark [*54] Enterprises, and Clark Onterie.

D. Breach of Good Faith and Fair Dealing (Count IV)

Defendants contend that Count IV should be dismissed because Illinois does not recognize an independent claim for breach of good faith and fair dealing. As discussed above, however, Massachusetts' law applies to this claim, and Massachusetts does recognize an independent claim for breach of the covenant of good faith and fair dealing which is implied in every contract. *Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 583 N.E.2d 806, 820 (Mass. 1991).* Under this theory, "neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." Id. To state a claim for breach of good faith and fair dealing, the plaintiff must allege that: "(1) a contract existed between the parties; and (2) the defendant acted in bad faith, causing the plaintiff to be deprived of a benefit promised under the contract." Id.

Here, it is undisputed that a contract (the Franklin Partnership Agreement) existed between the general partners (Milk Street and LMA) and the Plaintiffs, who were two of the limited [*55] partners. As discussed above, however, Plaintiffs have not alleged that a contract existed between them and the non-general partner Defendants. Plaintiffs also allege that Defendants "have acted to deprive the Limited Partners of the fruits of the Partnership Agreement." (Compl. at P 90.) Consequently,

this Court finds that Plaintiffs have properly stated a claim for breach of good faith and fair dealing against the general partners -- Milk Street and LMA -- but not against the remaining Defendants. The Court thus DENIES the motion to dismiss Count IV as to LMA but GRANTS the motion as to Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, Clark Enterprises, and Clark Onterie.

E. Intentional Interference with Contractual Relations (Count V)

Defendants contend that Plaintiffs have failed to sufficiently allege a claim for intentional interference with contractual relations. To state a claim for intentional interference with contractual relations under Massachusetts law, a plaintiff must allege that: "(1) [the plaintiff] had a contract with a third party, (2) the defendant knowingly induced the third party to break the contract, and (3) the plaintiff was harmed by the defendant's [*56] actions." *United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 551 N.E.2d 20, 21 (Mass. 1990).* n9 Additionally, the plaintiff must allege that "what the defendant intentionally did was wrongful or improper in its means or ends." Id.

> n9 Defendants cite only to Illinois law on intentional interference with contractual relations, which is essentially identical to Massachusetts law. See *Strosberg v. Brauvin Realty Servs., 295 Ill. App. 3d 17, 691 N.E.2d 834, 845, 229 Ill. Dec. 361 (Ill. App. Ct. 1998).*

Here, Defendants contend that Plaintiffs have failed to allege that any Defendant used any improper means to induce a third party to breach a contract or that any Defendant was aware of a contract. As explained above, however, Plaintiffs have alleged that Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, Clark Enterprises, and Clark Onterie controlled the general partners of the Franklin Partnership and participated in or caused the alleged wrongful conduct. Likewise, in paragraphs [*57] 96-98 of the Complaint, Plaintiffs allege that: (1) there was a valid contract between Plaintiffs and a third party (the Franklin Partnership Agreement between the limited partners and the general partners); (2) Defendants "improperly and intentionally" interfered with these contractual relations which caused the general partners to breach the Agreement with the limited partners; and (3) as a result of this interference, Plaintiffs (and the other limited partners) incurred damages.

Consequently, this Court finds that Plaintiffs have sufficiently alleged a claim for intentional interference with contractual relations, and thus, the motion to dismiss is DENIED as to Count V.

F. Fraud (Count VI)

Defendants have also moved to dismiss Counts VI (fraud claim) and II (ICFA claim) on the grounds that these claims fail to specifically plead fraud as required by *Federal Rule of Civil Procedure 9(b).*

Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity." n10 *Fed. R. Civ. P. 9(b).* Circumstances constituting fraud "include the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, [*58] and the method by which the misrepresentation was communicated to the plaintiff." *General Elec. Capital v. Lease Resolution, 128 F.3d 1074, 1078 (7th Cir.1997).* In other words, Rule 9(b) requires a plaintiff to plead "the who, what, when, where and how" of the fraud. *DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir.1990).* The purpose underlying Rule 9(b)'s particularity requirement is to: (1) protect the defendant's reputation; (2) minimize "strike suits and fishing expeditions"; and (3) provide notice of the claim. *Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 777 (7th Cir.1994).* However, although a plaintiff must plead the circumstances of the alleged fraud with particularity, "malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Fed. R. Civ. P. 9(b).*

> n10 Claims under the ICFA must also comply with Rule 9(b)'s requirements. See *Swift v. First USA Bank, 1999 U.S. Dist. LEXIS 8208, 1999 WL 965449,* at *5 (N.D. Ill. 1999).

[*59]

Here, a careful review of the Complaint reveals that Plaintiffs have adequately pled facts setting forth "the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and

the method by which the misrepresentation was communicated to the plaintiff." *General Elec. Capital, 128 F.3d at 1078.* For example, as discussed above, the February Memorandum was mailed to Plaintiffs either directly by Defendants or indirectly by Defendants through affiliated companies on February 23, 1999. The February Memorandum proposed a buy-out of the Franklin Partnership whereby LMA would replace Milk Street as the Franklin Partnership's general partner, acquire the limited partners' interests, and ultimately acquire the Onterie Center. Plaintiffs allege that the February Memorandum was "false and misleading" in that it: (1) misrepresented Onterie's value in order to induce the Limited Partners to grant their consents; (2) failed to disclose pervasive conflicts of interest which were part of the buy-out scheme; and (3) left out pertinent and fundamental information which Defendants were required to disclose. The details of each of these [*60] misrepresentations are fully alleged in the Complaint, so as to comply with Rule 9(b)'s particularity requirement. As a result of the misrepresentations in the February Memorandum, Plaintiffs allege that the Defendants improperly acquired the limited partners interests "for far less than their true value" and caused the limited partners to unnecessarily incur "huge tax liabilities."

Accordingly, this Court finds that Plaintiffs have alleged sufficient facts to meet Rule 9(b)'s particularity requirement, and thus, the motion to dismiss Count VI is DENIED.

G. Negligent Misrepresentation (Count VII)

Lastly, Defendants contend that Plaintiffs have failed to adequately plead a claim for negligent misrepresentation under Illinois law. To state a claim for negligent misrepresentation, the plaintiff must allege that the defendant: "(1) made a negligent misrepresentation of material fact; (2) is in the business of providing investment information; and (3) made the misrepresentation while guiding [the plaintiff] in [its] business relations with third parties." *Lennon v. Christoph, 1997 U.S. Dist. LEXIS 1231, 1997 WL 57150,* at *26 (N.D. Ill. Feb. 7, 1997). The "pivotal[]" inquiry in determining [*61] whether the defendant is "in the business of supplying investment information," is whether the defendant is "in the business of supplying information for the guidance of other[s] in their transactions." *Canel v. Lincoln Nat'l Bank, 1998 U.S. Dist. LEXIS 12519, 1998 WL 1760544,* at *9 (N.D. Ill. Aug. 6, 1998).

Courts applying the above elements have held that "the tort of negligent misrepresentation is a narrow one." *Lennon, 1997 U.S. Dist. LEXIS 1231, 1997 WL 57150,* at *26. For example, in *Canel, 1998 U.S. Dist. LEXIS 12519, 1998 WL 1760544,* at *9, in recommending that the district court grant summary judgment as to a claim for negligent misrepresentation, the magistrate judge found that the plaintiff failed to show that the defendant was in "the business of supplying information" because the defendant only supplied information to the plaintiff for "a specific isolated transaction." Id. Similarly, in *Lennon, 1997 U.S. Dist. LEXIS 1231, 1997 WL 57150,* at *26, in granting summary judgment for a claim of negligent misrepresentation, the court held that the plaintiff did not demonstrate that the defendant was "in the business of supplying information" because the defendant provided the investment information for the purpose [*62] of guiding the plaintiffs in making their own investment decisions, not for the plaintiffs to use "in their business relations with third parties," as required by Illinois law.

Here, after carefully reviewing the Complaint, this Court finds that Plaintiffs have failed to allege that Defendants are in the business of providing investment information. Plaintiffs allege that Defendants only provided investment information for this specific transaction to guide Plaintiffs in making their own investment decisions, not for use in their business relations with third parties. Consequently, this Court finds that Plaintiffs have failed to sufficiently plead a claim for negligent misrepresentation, and therefore, GRANTS the motion to dismiss as to Count VII.

In Sum, the Defendants' Rule 12(b)(6) motions are GRANTED as to Counts III and IV with respect to Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, Clark Enterprises, and Clark Onterie and Count VII with respect to all moving Defendants, while the motion is DENIED as to Counts I, II, V, and VI with respect to all Defendants and Count IV with respect to LMA.

With respect to the counts which have been dismissed, the Court grants Plaintiffs [*63] leave to file an amended complaint within 21 days consistent with their Rule 11 obligations.

CONCLUSION

For the reasons discussed above, this Court:

. DENIES the Motion to Dismiss Under Rule 12(b)(2) For Lack of Personal Jurisdiction [37-1, 36-1, and 9-1] as to BFGI, Clar Enterprises and Clark Onterie and GRANTS the motion with respect to BFTGI; and

. GRANTS the Motion to Dismiss Under Rule 12(b)(6) For Failure to State a Claim [37-1, 36-1, 9-1, 7-1] as to Counts III and IV with respect to Lend Lease, BFTGI, BFGI, BFGLP, Lake Michigan, Clark Enterprises, and Clark Onterie and Count VII with respect to all moving Defendants, and DENIES the motion as to Counts I, II, V, and VI with respect to all Defendants and Count IV with respect to LMA.

It is so ordered.

ENTER:

BLANCHE M. MANNING

U.S. DISTRICT COURT JUDGE

DATE: 1/17/03

LEXSEE 2002 U.S. DIST. LEXIS 23387

HAEMOSCOPE CORPORATION, Plaintiff, v. PENTAPHARM AG, et al., Defendants.

Case No. 02 C 4261

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2002 U.S. Dist. LEXIS 23387

December 6, 2002, Decided

DISPOSITION: [*1] Defendant's motions to dismiss granted in part and denied in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff manufacturer sued defendants, affiliated foreign corporations, one of which was a seller of diagnostic machines and the other of which was a developer of pharmaceutical and cosmetics ingredients. The manufacturer alleged that defendants infringed and diluted plaintiff's trademark which plaintiff used in connection with its blood coagulation testing machines. Defendants moved to dismiss the action for lack of personal jurisdiction.

OVERVIEW: The manufacturer contended that personal jurisdiction over the seller was proper since the seller maintained an Internet website in the United States and shipped a machine to a United States customer. The manufacturer also asserted that the developer similarly maintained a website, marketed its products, and owned multiple trademarks in the United States. The court held that it lacked personal jurisdiction over the seller but it was unable to determine whether the developer's contacts were sufficiently extensive to permit personal jurisdiction. The seller's passive website in the United States, which did little more than make information available, did not establish general jurisdiction over the seller, and specific jurisdiction was precluded since the seller was not amenable to service of process by federal statute or by application of the state long arm statute. Further, the developer's contacts with the United States were insufficiently related to the action to support specific jurisdiction, but further information concerning the developer's contact was required to determine whether general jurisdiction existed or whether the developer was amenable to service of process.

OUTCOME: Defendants' motion to dismiss for lack of personal jurisdiction was granted in part with regard to the seller, and the court deferred ruling with regard to the developer.

LexisNexis(R) Headnotes

Trademark Law > Federal Unfair Competition Law > Lanham Act > General Overview

[HN1] There is nothing in the text of *15 U.S.C.S. § 1051*(e) itself or in the legislative history which suggests that "proceedings affecting the mark" are limited to proceedings before the Patent and Trademark Office.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

[HN2] To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(2), a plaintiff bears the burden of providing sufficient evidence to establish a prima facie case of personal jurisdiction.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

[HN3] In ruling on a Fed. R. Civ. P. 12(b)(2) motion, a court must accept as true the jurisdictional allegations in the complaint, unless defendants submit contravening affidavits. Any conflicts among the parties' affidavits must be resolved in favor of the plaintiff. However, the court will take as true all facts in the defendant's affidavits that are unrefuted by the plaintiff.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
[HN4] In a federal question case, personal jurisdiction may be exercised as long as haling the defendant into the court is consistent with Fifth Amendment due process principles and the defendant is amenable to process from the court.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
[HN5] To satisfy constitutional due process requirements, a defendant must have "certain minimum contacts" with the forum in question so that a court's exercise of personal jurisdiction over a defendant does not offend traditional notions of fair play and substantial justice. The meaning of that standard in a given case depends on which type of personal jurisdiction the court is asked to exercise: specific or general jurisdiction. A court has general jurisdiction only if the defendant is domiciled in the forum or has continuous and systematic general business contacts with the forum. If the court cannot exercise general jurisdiction, it will be able to exercise specific jurisdiction provided that the defendant has sufficient minimum contacts with the forum and the litigation is related to or arises out of those specific minimum contacts.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
[HN6] In a federal question case, the forum in question is the United States: if the defendant has sufficient contacts with the United States as a whole rather than any particular state or other geographic area, the due process requirements of the Fifth Amendment for exercising personal jurisdiction are satisfied.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
[HN7] Jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN8] Placement of a product into the stream of commerce, without more, is not an act of a defendant purposefully directed toward the forum state.

Computer & Internet Law > Trademark Protection > Civil Infringement Actions > Determinations
Computer & Internet Law > Trademark Protection > Civil Infringement Actions > Jurisdiction & Venue
Trademark Law > Infringement Actions > Jurisdiction > Personal Jurisdiction
[HN9] Whether a website provides proper grounds for exercising personal jurisdiction depends on the nature and quality of commercial activity that an entity conducts over the Internet. A three part sliding scale analysis has emerged for determining what level of website interaction subjects a defendant to personal jurisdiction in a cyberspace trademark infringement case. At one end of the continuum are active websites, where the defendant directly sells its products through the website. Passive websites, which do little more than make information available to those who are interested, fall at the other end of the continuum. Passive websites do not provide a basis for the exercise of personal jurisdiction, but active websites do. The third category, sometimes called a hybrid website, falls between the two ends of the continuum: it does not allow a user to purchase defendant's products through the website directly, but does allow a user to exchange information with the defendant. A hybrid website can provide a basis for exercising personal jurisdiction over defendants who maintain such sites, but only after finding the level of interactivity and the commercial nature of the interaction to be high.

Civil Procedure > Pleading & Practice > Service of Process > General Overview
[HN10] Fed. R. Civ. P. 4 governs whether a defendant is amenable to service of process in a federal action.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
Civil Procedure > Pleading & Practice > Service of Process > General Overview
[HN11] Fed. R. Civ. P. 4(k)(1) provides that service is effective to establish personal jurisdiction over a defendant when either a federal statute authorizes service or the defendant could be subjected to the jurisdiction of a court in the forum state under the state's long arm statute.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Pleading & Practice > Service of Process > Methods > Foreign Service
[HN12] Fed. R. Civ. P. 4(k)(2) provides for service of process upon a foreign defendant only if (1) the plaintiff's claim arises under federal law, (2) the defendant is not subject to jurisdiction in any state court of general jurisdiction, and (3) the exercise of personal jurisdiction does not violate the United States Constitution or any other federal law.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
[HN13] An Illinois court does not acquire jurisdiction under the "last act" doctrine simply because an economic loss is felt in Illinois when all the conduct contributing to the injury occurred outside Illinois.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN14] An injury to an interest located in a particular state, without additional contacts with that state, is an insufficient basis for personal jurisdiction.

Civil Procedure > Pleading & Practice > Service of Process > General Overview
[HN15] Fed. R. Civ. P. 4(k)(2) applies only if a defendant is not subject to jurisdiction in another state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
[HN16] Without jurisdiction the court cannot proceed at all in any cause.

COUNSEL: For Haemoscorpe Corporation, PLAINTIFF: John R Crossan, Chapman & Cutler, Chicago, IL USA.

For Haemoscorpe Corporation, PLAINTIFF: Richard Martin Labarge, Marshall, Gerstein & Borun, Chicago, IL USA.

For Pentapharm AG, Pentapharm GMBH, DEFENDANTS: Christopher James Murdoch, Martin G Durkin, Holland & Knight LLC, Chicago, IL USA.

JUDGES: JOAN B. GOTTSCHALL, United States District Judge.

OPINION BY: JOAN B. GOTTSCHALL

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiff Haemoscope Corporation ("Haemoscope") has brought a five-count complaint against defendants Pentapharm AG and Pentapharm GmbH alleging federal claims of trademark infringement and trademark dilution under the Lanham Act, *15 U.S.C. § 1125*(a) and (c), in addition to several related state law claims. The Pentapharm defendants have moved to dismiss the case under *Fed. R. Civ. P. 12(b)(2)* [*2] for lack of personal jurisdiction and under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim. Defendant Pentapharm AG also moved to dismiss under *Fed. R. Civ. P. 12(b)(5)* for improper service. n1 For the reasons that follow, Pentapharm AG's 12(b)(5) motion to dismiss is denied, the Pentapharm defendants' 12(b)(2) motion to dismiss is granted with respect to Pentapharm GmbH, and the ruling on the 12(b)(2) motion with respect to Pentapharm AG is deferred, subject to a status hearing and possibly further briefing. Given the lack of personal jurisdiction over Pentapharm GmbH, that defendant's motion to dismiss for failure to state a claim is denied as moot. Finally, the court cannot rule on Pentapharm AG's motion to dismiss for failure to state a claim unless and until it determines that Pentapharm AG is subject to personal jurisdiction in this court.

n1 In their original motion to dismiss, both Pentapharm defendants moved to dismiss due to improper service, but after Haemoscope served Pentapharm GmbH in compliance with the Hague Convention, Pentapharm GmbH sought permission to withdraw its 12(b)(5) motion. (*See generally* Defs.' Mot. Am. Mot. Dismiss.) Defendants' motion to amend their previously filed motion to dismiss is granted. Accordingly, the court will address the 12(b)(5) motion only as it relates to Pentapharm AG.

[*3]

I. BACKGROUND

Plaintiff Haemoscope is an Illinois corporation in the business of importing, and now making, specialized blood coagulation testing machines which it uses for conducting laboratory tests and also sells to others. The development of Haemoscope's blood coagulation testing machines was based on the work of Dr. Hartert of Germany. According to Haemoscope, it has been the only United States importer and reseller of the Hartert machines, which are sold under the trademark THROMBELASTOGRAPH(R), and is now designing, manufacturing and selling machines under that trademark (and its shortened form, TEG(R)) worldwide after acquiring rights to the mark from the German owners. Haemoscope alleges that, through Pentapharm GmbH's product known as ROTEG and statements on the Pentapharm defendants' websites relating to that product, the Pentapharm defendants are infringing upon and diluting Haemoscope's THROMBELASTOGRAPH and TEG trademarks. Specifically, Haemoscope alleges that the Pentapharm defendants' websites feature descriptive, misdescriptive and generic misuses of Haemoscope's registered trademarks.

Both Pentapharm defendants are foreign entities: Pentapharm AG is a [*4] Swiss corporation and its sister corporation Pentapharm GmbH is a German corporation. The Pentapharm defendants are two of nine independent companies owned by Pentapharm Holdings, Ltd., which is located in Switzerland. The focus of Pentapharm GmbH's business is in vitro diagnostics. One of its principal products is the ROTEG whole blood haemostatis analyzer, which is currently sold in Europe. Pentapharm GmbH conducts no business in Illinois or anywhere else in the United States, does not market, promote, advertise, offer or sell any products in the United States (with a limited exception, as explained below), and has no relationships with any distributors in this country. Further, Pentapharm GmbH has not yet applied for FDA approval of the ROTEG device.

However, Pentapharm GmbH has filed an application (through its sister corporation Pentapharm AG) to register the ROTEG trademark in the United States. Also, although the ROTEG device is not currently sold or marketed in this country for in vitro diagnostic purposes, Pentapharm GmbH did ship one device to a Massachusetts pharmaceutical company in February 2002 for research use only. n2 Pentapharm GmbH subsequently sold three ROTEG devices, [*5] for research use only, to a Danish company. In August 2002, at the purchaser's request, Pentapharm GmbH shipped two of those devices directly to the Danish purchaser's sites in Texas and Virginia.

n2 It is unclear whether the Massachusetts pharmaceutical company paid for the ROTEG device it received.

Pentapharm AG, Pentapharm GmbH's sister corporation, is in the business of researching, developing and manufacturing active ingredients used in the diagnostic, pharmaceutical and cosmetics industries. Like Pentapharm GmbH, Pentapharm AG conducts no business in Illinois, and does not offer, promote, advertise or sell any of its products here. Pentapharm AG does sell its pharmaceutical and diagnostics ingredients directly to a few United States purchasers, but none are in Illinois. Further, those purchasers do not resell the pharmaceutical or diagnostics ingredients; instead, they incorporate them into their own products. Pentapharm AG also sells its cosmetics ingredients to its United States distributor, Centerchem, [*6] Inc., located in Connecticut.

Pentapharm AG and Pentapharm GmbH maintain their own websites at "pentapharm.com" and "pentapharm.de," respectively. n3 Each website offers general information about the company, its products and/or services. Further, each website allows users to request additional information about the company by submitting an on-line form. Neither website contains pricing information or allows for the direct purchase of the company's products. Moreover, neither website offers users direct interaction with a customer service representative. Pentapharm GmbH's website does not offer downloadable catalogs, nor does it provide any addresses or telephone numbers for contacts in the United States. Pentapharm AG's website does offer contact information for its American distributor, Centerchem, Inc., regarding its cosmetics and diagnostic products. Pentapharm AG's website also offers a downloadable catalog, but that catalog does not provide any information regarding the ROTEG device (nor does it provide pricing information). Rather, it directs readers interested in obtaining information about ROTEG to contact its sister company, Pentapharm GmbH. Pentapharm AG's website contains [*7] a link to the "pentapharm.de" website, and features a profile of Pentapharm GmbH in the description of the Pentapharm companies.

n3 "De" is the top-level German domain name. In addition to the "pentapharm.de" website, Pentapharm GmbH maintains an identical website at "roteg.com." Because those sites are identical, the court limits its discussion to "pentapharm.de."

Pentapharm AG is also the fiduciary holder of all trademarks for the Pentapharm companies. Accordingly,

Pentapharm AG filed the application to register the ROTEG trademark in the United States on behalf of Pentapharm GmbH. When it filed the trademark application, Pentapharm AG designated the Washington D.C. law firm of Finnegan, Henderson, Farabow, Garrett & Dunner L.L.P. ("Finnegan, Henderson") as its domestic representative for that application.

II. DISCUSSION

A. Service of Process Upon Pentapharm AG

Pentapharm AG has filed a motion to dismiss pursuant to Rule 12(b)(5), asserting that service upon Finnegan, Henderson was improper. [*8] Pentapharm AG admits that in its application to register the ROTEG trademark, it designated Finnegan, Henderson as its "domestic representative to receive service in connection with proceedings affecting the mark," as required by Section 1051(e) of the Lanham Act. Relying upon *Sunshine Distribution, Inc. v. The Sports Authority Michigan, Inc., 157 F. Supp. 2d 779, 787 (E.D. Mich. 2001)*, Pentapharm AG argues that "the domestic representative provision of the Lanham Act does not relate to service for civil actions or the jurisdiction of the federal courts." (Defs.' Mem. Supp. Mot. Dismiss at 4.) Conversely, relying on, *V&S Vin & Sprit Aktiebolag v. Cracovia Brands, Inc., 212 F. Supp. 2d 852, 855-56 (N.D. Ill. 2002)*, Haemoscope argues that the agency of a party's designated domestic representative is not limited to proceedings before the Patent and Trademark Office ("PTO"), but rather extends to other civil actions relating to the mark the party seeks to register. The court finds *V&S* more directly on point and more persuasive than *Sunshine Distribution*. In *Sunshine Distribution*, the court addressed whether § 1051(e) authorized nationwide [*9] service of process, whereas in *V&S*, the issue before the court was the precise issue presented here: whether it is proper to serve a foreign defendant in a civil action through its domestic representative designated under § 1051(e). *Sunshine Distrib., 157 F. Supp.2d at 787; V&S, 212 F. Supp. 2d at 854*. Moreover, the *V&S* court's analysis, which included an examination of the legislative history of § 1051 as well as the language of the statute, was more comprehensive. Accordingly, this court follows the holding in *V&S* that [HN1] "there is nothing in the text of § 1051(e) itself or in the legislative history which suggests that 'proceedings affecting the mark' are limited to proceedings before the PTO." *V&S, 212 F. Supp. 2d at 855*. The court therefore finds that Haemoscope properly served Pentapharm AG's domestic representative designated under § 1051(e), and denies Pentapharm AG's motion to dismiss under 12(b)(5).

B. Personal Jurisdiction Over Both Pentapharm Defendants

[HN2] To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(2)*, the plaintiff bears the "burden of providing sufficient evidence to establish a *prima facie* [*10] case of personal jurisdiction." *Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987)*. [HN3] In ruling on a 12(b)(2) motion, the court must accept as true the jurisdictional allegations in the complaint, unless defendants submit contravening affidavits. *Id.* Any conflicts among the parties' affidavits must be resolved in favor of the plaintiff. *Id.* "However, the court will take as true all facts in the defendant's affidavits that are unrefuted by the plaintiff." *Haggerty Enters., Inc. v. Lipan Indus. Co., Ltd., 2001 U.S. Dist. LEXIS 13012*, No. 00 C 766, *2001 WL 968592*, at *2 (N.D. Ill. Aug. 23, 2001). [HN4] In a federal question case, personal jurisdiction may be exercised as long as haling the defendant into the court is consistent with Fifth Amendment due process principles and the defendant is amenable to process from the court. *Lifeway Foods, Inc. v. Fresh Made, Inc., 940 F. Supp. 1316, 1318 (N.D. Ill. 1996)* (citing *United States v. Martinez De Ortiz, 910 F.2d 376, 381-82 (7th Cir. 1990)*).

1. *Due Process*

[HN5] To satisfy constitutional due process requirements, a defendant must have "certain minimum contacts" with the forum in question so that a court's [*11] exercise of personal jurisdiction over a defendant "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* (internal quotation marks omitted). The meaning of that standard in a given case depends on which type of personal jurisdiction the court is asked to exercise: specific or general jurisdiction. *RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997)*. A court has general jurisdiction only if the defendant is domiciled in the forum or "has continuous and systematic general business contacts with the forum." *Id.* (internal quotation marks omitted). If the court cannot exercise general jurisdiction, it will be able to exercise specific jurisdiction provided that the defendant has sufficient minimum contacts with the forum and the litigation "is related to or 'arises out of'" those specific minimum contacts. *Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)*.

[HN6] In a federal question case like the case at bar, the forum in question is the United States: if [*12] the defendant has "sufficient contacts with the United States as a whole rather than any particular state or other geographic area," the due process requirements of the Fifth Amendment are satisfied. n4 *Martinez de Ortiz, 910 F.2d at 382*. The court therefore must examine each defendant's contacts with the United States.

n4 From the briefs, it appears that none of the parties appreciated the significance of the distinction between a federal question case and a diversity case. Although the parties do address the Pentapharm defendants' contacts with the United States, they do so only as those contacts relate to amenability to service of process under *Fed. R. Civ. P. 4(k)(2).*

a. *Pentapharm GmbH*

Pentapharm GmbH's contacts with the United States are extremely minimal: it maintains a website that is accessible in this country and, although the ROTEG device is not currently sold or marketed in the United States for in vitro diagnostic purposes, Pentapharm GmbH shipped one device to a Massachusetts [*13] pharmaceutical company in February 2002 for research use. n5

n5 In August 2002, Pentapharm GmbH shipped two other ROTEG devices to the United States at the request of the Danish company who purchased them. The court does not consider those shipments because they occurred two months after Haemoscope filed its complaint and [HN7] "jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989).* Haemoscope has not offered any basis for the court to depart from that rule. In fact, Haemoscope appears to rely on just the shipment to Massachusetts. (Pls.' Supp. Materials Mot. Dismiss) ("Pentapharm GmbH has indeed transported at least one [ROTEG] product into the United States for 'research use only.'") More importantly, Haemoscope offers no evidence that when Pentapharm GmbH sold the ROTEG devices to the Danish purchaser, Pentapharm GmbH intended for those devices to end up in the United States. *See Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *4. The purchaser did not ask Pentapharm GmbH to ship the ROTEG devices to the States until several months after the purchase. [HN8] "Placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state." *Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 112, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).*

[*14]

As an initial matter, the fact that Pentapharm GmbH maintains a website that is accessible in the United States does not constitute sufficient activity for this court exercise either general or specific personal jurisdiction. [HN9] Whether a website provides proper grounds for exercising personal jurisdiction depends on "the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (E.D. Pa. 1997).* A three part sliding scale analysis has emerged for determining "what level of website interaction subjects a defendant to personal jurisdiction in a cyberspace trademark infringement case." *Euromarket Designs, Inc. v. Crate & Barrel, Ltd., 96 F. Supp. 2d 824, 837 (N.D. Ill. 2000).* At one end of the continuum are active websites, where the defendant directly sells its products through the website. *Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *5. Passive websites, which do "little more than make information available to those who are interested," fall at the other end of the continuum. *Zippo, 952 F. Supp. at 1124.* Passive websites do not provide [*15] a basis for the exercise of personal jurisdiction, but active websites do. *Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *5. The third category, sometimes called a hybrid website, falls between the two ends of the continuum--it does not allow a user to purchase defendant's products through the website directly, but does allow a user to exchange information with the defendant. *Id.* A hybrid website can provide a basis for exercising personal jurisdiction over defendants who maintain such sites, "but only after finding the level of interactivity and the commercial nature of the interaction to be high." *Id.*

The court agrees with Pentapharm GmbH that its website is passive. The website offers general information about the company, its products, and/or services. The website does not allow users to purchase defendants' products through the website--it does not even contain pricing information or allow users to download a catalog. Further, the court finds that although the website allows users to request additional information about the company by submitting an on-line form, the site does "little more than make information available to those who are interested . . . ." *Zippo, 952 F. Supp. at 1124.* [*16] In factually analogous cases, courts have found such websites to be passive. *LaSalle Nat'l Bank v. Vitro, Sociedad Anonima de Capital Variable, 85 F. Supp. 2d 857, 862 (N.D. Ill. 2000); Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *5. The website at issue in *LaSalle National Bank* did not allow for direct sales, but did offer users access to on-line catalogs and gave them the ability to interact directly with defendant's customer service representatives. *LaSalle Nat'l Bank, 85 F. Supp. 2d at 862.* Similarly, in *Haggerty Enterprises,* the website listed no prices and did not offer direct sales, but did allow the user to contact the defendant through its website to obtain further information. *Haggerty En-*

ters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592, at *6. Although the websites at issue in those cases allowed "a minimal level of interactivity," the courts still found them to be passive rather than hybrid. *LaSalle Nat'l Bank, 85 F. Supp. 2d at 862* (internal quotation marks omitted). And those passive websites were at least as interactive as, if not more interactive than, Pentapharm GmbH's website.

Relying on *Publications International, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178 (N.D. Ill. 2000),* [*17] Haemoscope argues that Pentapharm GmbH's website is a highly commercially interactive, hybrid website. But even assuming that Pentapharm GmbH's website is a hybrid, it is not highly commercially interactive, at least with respect to users in the United States. In *Publications International,* the court found a hybrid website to be highly commercially interactive because, after requesting a catalog through the website, users received defendant's catalog and could place orders. *121 F. Supp. 2d at 1183.* In contrast, Pentapharm GmbH's website is not used to generate sales in the United States: if a user in this country requests additional product information from Pentapharm GmbH through its website, the user is informed that the ROTEG device is not yet available here.

Pentapharm GmbH is not subject to general jurisdiction: a passive website and the shipment of one ROTEG device are not pervasive or extensive enough contacts to constitute "continuous and systematic general business contacts with the forum." *RAR, Inc., 107 F.3d at 1277* (internal quotation marks omitted); *see also LaSalle Nat'l Bank, 85 F. Supp. 2d at 861* (passive website insufficient [*18] to meet rigorous standard for general jurisdiction). Nor is Pentapharm GmbH subject to specific jurisdiction based on its passive website: even though this suit directly relates to that website, a passive website is insufficient to satisfy the minimum contacts requirement. *See Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *3, 6-7 (passive website did not satisfy minimum contacts required for exercising specific jurisdiction).

The only remaining issue is whether Pentapharm GmbH is subject to specific jurisdiction based on its shipment of one ROTEG device to a research institution in Massachusetts in February 2002. To make that determination, the court normally would assess whether this suit *"directly arise[s]* out of [that] specific contact[] between the defendant and the forum," *RAR, Inc., 107 F.3d at 1278* (emphasis in original), and whether, through that shipment, Pentapharm GmbH purposefully established sufficient minimum contacts such that the exercise of personal jurisdiction would be fair and reasonable, *id. at 1277.*

In this particular case, however, the court need not answer either of those questions. Even assuming that this [*19] suit directly arises out of the Massachusetts shipment, n6 and that a single shipment to this country constitutes sufficient minimum contacts, Pentapharm GmbH is not amenable to service of process from this court (as explained in Section II.B.2, *infra*), so it would be impermissible to exercise specific jurisdiction.

n6 The parties did not brief this issue. According to the complaint, Haemoscope's trademark infringement and trademark dilution claims directly arise out of purported descriptive, misdescriptive and generic misuses of Haemoscope's registered trademarks on Pentapharm GmbH's website. But reading the complaint broadly and considering the liberal notice pleading standards applicable to this case, it is not unreasonable to conclude that this suit is also directly related to the Massachusetts shipment. Moreover, Haemoscope evidently learned about the Massachusetts shipment through discovery in this case.

b. *Pentapharm AG*

Pentapharm AG's contacts with the United States, on the other hand, are more [*20] extensive than those of its sister company. In addition to maintaining a website at "pentapharm.com," Pentapharm AG sells its pharmaceutical and diagnostics ingredients directly to a few American purchasers, sells its cosmetics ingredients to its American distributor in Connecticut, owns multiple trademarks in this country, and has filed an application (on behalf of Pentapharm GmbH) to register the ROTEG trademark in the United States.

Pentapharm AG is not subject to specific jurisdiction. This suit does not arise out of Pentapharm AG's sales of diagnostics or cosmetic ingredients in the States, its relationship with a distributorship, or its ownership of trademarks in the United States--none of those contacts have anything to do with the ROTEG device (its sister company's product), and thus are unrelated to this suit. Further, the pending suit does not directly arise out of Pentapharm AG's application to register the ROTEG trademark in the United States. Rather, as noted above, it arises out of purported misuses of Haemoscope's registered marks on the Pentapharm defendants' websites.

The "pentapharm.com" website presents a more complicated issue. Because "pentapharm.com" includes [*21] some limited information relating to the ROTEG device, n7 this suit "arises out of" those ROTEG-related references on the website. Thus, the question is whether the website constitutes the minimum contacts necessary

to satisfy due process requirements. The website is arguably a hybrid, and if a hybrid website is highly commercially interactive, a court may exercise specific jurisdiction. *Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *5. Unlike Pentapharm GmbH's website, visitors to "pentapharm.com" are able to download a catalog, and the site offers contact information that includes a contact in Connecticut. While the *LaSalle Nat'l Bank* court held that a website that offered access to a catalog and contact information was passive, *85 F. Supp. 2d at 862,* in *Publications International*, the court found an arguably similar website to be a highly commercially interactive, hybrid website because, after requesting a catalog through the website, users received defendant's catalog and could place orders, *121 F. Supp. 2d at 1183.*

n7 The downloadable catalog directs readers interested in obtaining information about ROTEG to contact its sister company, Pentapharm GmbH, but does not provide any information regarding the product. Additionally, Pentapharm AG's website has a link to the "pentapharm.de" website, and features a profile of Pentapharm GmbH in the description of the Pentapharm companies.

[*22]

This court, however, need not reconcile those cases to rule on specific jurisdiction. Even if "pentapharm.com" *generally* were a highly commercially interactive, hybrid website, it is passive with respect to the ROTEG device. The interactive features of Pentapharm AG's website--*i.e.*, the downloadable catalog and contact information--relate solely to Pentapharm AG's products and services. This case does not directly arise out of the interactive website features, which are unrelated to the ROTEG device, so this court does not consider them in determining whether it may exercise specific jurisdiction. *See RAR, Inc., 107 F.3d at 1277* (in minimum contacts analysis for specific jurisdiction, court may consider only defendant's contacts that relate to the suit; it may not aggregate all of defendant's contacts with a forum). The few ROTEG-related references on the website are purely informational. This court therefore finds that with respect to the ROTEG device, "pentapharm.com" is a passive website which cannot satisfy the minimum contacts requirement. *See Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *6-7

While the court lacks specific jurisdiction, it may [*23] turn out that Pentapharm AG's contacts constitute "continuous and systematic general business contacts with the forum" and provide a basis for the exercise of general jurisdiction. n8 *RAR, Inc., 107 F.3d at 1277* (internal quotation marks omitted). Due to the parties' misunderstanding regarding the standard that applies to federal question cases, however, the parties did not address this issue adequately in their briefs. Without further information regarding the extent of Pentapharm AG's contacts with the United States, the court cannot determine whether such contacts warrant the exercise of general jurisdiction. The parties therefore are ordered to submit briefs addressing whether Pentapharm AG is subject to general jurisdiction.

n8 The "pentapharm.com" website, standing alone, would not warrant exercising general jurisdiction, however, because it does not permit direct sales through the website. *See LaSalle Nat'l Bank, 85 F. Supp. 2d at 862.*

2. *Amenability to Service*

[HN10] [*24] Rule 4 of the Federal Rules of Civil Procedure governs whether a defendant is amenable to service of process in a federal action. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987).* In the case at bar, the provisions of Rule 4(k)(1) and (2) are relevant. [HN11] Rule 4(k)(1) provides that service is effective to establish personal jurisdiction over a defendant when either a federal statute authorizes service or the defendant could be subjected to the jurisdiction of a court in the forum state under the state's long arm statute. *Fed. R. Civ. P. 4(k)(1).* [HN12] Rule 4(k)(2), on the other hand, provides for service of process upon a foreign defendant only if (1) the plaintiff's claim arises under federal law, (2) the defendant is not subject to jurisdiction in any state court of general jurisdiction, and (3) the exercise of personal jurisdiction does not violate the Constitution or any other federal law. *United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 38 (1st Cir. 1999).*

a. *Rule 4(k)(1)*

Neither defendant is amenable to service of process under Rule 4(k)(1). This is not a case in which a federal statute [*25] authorizes service of process--the Lanham Act does not provide for nationwide service of process. *LFG, LLC v. Zapata Corp., 78 F. Supp. 2d 731, 735* (N.D. Ill, 1999). Likewise, neither Pentapharm AG nor Pentapharm GmbH are within the reach of the Illinois long arm statute, *735 ILCS 5/2-209.* Even though the Illinois long arm statute allows courts to exercise personal jurisdiction to the full limits of the United States Constitution, *RAR, Inc., 107 F.3d at 1276,* neither defendant has the necessary minimum contacts with Illinois to be subject to jurisdiction: defendants have no offices in Illinois and do not offer, advertise, promote or sell any

products here. Further, as discussed above, Haemoscope cannot establish sufficient minimum contacts solely through the Pentapharm defendants' respective websites.

Haemoscope, however, argues that this court has specific jurisdiction for two reasons: because all harm and injury caused by defendants' tortious conduct is felt by plaintiff in Illinois, and because doctors in Illinois helped defendants with testing and promotion of the ROTEG device. Both of these arguments fail. Regarding Haemoscope's first point, [*26] [HN13] "an Illinois court does not acquire jurisdiction under the 'last act' doctrine simply because an economic loss is felt in Illinois when all the conduct contributing to the injury occurred outside Illinois." *Turnock, 816 F.2d at 335.* Thus, [HN14] an injury to an interest located in a particular state, without additional contacts with that state, is an insufficient basis for personal jurisdiction. *See, e.g., Indianapolis Colts, Inc. v. Metro. Baltimore Football Club L.P., 34 F.3d 410, 412 (7th Cir. 1994); Lifeway Foods, Inc., 940 F. Supp. at 1319.* And as already noted, the Pentapharm defendants have no other contacts with Illinois.

Haemoscope's argument that Illinois doctors helped the Pentapharm defendants test the ROTEG device, and did so by using a ROTEG device in Illinois, also fails as a matter of fact. n9 The Pentapharm defendants submitted sworn affidavits attesting that the research conducted by the Illinois doctors was done in Germany, not in Illinois, that no ROTEG device has ever been in Illinois, and further, that the Pentapharm defendants were not involved in the research. When a court evaluates whether to exercise personal jurisdiction, [*27] if there are facts in affidavits submitted by defendants that the plaintiff does not refute, the court accepts those facts as true. *Haggerty Enters., 2001 U.S. Dist. LEXIS 13012, 2001 WL 968592,* at *2. Although Haemoscope submitted an affidavit addressing the research issue, the relevant statements in that affidavit were not based on the personal knowledge of the affiant. n10 Because there is no competent evidence to refute the Pentapharm defendants' affidavits, the court accepts the facts set forth in those affidavits regarding the research conducted by Illinois doctors. Accordingly, the court concludes that neither Pentapharm AG nor Pentapharm GmbH is amenable to service of process under the Illinois long-arm statute.

n9 This argument also seems impermissibly to attribute to *Pentpharm AG* contacts that, had they occurred, likely were contacts between *Pentapharm GmbH* and Illinois; given that the ROTEG device is Pentapharm GmbH's product, that defendant presumably would have conducted ROTEG-related research.

n10 Haemoscope submitted the affidavit of its President, Dr. Eli Cohen, who stated in relevant part that: (1) two doctors affiliated with Loyola University of Chicago Medical Center in Maywood, IL participated in research and published an article relating to the ROTEG device; and (2) "It would have been irresponsible of the Loyola doctors not to have had use of a [ROTEG] device at their laboratories for conducting or at least checking on the work done and reported in their article. That device would have been present in this District, independently of whether there was FDA approval for sale of such device." (Pl.'s Opp. Mot. Dismiss, Ex. L, P 5.)

[*28]

b. *Rule 4(k)(2)*

The crux of Haemoscope's argument is that the Pentapharm defendants are amenable to service of process under Rule 4(k)(2). This could be a strong argument with respect to Pentapharm AG had Haemoscope not overlooked one critical aspect of Rule 4(k)(2): [HN15] Rule 4(k)(2) applies only if Pentapharm AG is not subject to jurisdiction in another state. Haemoscope did not brief that issue at all. The Pentapharm defendants argued that Pentapharm AG has stronger contacts with other states, and thus may be subject to jurisdiction in those states. If Pentapharm AG wants to avoid the reach of Rule 4(k)(2), it must identify another jurisdiction where it would be amenable to suit; if it does so, it will be effectively consenting to jurisdiction in that forum. *ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir. 2001); Swiss Am. Bank, Ltd., 191 F.3d at 41.* In that case, Haemoscope will have three options: (1) move to transfer this action to a district court in the state identified; (2) discontinue this action (perhaps to proceed in another court); or (3) dispute whether Pentapharm AG is subject to personal jurisdiction in the [*29] identified state. *Swiss Am. Bank, Ltd., 191 F.3d at 42.* On the other hand, if Pentapharm AG does not identify another state, the court must determine whether Pentapharm AG is amenable to process under Rule 4(k)(2). *ISI, 256 F.3d at 552.* At the status hearing scheduled in the accompanying minute order, the parties should be prepared to address how they wish to proceed.

With respect to Pentapharm GmbH, Rule 4(k)(2) is irrelevant. As discussed earlier, the only contact between Pentapharm GmbH and the United States that is relevant to the minimum contacts analysis is the shipment of the ROTEG device to Massachusetts. If that single contact is sufficient to satisfy the minimum contacts requirement, then Pentapharm GmbH will be subject to personal juris-

diction in another state (Massachusetts), n11 and Rule 4(k)(2) would not assist Haemoscope. If that single contact does not satisfy the minimum contacts requirement, then it would violate the Fifth Amendment to subject Pentapharm GmbH to personal jurisdiction.

n11 Assuming the single shipment satisfies constitutional due process requirements, then a federal court in Massachusetts may exercise specific jurisdiction as long as the defendant falls within the reach of the Massachusetts long-arm statute. *See Am. Home Assurance Co. v. Sport Maska, Inc., 808 F. Supp. 67, 71-72 (D. Mass. 1992)*. The Massachusetts long-arm statute permits the exercise of personal jurisdiction over anyone "transacting business," "contracting to supply services or things," and "causing tortious injury" in that state. *See Mass. Gen. L. ch. 223A, § 3(a)*-(c). Haemoscope's claims sound in tort; additionally, the shipment likely constitutes both a business transaction and a contract to supply things. Thus, one or more of those provisions should apply to make Pentapharm GmbH amenable to service in Massachusetts.

[*30]

C. Failure to State a Claim

Given the lack of personal jurisdiction over Pentapharm GmbH, that defendant's motion to dismiss for failure to state a claim is denied as moot. Additionally, the court cannot rule on Pentapharm AG's motion to dismiss for failure to state a claim unless and until it determines that Pentapharm AG is subject to personal jurisdiction in this court. *See Steel Co. v. Citizens for Better Environ., 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)* [HN16] ("Without jurisdiction the court cannot proceed at all in any cause.").

III. CONCLUSION

As explained above: (1) Pentapharm AG's motion to dismiss for improper service is denied; (2) Pentapharm GmbH's motion to dismiss for lack of personal jurisdiction is granted; and (3) regarding the Pentapharm defendants' motion to dismiss for failure to state a claim, the court denies the motion with respect to Pentapharm GmbH as moot and does not reach the motion as it relates to Pentapharm AG.

Regarding Pentapharm AG's motion to dismiss for lack of general jurisdiction, n12 there are three possible outcomes: (a) Pentapharm AG's contacts with the United States are insufficient to meet constitutional [*31] minimum contacts requirements, and thus the defendant is not subject to general jurisdiction in this country; (b) Pentapharm AG's contacts with the United States satisfy minimum contacts requirements, and those contacts are sufficiently concentrated in a particular state (other than Illinois) that Pentapharm AG is amenable to service of process in that state under Rule 4(k)(1); or (c) Pentapharm AG's contacts with the United States satisfy minimum contacts requirements, but those contacts are too diffuse for Pentapharm AG to be amenable to service of process in any particular state, making Pentapharm AG amenable to service of process from this court under Rule 4(k)(2). The court's ruling on that 12(b)(2) motion is deferred, subject to a status hearing and possibly further briefing.

n12 As discussed earlier, Pentapharm AG is not subject to specific jurisdiction.

ENTER:

JOAN B. GOTTSCHALL

United States District Judge

DATED: December 6, 2002

LEXSEE 2003 U.S. DIST. LEXIS 14808, *2

INFOSYS INC., an Illinois corporation, Plaintiff, v. BILLINGNETWORK.COM, INC., a Florida corporation, Defendant.

No. 03 C 3947

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2003 U.S. Dist. LEXIS 14808

August 26, 2003, Decided

DISPOSITION: [*1] Defendant's Motion to Dismiss and Plaintiff's Motion for Leave to File a Sur-Reply granted.

OUTCOME: Defendant's motion to dismiss was granted. Plaintiff's motion for leave to file a sur-reply was granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff brought suit for a declaratory judgment regarding defendant's patent for an Internet medical billing system. Defendant moved to dismiss the suit for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue under *Fed. R. Civ. P. 12(b)(1)*, *12(b)(2)*, and *12(b)(3)*. Plaintiff filed a motion for leave to file a sur-reply.

OVERVIEW: Defendant obtained a patent for its Internet billing system. Defendant became aware that plaintiff was selling its own Internet based billing system. Defendant initiated letters and phone calls in an attempt to enter into a license agreement for its patent. Plaintiff sought a declaratory judgment, and defendant moved to dismiss. The court granted the dismissal, finding that it lacked both general and specific jurisdiction over the suit. Defendant was a non-resident, and even if plaintiff could have established the minimal level of interactivity of the defendant's website that was sufficient to establish that the website was a hybrid website, general jurisdiction did not exist because of the absence of any non-website activities by defendant. Plaintiff failed to establish that defendant purposefully directed its website toward the forum state. Defendant's website promoted national advertising, which was insufficient to establish general jurisdiction in the forum state. Finally, subject matter jurisdiction was also lacking because defendant's letters and phone calls regarding a potential licensing agreement did not create a reasonable apprehension of an infringement suit.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
Patent Law > Remedies > Declaratory Relief
[HN1] In order to defeat a motion to dismiss for lack of personal jurisdiction, a plaintiff need only establish a prima facie case of personal jurisdiction over defendant. In patent infringement cases, Federal Circuit law controls, even in determining the question of whether to exercise personal jurisdiction over out-of-state defendants. The court also applies Federal Circuit law in personal jurisdiction inquiries over out-of-state patentees in declaratory judgment actions. The analysis for determining whether personal jurisdiction exists is a two-step inquiry. First, the defendant must be amenable to service of process under the appropriate state long-arm statute. Second, the court must determine that the defendant's activities within the forum state satisfy the minimum contacts requirement of the due process clause.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
[HN2] For an exercise of personal jurisdiction to satisfy due process, a defendant must have minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. This determination depends on whether the plain-

tiff asserts general or specific jurisdiction against the defendant. General jurisdiction is for suits neither arising out of nor related to the defendant's contacts, and it is permitted only where the defendant has continuous and systematic general business contact with the forum. Specific jurisdiction, on the other hand, refers to jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.

Civil Procedure > Jurisdiction > General Overview
Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
Computer & Internet Law > Internet Business > General Overview
[HN3] A website can be a purposeful contact with the forum state for purposes of general jurisdiction. An exercise of personal jurisdiction is proper where a defendant clearly does business with residents of the forum state over the Internet.

Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
Computer & Internet Law > Internet Business > General Overview
[HN4] In weighing the issue of personal jurisdiction in the context of the Internet, courts typically use a sliding scale analysis to ascertain what level of Internet interaction subjects a defendant to personal jurisdiction. The analysis consists of three levels: (1) where the defendant conducts business over the Internet through its active website; (2) where the defendant maintains an interactive website; and (3) where the defendant maintains a passive website. Level one consists of situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction over the Internet, personal jurisdiction is proper. Here, websites are interactive and allow for a transaction between the user and the website owner. Level two is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. Level three consists of situations where a defendant has simply posted information on an Internet website, which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.

Civil Procedure > Jurisdiction > General Overview
Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
[HN5] Cases conferring jurisdiction partly on the basis of Internet activity reflect that personal jurisdiction is typically determined based not only on the defendant's Internet activities, but also on its non-Internet activities.

Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
Computer & Internet Law > Online Advertising > General Overview
[HN6] Generally, national advertisements (including those on the Internet) are insufficient to subject a defendant to jurisdiction in Illinois. There must be evidence that the defendant intended its advertisements to reach a particular state.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
Computer & Internet Law > Internet Business > General Overview
[HN7] The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
[HN8] For specific jurisdiction, the Federal Circuit has established a three-prong test that must be satisfied: (1) whether the defendant purposefully directed its activities at the residents of the forum; (2) whether the claim arises out of or is related to those activities; and (3) whether assertion of personal jurisdiction is reasonable and fair.

Patent Law > Inequitable Conduct > General Overview

Patent Law > Jurisdiction & Review > General Overview
Patent Law > Remedies > Declaratory Relief
[HN9] To establish an "actual controversy" in a patent invalidity declaratory action, (1) there must be an explicit threat or action by the patentee, which creates a reasonable apprehension on the part of the declaratory judgment plaintiff that it will face an infringement suit, and (2) plaintiff must actually have either produced the device or have prepared to produce the device. The test for whether a defendant's conduct creates a reasonable apprehension is a "totality of the circumstances" test.

Civil Procedure > Justiciability > Case or Controversy Requirements > Actual Disputes
Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview
[HN10] In determining the presence of an "actual controversy" in a patent infringement suit, the test for reasonable apprehension is an objective test. The test therefore requires more than the nervous state of mind of a possible infringer; it requires that the objective circumstances support such an apprehension. A purely subjective apprehension is insufficient to satisfy the actual controversy requirement.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview
Patent Law > Ownership > Conveyances > Licenses
[HN11] A patent holder's mere offer of a licensing agreement to a patent infringer does not create a reasonable apprehension of a patent infringement lawsuit. Threats of litigation within the context of license negotiations also do not create a reasonable apprehension.

COUNSEL: For INFOSYS, INC., plaintiff: Todd Sheldon Parkhurst, Charles Lincoln Philbrick, Holland & Knight LLC, Chicago, IL.

For BILLINGNETWORK.COM, INC., defendant: Jeffrey A. Schulman, Wolin and Rosen, Chicago, IL.

For BILLINGNETWORK.COM, INC., defendant: John M Adams, Thomas Michael Joseph, Price & Adams, Pittsburgh, PA.

JUDGES: James B. Zagel, United States District Judge.

OPINION BY: James B. Zagel

OPINION:

MEMORANDUM OPINION AND ORDER

Defendant Billingnetwork.com, Inc. ("BNC") is a Florida-based company that offers an Internet-based billing system to doctors, medical practices, hospitals, and other companies that provide medical billing services. On October 20, 1999, BNC filed a patent application in the name of two BNC employees for its Internet-based medical billing system known as "DirectAccess." On April 16, 2002, *U.S. Patent No. 6,374,229* ("the '229 patent") was issued on this application. While this application was pending, many Internet-based medical billing systems were developed by other companies, including plaintiff InfoSys, Inc.

On or about October 29, 2002, BNC learned that InfoSys [*2] was selling its own Internet-based medical billing system. On March 16, 2003, BNC sent InfoSys an offer to enter into a license agreement under the '229 patent. After receiving a telephone message from an InfoSys employee, BNC instructed its attorneys to send InfoSys a follow-up letter on April 28, 2003. Further correspondence between the parties then ensued followed by InfoSys filing a Complaint for a declaratory judgment of the '229 patent against BNC on June 10, 2003. BNC now moves to dismiss this action for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue under *Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(3)*. n1

n1 InfoSys's Motion for Leave to File a Sur-Reply is granted, but the Sur-Reply does not affect my decision regarding personal and subject matter jurisdiction.

Personal Jurisdiction

[HN1] In order to defeat BNC's motion to dismiss for lack of personal jurisdiction, InfoSys need only establish a prima facie case of personal jurisdiction over [*3] BNC. *Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp.2d 824, 833 (N.D. Ill. 2000)*. In patent infringement cases, Federal Circuit law controls, even in determining the question of whether to exercise personal jurisdiction over out-of-state defendants. *Hildebrand v. Steck Mfg. Co., 279 F.3d 1351, 1354 (Fed. Cir. 2002)*. The Court also applies Federal Circuit law in personal jurisdiction inquiries over out-of-state patentees in declaratory judgment actions. *Id.*

The analysis for determining whether personal jurisdiction exists is a two-step inquiry. *Id.* First, the defendant must be amenable to service of process under the appropriate state long-arm statute.*Id.* Second, I must determine that the defendant's activities within the forum

state satisfy the minimum contacts requirement of the due process clause. *Hildebrand, 279 F.3d at 1354.* In this case, the Illinois long-arm statute authorizes the exercise of personal jurisdiction to the fullest extent authorized under the United States Constitution and the Illinois Constitution. *Facilitec Corp. v. Grease Stopper, Inc.*, 2002 U.S. Dist. LEXIS 2178, No. 01 C 2971, 2002 WL 226758, [*4] at *2 n. 1 (N.D. Ill. Feb. 13, 2002). Because of this, "the statutory analysis collapses into a due process inquiry, and [I] need not consider whether defendants engaged in any of the acts enumerated in the long-arm statute." *LFG, LLC v. Zapata Corp., 78 F. Supp.2d 731, 735 (N.D. Ill.1999).*

[HN2] For an exercise of personal jurisdiction to satisfy due process, the defendant must have minimum contacts with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).* This determination depends on whether the plaintiff asserts general or specific jurisdiction against the defendant. "General jurisdiction ... is for suits neither arising out of nor related to the defendant's contacts, and it is permitted only where the defendant has 'continuous and systematic general business' contact with the forum." *RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997).* Specific jurisdiction, on the other hand, refers to jurisdiction over a defendant in a suit "arising out of or related to [*5] the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984).*

In the instant case, the Complaint contains no direct allegation that the Court may exercise personal jurisdiction, either general or specific, over BNC as a non-resident defendant. Plaintiff merely refers to venue, stating that "venue is proper in this District pursuant to *28 U.S.C. § 1391(b)(2).*" BNC maintains that this Court has neither general nor specific jurisdiction over it. In response, InfoSys argues that BNC has subjected itself to personal jurisdiction of this Court - either general or specific - by virtue of its purposeful and continuous sales efforts in Illinois through its interactive website and national marketing campaigns directed at the healthcare industry.

General Jurisdiction

[HN3] A website can be a purposeful contact with the forum state for purposes of general jurisdiction. *Euromarket Designs, Inc., 96 F. Supp.2d at 837.* An exercise of personal jurisdiction is proper where a defendant clearly does business with residents of the forum state over [*6] the Internet, *i.e.*, the website is "interactive." *Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).*

> [HN4] In weighing the issue of personal jurisdiction in the context of the Internet, courts typically use a sliding scale analysis to ascertain what level of Internet interaction subjects a defendant to personal jurisdiction ... The analysis consists of three levels: (1) where the defendant conducts business over the Internet through its active website; (2) where the defendant maintains an interactive website; and (3) where the defendant maintains a passive website.
>
> ...
>
> The first category [level 1] consists of situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction ... over the Internet, personal jurisdiction is proper ... Websites in this category are interactive and allow for [a] transaction between the user and the website owner.
>
> ...
>
> The second category [level 2] is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined [*7] by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.
>
> ...
>
> The final category [level 3] consists of situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.

This Court has addressed this issue in *Aero Products Int'l, Inc. v. Intex Corp.*, 2002 U.S. Dist. LEXIS 17948,

No. 02 C 2590, 2002 WL 31109386, at *5 (N.D. Ill. Sept. 20, 2002) (internal quotation marks and citations omitted).

Here, InfoSys argues that BNC's website is sufficiently interactive to confer either general or specific jurisdiction. Although the website is clearly not a level 1 website because it does not include an area where potential customers can enter into a contract with BNC over the Internet, it does have a high "level of interactivity" that is of a high "commercial nature." *Aero Prods. Int'l, Inc.*, 2002 U.S. Dist. LEXIS 17948, 2002 WL 31109386, at *5. First, the company's name of "Billingnetwork.com, Inc." indicates [*8] that the website plays an integral role in the business and thus has a highly commercial nature. In addition, the website states that personal information from potential clients for BNC's Internet billing system known as "DirectAccess" can be collected from "registration forms, product order information, and other web forms." Furthermore, although "DirectAccess" clients cannot enter into a contract exclusively through the website, the website does profess that one can become a client online and that "all enrollment and training can be accomplished online." Even if this is not the case, however, the process for becoming a "DirectAccess" client can at least be initiated through an exchange of information via the website, and, once under contract, clients may use the website as the primary means for implementing the product and training new users.

In addition to marketing "DirectAccess" for purchase online and initiating client relationships, the website solicits non-customers to become "partners" with BNC. The website describes these partnerships as "strategic relationships with other billing centers and companies who operate in the healthcare industry," and the intent for forming them [*9] is "to create new opportunities and new customers for BillingNetwork and our partners." Accordingly, these partnerships have a strong commercial nature. Anyone interested in becoming a BNC "partner" may enroll with BNC directly from the Partners page of the website, and thus there is interconnectivity of a commercial nature.

The website also solicits software resellers, medical sales representatives, and practice management consultants to join its "network of qualified Value Added Resellers (VARS)." Anyone interested in doing so is invited to fill out an online form to join. Therefore, we have more interconnectivity of a commercial nature. Finally, there are other interconnectivity features but of a lesser commercial nature; the website offers an opportunity to subscribe to its periodic newsletter, and, on a separate page for investors, the website invites potential investors to fill out a form for more information "about investment opportunities" in the company.

In the end, whether the BNC website is sufficiently interactive to confer general jurisdiction by itself is, to say the least, a close call. On the one hand is a line of cases in which courts found that comparable sites [*10] did not confer jurisdiction. n2 On the other hand is an equally strong line of cases in which courts found that comparable sites did confer jurisdiction. n3 In the final analysis, BNC makes the determinative point when it cites to *Watchworks, Inc. v. Total Time, Inc.*, 2002 U.S. Dist. LEXIS 4491, No. 01 C 5711, 2002 WL 424631, at *6 (N.D. Ill. Mar. 19, 2002) for the observation that [HN5] cases conferring jurisdiction partly on the basis of Internet activity "reflect that personal jurisdiction is typically determined based not only on the defendant's Internet activities but also on its non-Internet activities." n4 In contrast to these situations, the *Watchworks* Court found no jurisdiction because the plaintiff provided evidence only of an employee and its investigator accessing the website and no evidence of other Illinois residents accessing the website or requesting that it be placed on defendant's mailing list. 2002 U.S. Dist. LEXIS 4491, 2002 WL 424631, at *6 note 8. In sum, there is no case where general jurisdiction was conferred on the basis of an interactive website in the absence of non-website factors evidencing intent for a defendant's product or website to reach a particular state.

n2 *See Haemoscope Corp. v. Pentapharm AG*, 2002 U.S. Dist. LEXIS 23387, No. 02 C 4261, 2002 WL 31749195 (N.D. Ill. Dec. 9, 2002) (finding no jurisdiction on the basis of a website that allowed users to request additional product information from the site, but then informed the user that the allegedly infringing device was not yet available in Illinois); *Haggerty Enters., Inc. v. Lipan Indus. Co., Ltd.*, 2001 U.S. Dist. LEXIS 13012, No. 00 C 766, 2001 WL 968592, at *6 (N.D. Ill. Aug. 23, 2001) (finding no jurisdiction on the basis of a website that listed no prices and did not offer direct sales, but did allow the user to contact the defendant through its website to obtain further information); *LaSalle Nat'l Bank v. Vitro, Sociedad Anonima de Capital Variable, 85 F. Supp.2d 857, 862 (N.D. Ill. 2000)* (finding no jurisdiction on the basis of a website that did not allow for direct sales, but did offer users access to on-line catalogs and gave them the ability to interact directly with defendant's customer service representatives).

[*11]

n3 *See Publications Int'l, Ltd. v. Burke/Triolo, Inc., 121 F. Supp.2d 1178, 1183*

(N.D. Ill. 2000) (finding jurisdiction on the basis of a hybrid website which it found to be highly commercially interactive because, after requesting a catalog through the website, users received defendant's catalog and could place orders); *LFG, LLC v. Zapata Corp., 78 F. Supp.2d 731 (N.D. Ill. 1999)* (finding jurisdiction on the basis of an Internet website portal, directing users to other websites through interactive dialogue and through which Illinois users were invited to place themselves on defendant's mailing list); *Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo.1996)* (finding jurisdiction on the basis of a website providing information about a forthcoming electronic mailing list service that would forward to users advertisements that matched their selected interests).

n4 *See Publications Int'l, Ltd., 121 F. Supp.2d at 1182-83* (finding that the defendant had extensively distributed the allegedly infringing materials in Illinois); *LFG, LLC, 78 F. Supp.2d at 736-37* (not only emphasizing that the defendant's website was actually an Internet portal but also that 25 Illinois residents requested to be placed on the defendant's mailing list); *Maritz, Inc., 947 F. Supp. 1328* (finding the defendant's website had been accessed at least 311 times in Missouri, the state in which personal jurisdiction was at issue).

[*12]

Here, assuming *arguendo* that InfoSys can establish the minimal level of interactivity of the BNC website that is sufficient to establish that the website is a hybrid (level 2) website, general jurisdiction does not exist because of the absence of any non-website activities by BNC. InfoSys claims that BNC marketed its website in Illinois and nationwide through its advertisements and listings on several Internet directories that position the website as a source for medical billing solutions, but these Internet advertisements and accompanying Internet-based publicity are insufficient in connection with the hybrid website to establish personal jurisdiction. [HN6] Generally, national advertisements (including those on the Internet) are insufficient to subject a defendant to jurisdiction in Illinois. *Aero Products Int'l, Inc.*, 2002 U.S. Dist. LEXIS 17948, 2002 WL 31109386, at *7. There must be evidence that the defendant intended its advertisements to reach a particular state. *Id.* Here, InfoSys has cited no evidence indicating that BNC has specifically directed its Internet based advertisements into Illinois or targeted its website at Illinois residents, just as there was no such evidence in *Aero* [*13] *Products Int'l, Inc.* In addition, InfoSys has not offered evidence that BNC had Illinois clients, potential Illinois clients such as in *LFG, LLC*, or even any Illinois visitors to the website as in *Maritz*. All InfoSys has is BNC's alleged national advertising, but [HN7] "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* 2002 U.S. Dist. LEXIS 17948, [WL] at *6 (quoting *Asahi-Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987))*. Accordingly, because of the absence of any non-website factors in conjunction with the arguably hybrid website, general jurisdiction is not appropriate in this case.

Specific Jurisdiction

As mentioned above, specific jurisdiction is appropriate when the plaintiff's claim is related to or arises out of defendant's contacts within the state. *Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 414 n. 8.* [HN8] For specific jurisdiction, the Federal Circuit has established a three-prong test that must be satisfied: (1) whether the defendant purposefully directed its activities at the residents of the forum; [*14] (2) whether the claim arises out of or is related to those activities; and (3) whether assertion of personal jurisdiction is reasonable and fair. *HollyAnne Corp. v. TFT, Inc., 199 F.3d 1304, 1307 (Fed. Cir. 1999)*. InfoSys asserts specific jurisdiction based on the website, but, once again, there are no allegations, as *Aero Prods. Int'l, Inc.*, that BNC's website was specifically targeted at Illinois residents or that Illinois residents had initiated any actual or potential business relationships with BNC due to visiting the website. 2002 U.S. Dist. LEXIS 17948, 2002 WL 31109386, at *6-7. Accordingly, InfoSys cannot satisfy the first prong of the *HollyAnne* test and therefore specific jurisdiction is also not appropriate in this case.

Subject Matter Jurisdiction

Along with the lack of personal jurisdiction, BNC argues that this Court cannot exercise subject matter jurisdiction over this dispute because there is no "actual controversy" as required under the Declaratory Judgment Act, *28 U.S.C. § 2201. See Spectronics Corp. v. H.B. Fuller Co., 940 F.2d 631, 634 (Fed. Cir. 1991)*. [HN9] To establish an "actual controversy" in a patent invalidity [*15] declaratory action, (1) there must be an explicit threat or action by the patentee, which creates a reasonable apprehension on the part of the declaratory judgment plaintiff that it will face an infringement suit, and (2) plaintiff must actually have either produced the device or have prepared to produce the device. *Arrowhead Indus. Water, Inc. v. Ecolochem, 846 F.2d 731, 736 (Fed. Cir. 1988); see also, Spectronics Corp., 940 F.2d*

at 632. The test for whether a defendant's conduct creates a reasonable apprehension is a "totality of the circumstances" test. *Shell Oil Co. v. Amoco Corp., 970 F.2d 885, 888 (Fed. Cir. 1992)*.

Here, the totality of the circumstances does not indicate that BNC's actions constituted a threat of litigation which created a reasonable apprehension of an infringement suit. At the onset, [HN10] the test for reasonable apprehension is an objective test. *Indium Corp. of America v. Semi-Alloys, Inc., 781 F.2d 879, 883 (Fed. Cir. 1985)*. The test therefore requires more than the nervous state of mind of a possible infringer; it requires that the objective circumstances support such an apprehension. *Phillips Plastics Corp. v. Kato Hatsujou Kabushiki Kaisha, 57 F.3d 1051, 1053-54 (Fed. Cir. 1995)*. [*16] A purely subjective apprehension is insufficient to satisfy the actual controversy requirement. *Indium Corp. of America, 781 F.2d at 883*. Therefore, the subjective beliefs of InfoSys employees and clients as to whether litigation would be initiated - and even to what extent they believed this - is entirely irrelevant.

Regarding BNC's objective conduct, it is black letter law that [HN11] merely offering a license does not create a reasonable apprehension. *Phillips Plastics Corp. v. Kato Hatsujou Kabushiki Kaisha, 57 F.3d 1051, 1053 (Fed. Cir. 1995)*. Threats of litigation within the context of license negotiations also do not create a reasonable apprehension. *Shell, 970 F.2d at 887*. In *Shell*, the following circumstances occurred:

> before the meeting ended, offers were again made and rejected. Shell indicated that the parties were at an impasse and that litigation appeared likely. Oliver questioned whether Shell could file a declaratory judgment action since Shell was not manufacturing its catalyst. Vance responded that Shell was manufacturing the catalyst and asked, "I assume you will enforce your patent?" A representative of Amoco [*17] replied, "Yes," and the meeting ended.

Id. *Shell* held that the patentee's statements that the alleged infringer's activities "fall within," are "covered by," and are "operations under" the patent did not create a reasonable apprehension. *Id. at 889*.

Here, InfoSys's main support for the purported threats of litigation are a couple of letters and some follow-up phone calls. However, the letters include no explicit or implicit threat of litigation and clearly state that there are merely offers to take a license. For example, the March 16, 2003 letter also includes the following language:

> We are not charging you with infringement of the patent, but are bringing the patent to your attention so that you may consider licensing the patent to avoid a potential conflict with the patent. We are offering to license the patent on a non-exclusive basis for a modest royalty.

In addition, the follow-up phone calls in reference to the letters do not create a reasonable apprehension because they were made within the context of license negotiations. *Shell, 970 F.2d at 887*. Accordingly, InfoSys's assertion that BNC has made threats against [*18] it is without support in fact or law. BNC has not engaged in any extraordinary or threatening conduct by merely sending letters and/or making telephone calls to InfoSys or its customers in which it used language that was either identical or very similar to the language used in *Shell*. Therefore, subject matter jurisdiction does not exist. n5

> n5 Having found that there is no basis for either personal jurisdiction or subject matter jurisdiction, it is unnecessary to consider whether venue is proper.

For the reasons above, BNC's Motion to Dismiss and InfoSys's Motion for Leave to File a Sur-Reply are GRANTED.

ENTER:

James B. Zagel

United States District Judge

DATE: August 26, 2003

LEXSEE 1997 U.S. DIST. LEXIS 3331

NEOGEN CORPORATION, Plaintiff, -vs- VICAM and JACK L. RADLO, jointly and severally, Defendants.

Case No. 5:96-CV-138

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1997 U.S. Dist. LEXIS 3331

February 20, 1997, Decided
February 20, 1997, FILED

DISPOSITION: [*1] Defendants' motion to quash service of process and to dismiss action for want of personal jurisdiction GRANTED. Defendants' motion to change venue DENIED as moot.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, a partnership and a partner, filed a motion to quash service of process and to dismiss action for want of personal jurisdiction in plaintiff corporation's libel action. The partnership had sent a letter to its customers stating that the corporation's new product infringed on its patents.

OVERVIEW: The court granted the motion. The partnership was a Delaware limited partnership with offices in Massachusetts. The partnership and the partner were not residents of Michigan. The partnership did not solicit business there and was not registered there. The partner had never been in Michigan. The fact that the partnership sold its product to two Michigan customers for $ 7,500 did not constitute general jurisdiction. The court rejected the corporation's assertion of specific jurisdiction based on the partnership's having written two letters to the corporation in which it notified the corporation that it would file a lawsuit if the corporation infringed on its patent. Such minimal contacts did not support a finding of purposeful availment. Libel cases did not require a different and lower standard to support personal jurisdiction. The corporation did not claim that the allegedly defamatory statements were circulated in Michigan. No market for the partnership's product existed in Michigan; thus, the only harm experienced there was indirect: reduced profits in the state. Further, the allegedly libelous letters reported no Michigan information other than the name of the corporation.

OUTCOME: The court granted the motion of the partnership and the partner to quash service and dismiss the action for lack of personal jurisdiction. The court dismissed the corporation's libel action.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
[HN1] On a motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing that jurisdiction exists. Plaintiff may not rely on general allegations, but must set forth specific facts illustrating the court's jurisdiction over the defendant by affidavit or otherwise.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN2] Where the court proceeds without an evidentiary hearing, plaintiff is required to make only a prima facie showing of jurisdictional facts. Where the court decides the issue solely on the basis of written materials, plaintiff is required only to demonstrate facts that support a finding of jurisdiction in order to avoid a motion to dismiss. In determining whether plaintiff has made such a showing, the district court must consider the pleadings and affidavits in the light most favorable to the plaintiff.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > General Overview
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
Civil Procedure > Federal & State Interrelationships > Erie Doctrine
[HN3] In a diversity action, personal jurisdiction is determined by applying the law of the state in which the court sits. Michigan has long-arm statutes governing both general and specific personal jurisdiction over corporations. *Mich. Comp. L. § § 600.711* and 600.715. Similarly, Michigan has parallel long-arm statutes governing general and specific jurisdiction over individuals. *Mich. Comp. L. § § 600.701* and 600.705.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
[HN4] Constitutional notions of due process limit the reach of state long-arm statutes. Michigan's long-arm statutes extend personal jurisdiction to the limits of constitutional due process. As a consequence, the court's review of personal jurisdiction is narrowed to the single inquiry whether the exercise of jurisdiction meets the requirements of due process.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
[HN5] In order to constitutionally subject a defendant to the personal jurisdiction of a court, the defendant must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. A fundamental test in personal jurisdiction is whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court in the forum state. In analyzing personal jurisdiction, courts distinguish between general jurisdiction and specific jurisdiction. Where a defendant is not found in the forum, in order to establish general jurisdiction, a court must find that a defendant's contacts with the forum state are of such a "continuous and systematic" nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
[HN6] There is a three-part test to determine whether the exercise of specific jurisdiction comports with due process: First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. In order to support jurisdiction, defendants' contacts must meet all three prongs.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN7] The "purposeful availment" requirement, is designed to insure that random, fortuitous, or attenuated contacts do not cause the defendant to be haled into a jurisdiction. The requirement is satisfied when the defendant's contacts with the forum state proximately result from actions by the defendant himself that create a "substantial connection" with the forum state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Torts > Intentional Torts > Defamation > Elements > Libel
[HN8] The tort of libel is generally held to occur wherever the offending material is circulated.

COUNSEL: For NEOGEN CORPORATION, a Michigan corporation, plaintiff: Mark R. Fox, Fraser, Trebilcock, Davis & Foster, PC, Lansing, MI.

For VICAM, a Massachusetts corporation, jointly and severally, JACK L. RADLO, jointly and severally aka Jason L. Radlo, defendants: Patrick F. Geary, Smith, Haughey, Rice & Roegge, PC, Grand Rapids, MI.

JUDGES: Douglas W. Hillman, Senior District Judge

OPINION BY: Douglas W. Hillman

OPINION:

OPINION

Plaintiff Neogen Corporation ("Neogen"), a Michigan corporation, has brought suit against VICAM, L.P. ("VICAM"), a Massachusetts limited partnership, and Jack L. Radlo, a Massachusetts resident, alleging that defendants libeled plaintiff corporation and interfered in its business and contractual relationships. Defendants have filed a motion to quash service of process and to dismiss for lack of personal jurisdiction. Alternatively, defendants argue that venue is inappropriate in this district and have moved to transfer venue. The court need not address the venue question because the facts, taken in the [*2] light most favorable to the plaintiff, fail to establish the existence of personal jurisdiction over defendants. Accordingly, the court **GRANTS** defendants' motion to quash service and to dismiss the complaint.

I.

Neogen is a Michigan corporation that recently developed and began marketing a test kit to determine the presence of aflatoxin in peanuts. Defendant VICAM is a Massachusetts company that presently holds two patents for testing equipment to measure the presence of aflatoxin in peanuts.

According to the allegations of the complaint, Neogen had been developing and testing an aflatoxin detector for some time. On February 22, 1995, defendant Radlo n1, on behalf of VICAM, sent a letter to Neogen stating that VICAM had become aware that Neogen was developing a test similar to VICAM's AflaTest TM, and threatened legal action if the Neogen test infringed on VICAM's patents. On February 28, 1995, Neogen responded, advising defendants that Neogen's test was distinct from VICAM's patented testing process and that Neogen would not infringe on any VICAM patent.

n1 Jack L. Radlo is president of VICAM Management Company ("VMC"), the sole general partner of defendant VICAM.

[*3]

On July 18, 1996, Neogen again wrote to defendants to advise VICAM that it had begun field testing a diagnostic kit that used a column format and assuring VICAM that patent counsel had reviewed the test and found that it did not infringe on the VICAM patents. On July 30, 1996, VICAM requested additional information on the product and advised Neogen that VICAM believed that its patents provided broad protection for any commercially viable aflatoxin test kit that "utilizes an antibody affinity column with a fluorescence detection step."

Neogen responded by a letter dated August 9, 1996 that it would provide an actual sample of the test kit when it was available for commercial sales. On August 12, 1996, before receiving a sample test kit, VICAM sent a letter to its customers stating that the Neogen test kits were considered by VICAM to infringe upon VICAM's patents, that VICAM would take the necessary legal steps to protect its patents, and that use of the products as advertised would infringe VICAM's patents. It is undisputed that none of the recipients of the letter resided in Michigan.

On August 16, 1996, Neogen forwarded a sample diagnostic kit to VICAM, expressing its belief that [*4] VICAM would find no patent infringement. That same date, Neogen's attorneys wrote to VICAM advising that Neogen considered VICAM's August 12 letter to its customers to constitute trade libel, product disparagement and tortious interference with Neogen's contractual and advantageous business expectancies. The letter demanded VICAM's unequivocal retraction of its statements. Neogen also filed the instant lawsuit on August 14, 1996. Thereafter, Neogen filed an amended complaint on August 26, 1996, before VICAM had filed its first responsive pleading.

VICAM subsequently filed the present motion to quash service of process and dismiss the complaint as its first responsive pleading. Alternatively, defendants moved for transfer of venue.

Defendants principally contend that this court has no personal jurisdiction over either defendant. VICAM is a Delaware limited partnership with business offices in Watertown, Massachusetts. VICAM's general partner, VMC, is a Massachusetts corporation with its principal place of business in Massachusetts.

In support of their motion, defendants submitted the affidavit of defendant Radlo. Radlo attests that he resides in Lexington, Massachusetts and has no [*5] connections with Michigan. VICAM contends that it does not sell, manufacture or distribute its aflatoxin detection products in Michigan. In addition, defendants have no resident agent in Michigan and are not qualified to conduct business in the state.

II.

[HN1] On a motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing that jurisdiction exists. *Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)*. Plaintiff may not rely on general allegations, but must set forth specific facts illustrating the court's jurisdiction over the defendant by affidavit or otherwise. Id.

However, [HN2] where the court proceeds without an evidentiary hearing, plaintiff is required to make only

a prima facie showing of jurisdictional facts. *Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996); Welsh v. Gibbs, 631 F.2d 436, 438 (6th Cir. 1980)*, cert. denied, *450 U.S. 981, 67 L. Ed. 2d 816, 101 S. Ct. 1517 (1981)*. Where the court decides the issue solely on the basis of written materials, plaintiff is required only to "'demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.'" Id. (quoting [*6] *Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)*). See also *American Greetings Corp. v. Cohn, 839 F.2d 1164, 1168-69 (6th Cir. 1988)*. In determining whether plaintiff has made such a showing, the district court must consider the pleadings and affidavits in the light most favorable to the plaintiff. *American Greetings, 839 F.2d at 1169*.

[HN3] In a diversity action, personal jurisdiction is determined by applying the law of the state in which the court sits. *Erie R.R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*. Michigan has long-arm statutes governing both general and specific personal jurisdiction over corporations. See *Mich. Comp. L. § § 600.711* (general jurisdiction), 600.715 (limited jurisdiction). Similarly, Michigan has parallel long-arm statutes governing general and specific jurisdiction over individuals. See *Mich. Comp. L. § § 600.701* (general), 600.705 (limited).

[HN4] The reach of state long-arm statutes, however, is limited by constitutional notions of due process. See *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*. It is well established that Michigan's [*7] long-arm statutes extend personal jurisdiction to the limits of constitutional due process. See, e.g., *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 954 F.2d 1174 (6th Cir. 1992)* (citing *Chandler v. Barclays Bank PLC, 898 F.2d 1148, 1150-51 (6th Cir.1990)*). As a consequence, the court's review of personal jurisdiction is narrowed to the single inquiry whether the exercise of jurisdiction meets the requirements of due process. Id.

[HN5] In order to constitutionally subject a defendant to the personal jurisdiction of a court, the defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)*). The Supreme Court has stated that a fundamental test in personal jurisdiction is whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court [in the forum state]." *World-Wide Volkswagen Corp.* [*8] *v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)*. In analyzing personal jurisdiction, courts distinguish between "general" jurisdiction and "specific" jurisdiction. See *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*; Third Nat'l Bank in *Nashville v. WEDGE Group, Inc., 882 F.2d 1087, 1089 (6th Cir. 1989)*. Where a defendant is not found in the forum, in order to establish general jurisdiction, a court must find that a "defendant's contacts with the forum state are of such a 'continuous and systematic' nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." *WEDGE Group, 882 F.2d 1087*.

In the instant case, no serious argument can be advanced that plaintiff alleged facts constituting a prima facie case of general jurisdiction. See *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., Ltd., 91 F.3d 790, 793 (6th Cir. 1996)*. While plaintiff has alleged that defendants' business in Michigan was "continuous and systematic," plaintiff has brought forward few specific facts in support of that allegation. Defendants attest [*9] and plaintiff does not contest that VICAM and Radlo are not residents of Michigan, own no property in Michigan, and have no agent in Michigan. Defendant VICAM further attests that it has not solicited business in Michigan and is not registered in Michigan. Radlo also avers that he never has been physically present in Michigan.

The only facts plaintiff offers to support general jurisdiction over defendants are found in Exhibit L to plaintiff's brief. Exhibit L purports to be a list that plaintiff obtained from VICAM during discovery that recites all transactions with customers in Michigan during 1995-96. That list involves two customers and a total of $ 7,518.00 of sales.

Such limited activity falls considerably below the standard of "continuous and systematic" so as to confer general jurisdiction over VICAM. See *Conti v. Pneumatic Products Corp., 977 F.2d 978, 981 (6th Cir. 1992)* ($ 900,000 of sales insufficient to support general jurisdiction). See also *Nationwide, 91 F.3d at 793-94* (limited or sporadic contacts insufficient to support general jurisdiction). Moreover, evidence of VICAM's sales provides absolutely no basis for a finding of personal jurisdiction over Radlo [*10] individually.

With respect to specific jurisdiction, the Sixth Circuit has used [HN6] a three-part test to determine whether the exercise of specific jurisdiction comports with due process:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence

> in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Conti, 977 F.2d at 981 (quoting *Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968)).* In order to support jurisdiction, defendants' contacts must meet all three prongs of the test set forth in Southern Machine. See *Conti, 977 F.2d at 983* ("Each [Southern Machine] criterion represents an independent requirement, and failure to meet any one of the three means that personal jurisdiction may not be invoked.") (internal quotations omitted).

In support of specific jurisdiction, plaintiff offers two discrete facts, First, plaintiff [*11] contends that defendant wrote two letters to plaintiff regarding Neogen's aflatoxin test. Second, plaintiff contends that to establish personal jurisdiction in a libel case, a plaintiff need do no more than show that the defendant was aware at the time it committed the alleged libel that plaintiff was a Michigan corporation with its principal place of business in Michigan.

With respect to plaintiff's first asserted basis for jurisdiction, the letters plaintiff relies upon cannot support jurisdiction because they fail the first prong of the Southern Machine test. As previously stated, under the first prong, a defendant "must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state." *Southern Machine, 401 F.2d at 381.* As the Sixth Circuit has recognized, [HN7] the "purposeful availment" requirement, is designed to insure that "'random,' 'fortuitous,' or 'attenuated' contacts" do not cause the defendant to be haled into a jurisdiction. *Nationwide, 91 F.3d at 795.* The requirement is satisfied when the defendant's contacts with the forum state "proximately result from actions by the defendant himself that create a 'substantial [*12] connection' with the forum state. *Compuserve, 89 F.3d at 1263.*

Here, the two letters were insubstantial. See *Reynolds v. Intern. Amateur Athletic Federation, 23 F.3d 1110, 1116 (6th Cir. 1994)* (isolated letters insubstantial); *Conti, 977 F.2d at 983* (multiple telephone contacts insufficient). Neither initiated any relationship nor formed the basis for later tortious conduct. Both letters were addressed to registering defendants' concern that plaintiff not infringe VICAM's patents. In fact, one amounted to little more than an acknowledgment of plaintiff's preceding letter. The quality of such minimal contacts cannot support a finding of purposeful availment. See *Compuserve, 89 F.3d at 1265* (focusing on the quality of the contacts, not the number or status, in determining purposeful availment). See also *Wisconsin Elec. Mfg. Co. v. Pennant Prods. Inc, 619 F.2d 676, 678-79 n.10 (7th Cir. 1980)* (noting that courts have refused to find that personal jurisdiction exists where the defendant's contact with the forum was limited to an attempt to resolve the parties dispute), cited in *Nationwide, 91 F.3d at 796.*

With respect to plaintiff's second asserted basis for jurisdiction, [*13] plaintiff contends that because defendants were aware at the time of their alleged defamation of the forum in which plaintiff resided, they were aware that the effects of their defamation would be experienced in Michigan. As a result, plaintiff contends that defendants' knowledge amounts to "purposefully availing" themselves of a "privilege" in Michigan. I disagree. If a defendant may be brought within the jurisdiction of the court simply by knowledge of where plaintiff resides at the time a tortious act is committed, there can be little remaining meaning to the requirement of purposeful conduct or of "substantial connection" to the forum.

Plaintiff implies, however, that libel cases require a different and lower standard to support personal jurisdiction. In support of its claim, plaintiff principally relies upon a factually similar case originating in this district. *Moellers North America, Inc. v. MSK Covertech, Inc., 870 F. Supp. 187 (W.D. Mich. 1994).* In Moellers, defendant was alleged to have sent a libelous letter to a potential customer of both companies stating that the Moellers system infringed on the patent of MSK. The district court concluded that because defendant [*14] knew plaintiff was incorporated in and had its principal place of business in Michigan, it knew that its intentional acts could be considered aimed at Michigan, where it was aware that the effects of its letter would be felt.

I am not persuaded that the Moellers decision correctly applied existing law on personal jurisdiction. First, as I noted previously, the conclusion does not accord with the three-part analysis set forth in this circuit for special jurisdiction. In fact, the district court did not specifically analyze the facts under the Southern Machine test.

In addition, the Moellers court centrally relied upon its analysis of the Supreme Court's decision in *Calder v. Jones, 465 U.S. 783, 788-89, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984).* The court concluded that Calder stood for the proposition that, "in a libel action, the forum in which the allegedly libeled person resides has personal jurisdiction over those accused of libel on the basis of the 'ef-

fects' of their out-of-state conduct in the forum state." *Moellers, 870 F. Supp. at 191.*

I disagree with this summary of the Calder decision. Calder involved a suit by performer Shirley Jones against [*15] the National Inquirer, together with the author and editor of an article in which she was defamed. The Calder Court held that the author and editor both were subject to personal jurisdiction in California, despite their lack of contacts outside the writing and editing of the article in question. The Court noted that the authors intended to and did circulate the magazine in California. In fact, the magazine's largest circulation was in California. The Court summarized the other factors involving California as follows:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources and the brunt of the harm, in terms of both respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Id. at 789.

Here, the links to Michigan are much more [*16] limited. Unlike in Calder, plaintiff does not claim that the allegedly defamatory statements were circulated in Michigan. In addition, plaintiff does not contest defendants' sworn statements that no market for plaintiff's product exists in Michigan because it is not a peanut-producing state. Thus, the harm is not alleged to be directly experienced in Michigan by loss of sales within the state. Instead, the only harm experienced in Michigan is indirect: a reduction in total profits declared within the state. Further, the allegedly libelous letters report no information relating to Michigan or drawn from Michigan other than plaintiff's name. The only connection with Michigan that plaintiff has shown is its own residence.

The Calder decision simply did not address the facts of this case. Calder does not support the exercise of jurisdiction based on such an attenuated connection to the forum as plaintiff claims.

Moreover, on the same date it decided Calder, the Supreme Court decided *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984).* In Keeton, the Court addressed the issue of personal jurisdiction in a defamation action involving [*17] a nonresident plaintiff. The Court observed that [HN8] "the tort of libel is generally held to occur wherever the offending material is circulated. *Id. at 777* (citing *Restatement (Second) of Torts § 577A*, Comment a (1977). Thus, while Keeton suggests that mere circulation of a libelous statement within a state will be sufficient to support jurisdiction, it simultaneously suggests that such circulation, at a minimum, is necessary.

Further, I observe that the Moellers court did not discuss a controlling Sixth Circuit case involving personal jurisdiction in the context of a defamation action. In *Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110* (6th Cir.), cert. denied *513 U.S. 962, 130 L. Ed. 2d 338, 115 S. Ct. 423 (1994)*, a case decided shortly before the Moellers decision, the court rejected the notion that a defendant comes within the personal jurisdiction of the court solely by making defamatory remarks about a resident plaintiff. The Reynolds court distinguished Calder, holding that the Calder facts established a much more significant connection with the state than the mere fact that the effects of the defamation would be experienced in the forum [*18] because the plaintiff resided there. The court specifically noted five distinct facts in Reynolds that distinguished Calder: (1) that the allegedly defamatory statement involved activities outside the forum; (2) that the source of the report was outside the forum; (3) that the individual, while a resident of the state, had a reputation that was not centered in the state; (4) that the defendant did not publish or circulate the report in the state; and (5) that the forum state was not the "focal point" of the defamatory statement. All but the first of these distinguishing features applies equally to the instant case.

Moreover, I conclude that the Reynolds court expressly has rejected plaintiff's proposed analysis of personal jurisdiction:

> The fact that the [defendant] could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction. . . .
>
> [Plaintiff] argues, however, that his claims arose out of the [defendant's] connection with Ohio because the [defendant] intentionally defamed him and interfered with his Ohio business relationships. Under this theory, the [defendant] knew that the [*19] worldwide media would carry the report and that the brunt of the injury would occur in Ohio.

> Even accepting that the [defendant] could foresee that its report would be disseminated in Ohio, however, the [defendant] would not be subject to personal jurisdiction in Ohio. *Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1990)* (defendant's knowledge that independent publisher might publish defamatory statements in California does not create personal jurisdiction).

Reynolds, 23 F.3d at 1120. Where, as here, the only connection with the forum state is defendants' knowledge of plaintiff's residence, Reynolds bars a finding of personal jurisdiction. See also *Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1079 (10th Cir. 1995)* (mere allegation that defendant interfered with contractual rights or committed other business torts against resident of forum does not establish minimum contacts); *Southmark Corp. v. Life Investors, Inc., 851 F.2d 763, 772-73 (5th Cir. 1988)* (no personal jurisdiction solely based on allegation that plaintiff suffered injuries in the forum); *Wallace v. Herron, 778 F.2d 391,* 394-95 (7th Cir. 1985) (mere allegation of intentional tort [*20] does not create jurisdiction in plaintiff's home forum under Calder), cert. denied, *475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1642 (1986).*

In sum, because the only substantial connection to the state that has been alleged by plaintiff is that defendant knowingly defamed a resident of the state, I conclude that plaintiff has failed to set forth prima facie evidence of personal jurisdiction. I conclude that holding defendants liable to suit in Michigan does not comport with "traditional notions of fair play and substantial justice." *International Shoe, 326 U.S. at 316.*

III.

For the foregoing reasons, defendants' motion to quash service of process and to dismiss the action for want of personal jurisdiction is **GRANTED**. In light of the court's decision on the jurisdictional issue, defendants' motion to change venue is **DENIED** as moot.

Douglas W. Hillman

Senior District Judge

Dated: FEB 20 1997.

ORDER

In accordance with the opinion filed this date,

IT IS ORDERED that defendants' motion to quash service and to dismiss is **GRANTED**, and defendants' motion to change venue is **DENIED** as moot.

Douglas W. Hillman

Senior District [*21] Judge

Dated: FEB 20 1997.

LEXSEE 2000 U.S. DIST. LEXIS 383, *3

TY INC., a Delaware Corporation, Plaintiff, v. MAX CLARK, an individual, and EXPEDIENT I.T. SOLUTIONS LTD., Defendants.

Case Number: 99 C 5532

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2000 U.S. Dist. LEXIS 383

January 13, 2000, Decided
January 14, 2000, Docketed

DISPOSITION: [*1] Ty Inc.'s action for trademark infringement, unfair competition, trademark dilution, consumer fraud, and deceptive business and trade practices dismissed without prejudice.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff brought action against defendants for trademark infringement, unfair competition, trademark dilution, common law trademark infringement, consumer fraud, and deceptive business and trade practices.

OVERVIEW: Plaintiff, a stuffed toy manufacturer, filed suit against defendants, a merchant and its manager, who sold plaintiff's toys via a web site. Plaintiff alleged trademark infringement, unfair competition, trademark dilution, common law trademark infringement, consumer fraud, and deceptive business and trade practices, and asserted venue over the defendants, pursuant to *28 U.S.C.S. § 1391*(b). However, sua sponte, the court dismissed without prejudice, plaintiff's action, for lack of personal jurisdiction. Under the Zippo "sliding scale," personal jurisdiction was lacking over defendants because defendants' web site was an interactive site which allowed consumers to exchange information with defendants, but which did not clearly do business over their web site. Defendants did not allow consumers to order or purchase products on-line, and did not enter into contracts over the web site. Consequently, plaintiff could not establish defendants conducted business over the Internet with forum residents.

OUTCOME: The court lacked personal jurisdiction over defendants because their web site only exchanged informational e-mails with consumers. The web site did not allow consumers to order or purchase products on-line. Consequently, plaintiff could not establish defendants conducted business over the Internet with forum residents, so action was dismissed without prejudice.

LexisNexis(R) Headnotes

Civil Procedure > Venue > Multiparty Litigation
[HN1] See *28 U.S.C.S. § 1391*(b).

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN2] Where there is no federal statute governing personal jurisdiction, a court has authority to exercise personal jurisdiction as conferred by state law. *Fed. R. Civ. P. 4(e)*. The extent to which the court may exercise that authority is governed by the Due Process Clause of the U.S. Const. amend. XIV.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN3] The State of Illinois' long-arm jurisdiction statute is codified under *735 Ill. Comp. Stat. 5/2-209*. In particular, the statute covers individuals or corporations who transact any business within Illinois, commit a tortious act within Illinois, or do business within Illinois. *735 Ill. Comp. Stat. 5/2-209(a)(1)*, (a)(2), (b)(4).

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts

[HN4] There are constitutional limitations on the exercise of personal jurisdiction, depending upon whether general or specific jurisdiction over a non-resident defendant is sought. General jurisdiction allows a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state. Specific jurisdiction allows a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the relationship between the defendant and the forum falls within the "minimum contacts" framework.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview

Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements

Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview

[HN5] The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.

Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements

Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview

Computer & Internet Law > Internet Business > General Overview

[HN6] The "sliding scale" provides that at one end of the spectrum are situations where a defendant clearly does business over the Internet. If defendant enters into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on a web site which is accessible to users in foreign jurisdictions. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site.

COUNSEL: For TY INC, plaintiff: Terry Michael Hackett, Antonio DeBlasio, Michael Anthony Nicolas, Gardner, Carton & Douglas, Chicago, IL.

JUDGES: David H. Coar, United States District Judge.

OPINION BY: David H. Coar

OPINION:

MEMORANDUM OPINION AND ORDER

For the following reasons, plaintiff Ty Inc.'s action for trademark infringement, unfair competition, trademark dilution, common law trademark infringement, consumer fraud and deceptive business and trade practices, against defendants Max Clark and Expedient I.T. Solutions Ltd., is dismissed without prejudice because of lack of personal jurisdiction.

Background

The plaintiff, Ty Inc. ("plaintiff" or "Ty") is a Delaware corporation with its principal place of business in Westmont, Illinois. (Complaint P 1). Ty is the creator of the world famous plush stuffed toys named "Beanie Babies." Ty markets these Beanie Babies throughout the world and sells them through authorized dealers. (Complaint P 6). Since their introduction in 1994, Beanie Babies have become extremely [*2] popular, with sales over one billion dollars. (Complaint PP 6, 9). Ty has obtained a federal registration from the United States Patent and Trademark Office for the marks "Ty" (Reg. Nos. 1,722,141 and 2,118,114) and "Beanie Babies" (Reg. No. 1,049,196). (Complaint P 7).

One aspect of Ty's marketing strategy for Beanie Babies and related products is Ty's web site on the Internet, which contains the domain names, "www.beaniebabies.com" and "www.ty.com." (Complaint P 8).

One of the defendants, Expedient I.T. Solutions Ltd. ("EIS") is a private English corporation with its principal place of business in Cheshire, England. (Complaint P 2). Max Clark ("Clark"), an individual who also resides in Cheshire, England, has the primary responsibility for the control, management, operation and maintenance of the affairs of EIS (jointly referred to as "defendants"). (Complaint P 3). EIS and Clark acquired a registration for the Internet domain name "beaniebabiesuk.com" through Network Solutions, Inc. ("NSI"). n1 (Complaint P11). Through this domain name, the defendants established an Internet web site with the URL "http://www.beaniebabiesuk.com." This Internet web site is accessible to Internet [*3] users in Illinois and throughout the world. (Complaint P 12).

n1 Network Solutions, Inc. has contracted with the National Science Foundation to provide registration services for all Internet domain names. Once a domain name is registered to one user, it may not be used by another.

The defendants' Internet web site "beaniebabiesuk.com" is hosted by the Internet service provider, Simple Network Communications, Inc. ("SimpleNet"), a California corporation located in San Diego. Internet users seeking access to the "beaniebabiesuk.com" web site have been directed to two domain name servers operated by SimpleNet in San Diego, California. (Complaint P 14). Therefore, one could argue, the "beaniebabies.com" web site is located in the State of California. (Id.).

On the "beaniebabiesuk.com" web site, the defendants offer for sale, among other things, the majority of Ty's Beanie Babies toy products. (Complaint P 5). The defendants display images of Ty's Beanie Babies toys on the web site. (Complaint P 16). The defendants [*4] also market and offer for sale on the web site a variety of British products, such as British candies, British baskets filled with teas and crackers, British foods and preserves, and chine tea cups and tea pots. (Complaint P 15).

Ty alleges that the defendants have solicited orders for Beanie Babies toy products and have represented that they accept United States currency for payment. (Complaint P 17). On the web site, the defendants provide a price list of all the Beanie Babie models they offer. (Pl. Ex. B). An icon on the web site also allows consumers to click on an icon to send e-mail messages to the defendants to obtain specific information about any product on the web site. (Pl. Ex. B). However, a closer examination of the web site reveals that the defendants do not take orders over the web site itself. Instead, consumers must print out a order form on the web site and then either fax, telephone, or send their order to ESI. (Pl's Ex. B).

Ty brings a six-count complaint against the defendants, alleging trademark infringement, unfair competition, trademark dilution, common law trademark infringement, Illinois consumer fraud and deceptive business practices, and Illinois uniform [*5] deceptive trade practices. (Complaint PP 19 - 45). The court requested that the plaintiff brief the court on the issues regarding venue.

Analysis

The plaintiff begins its argument by citing the Federal Venue Statute, [HN1] *28 U.S.C. § 1391*(b), which 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.

The plaintiff argues that venue in the Northern District of Illinois is appropriate for this action, pursuant to *28 U.S.C. § 1391*(b)(2), because a substantial part of the events or omissions giving rise to the plaintiff's claims occurred in this District and a substantial part of property that is the subject [*6] of this action--Ty's trademarks--is situated in this District. (Pl's Mem., p. 3). However, in the plaintiff's argument for venue, the plaintiff assumes that this court has personal jurisdiction over the defendants. (Pl's Mem., p. 3). As a review of the case law will show, this is not an assumption the plaintiff can make.

[HN2] As there is no federal statute governing personal jurisdiction in this case, this court has authority to exercise personal jurisdiction as conferred by state law. *Fed.R.Civ.P. 4(e)*. The extent to which the court may exercise that authority is governed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Kulko v. Superior Court of California, 436 U.S. 84, 91, 98 S. Ct. 1690, 1696, 56 L. Ed. 2d 132 (1978)*.

[HN3] The State of Illinois' long-arm jurisdiction statute is codified under *735 Ill. Comp. Stat. 5/2-209*. In particular, the statute covers individuals or corporations who transact any business within Illinois, commit a tortious act within Illinois, or do business within Illinois. *735 Ill. Comp. Stat. 5/2-209(a)(1)*, (a)(2), (b)(4). It seems that the plaintiff is arguing that the defendants, through the use of the web [*7] site "www.beaniebabiesuk.com," transact business within Illinois and have committed a tortious act.

However, [HN4] there are constitutional limitations on the exercise of personal jurisdiction, depending upon whether general or specific jurisdiction over a nonresident defendant is sought. *Mink v. AAAA Development LLC, 190 F.3d 333, 335-36 (5th Cir. 1999); Panavision International, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997)*. General jurisdiction

allows a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404 (1984).* Specific jurisdiction allows a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the relationship between the defendant and the forum falls within the "minimum contacts" framework of *International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).* [*8] *Mink, 190 F.3d at 336.*

A significant number of Circuit who have addressed the issue of personal jurisdiction and Internet sites have relied on the three-category "sliding scale" model developed by the District Court in the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119* (W.D.Penn., 1997). See, *Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999); Mink, 190 F.3d at 336 (5th Cir. 1999); Cybersell, 130 F.3d at 418-419 (9th Cir. 1997); Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd., 64 F. Supp. 2d 448, 451 (E.D.Penn. 1999).* In Zippo, the court found that "the [HN5] likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo, 952 F. Supp. 1119 at 1124.* The court presented [HN6] the "sliding scale" as follows:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into [*9] contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *Zippo, 952 F. Supp. at 1124* (citations omitted).

The present case falls in the "middle ground" of the sliding scale model of Zippo. The defendants in the present case do not run a completely passive web site, for it is possible for consumers to e-mail the defendants questions about products and to receive information about placing orders, etc. However, at the same time, the defendants [*10] do not clearly do business over their web site, for they do not take orders nor enter into contracts over the web site. In fact, the defendants make it extremely clear on their web site that they do not conduct on-line transactions. (See Pl. Ex. B, "Section 3: Payment Arrangements"). Instead, the defendants have consumers print out an order form and either fax, telephone, or send their orders through traditional mail to the defendants' offices in Great Britain. (See Pl. Ex. Be, "Section 1: How to Order," "Beanie Baby Airmail Form").

The Fifth Circuit, in an extremely similar case, found that personal jurisdiction could not be exercised over the defendant through its web site. In Mink v. AAAA Development, a copyright infringement case, the plaintiff, an individual in Texas, argued for personal jurisdiction over the defendant, a Vermont corporation, based upon the defendant's web site. The Fifth Circuit, using the Zippo sliding scale analysis, found that personal jurisdiction could not be exercised over the Vermont corporation for two reasons. First, the only exchange of information over the web site was informational e-mails between consumers and the company. Second, the web [*11] site did not allow consumers to order or purchase products or services on-line. In fact, consumers were instructed by the web site to complete an order form and submit it by either fax or traditional mail. *Mink, 190 F.3d at 337.* The Fifth Circuit found these activities were not enough to exercise personal jurisdiction, for there was no evidence that the defendant conducted business over the Internet by engaging in business transactions with forum residents or by entering into contracts over the Internet. Id. The present case is the exact same situation. n2

> n2 While Mink was a copyright infringement case and the present case is a trademark case, courts have found that simply registering someone else's trademark as a domain name and posting a web site is not sufficient to subject a party to jurisdiction in another state. Instead, there must be "something more" to demonstrate that the defendants directed their activity toward the forum state. *Panavision, 141 F.3d at 1322 (9th Cir. 1998); Cybersell, 130 F.3d at 418 (9th Cir. 1997).* As the above discussion demonstrates, the

defendants in the present situation have not done "something more" to direct their activity toward Illinois.

[*12]

This court finds that personal jurisdiction over the defendants based upon the presence of their web site is not appropriate. Therefore, this case is dismissed without prejudice. n3

n3 In CompuServe, Inc. v. Patterson, the Sixth Circuit held that a Texas resident who had advertised his product through a computer information service located in Ohio was subject to personal jurisdiction in Ohio because the defendant had taken direct action to create that commercial connection with *Ohio. 89 F.3d 1257, 1264 (6th Cir. 1996)*. Therefore, one could argue in the present case that personal jurisdiction could be exercised over defendants in the Southern District of California, for the defendants contracted with SimpleNet, based in San Diego, California, to host their Internet web site. Thus, the defendants' web site is located in San Diego, California. (Complaint P 14).

Conclusion

For the foregoing reasons, plaintiff Ty Inc.'s action for trademark infringement, unfair competition, trademark dilution, [*13] common law trademark infringement, consumer fraud and deceptive business and trade practices, against defendants Max Clark and Expedient I.T. Solutions Ltd., is dismissed without prejudice because of lack of personal jurisdiction.

Enter:

David H. Coar

United States District Judge

Dated: JAN 13 2000

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed without prejudice for lack of personal jurisdiction. This case is closed.

Date: 1/13/2000

LEXSEE 2002 U.S. DIST. LEXIS 4491

WATCHWORKS, INC., Plaintiff, v. TOTAL TIME, INC., Defendant.

Case Number: 01 C 5711

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2002 U.S. Dist. LEXIS 4491

March 18, 2002, Decided
March 19, 2002, Docketed

DISPOSITION: [*1] Defendant's motion to dismiss for lack of personal jurisdiction granted. Defendant's motion to dismiss for improper venue and its alternative motion to transfer venue denied as moot. Case dismissed without prejudice.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant infringer moved to dismiss the complaint of plaintiff watch company under *Fed. R. Civ. P. 12(b)(2)* for lack of personal jurisdiction, and under *Fed. R. Civ. P. 12(b)(3)* for improper venue. In the alternative, defendant moved under *28 U.S.C.S. § 1404* to transfer venue. The complaint alleged that defendant was liable for trademark infringement, false designation of origin, as well as various other causes of action.

OVERVIEW: According to the infringer, it did not and had never owned, operated, or had any affiliation or connection with any stores or businesses anywhere in the forum state. In response, the watch company pointed to the infringer's catalog distribution and its website as the means by which the infringer established contacts within the forum state. The court held that as the infringer was not domiciled in the forum state and as there was no evidence from which a fair inference could be drawn that the infringer had continuous and systematic general business contacts within the forum state, the infringer was not subject to general jurisdiction. The court further held that the infringer was not subject to specific jurisdiction. Despite the infringer's manager's representations that she sold and shipped to the forum state and the infringer's representations on its website that its corporate specialists worked with clients throughout the United States, there simply was no hard evidence that the infringer had done business in the forum state. As it was not clear that the watch company wished to pursue litigation in the transferee forum, the court did not consider the venue issue.

OUTCOME: Infringer's motion to dismiss for lack of personal jurisdiction was granted, but its motion to dismiss for improper venue and its alternative motion to transfer venue was denied as moot. The case was dismissed without prejudice to filing in an appropriate district.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
[HN1] In deciding a motion to dismiss for lack of personal jurisdiction, the court must take as true any jurisdictional allegations asserted by the plaintiff in the complaint; the defendant, however, may controvert these allegations with affidavits. The court must resolve any conflicts of fact in favor of the plaintiff.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions > Substantial Questions
[HN2] The plaintiff bears the burden of demonstrating personal jurisdiction. In order to meet this burden, the plaintiff must provide sufficient evidence to establish a prima facie case of personal jurisdiction. In a federal question case, the court's assertion of personal jurisdiction must satisfy the due process requirements familiarly

characterized as traditional notions of fair play and substantial justice, and the defendant must be amenable to service of process.

Civil Procedure > Pleading & Practice > Service of Process > General Overview
[HN3] Amenability to service derives from *Fed. R. Civ. P. 4(k)(1)*, which provides that service is effective to establish jurisdiction over the person of a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or when authorized by a statute of the United States.

Civil Procedure > Pleading & Practice > Service of Process > General Overview
Trademark Law > Infringement Actions > Jurisdiction > General Overview
[HN4] The Lanham Act, which governs a trademark dispute, does not provide for nationwide service of process. *15 U.S.C.S. § 1121.*

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Long-Arm Jurisdiction
Torts > Procedure > Commencement & Prosecution > Personal Jurisdiction
[HN5] Illinois' long arm statute provides for jurisdiction over a defendant who performs enumerated acts in connection with tort or contract, and further allows the exercise of personal jurisdiction on any basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. 735 Ill. Comp. Stat. 5/2-290(c). Because the statute allows the exercise of personal jurisdiction to the constitutional limits, the statutory analysis collapses into a due process inquiry, and the courts need not consider whether the defendant engaged in any of the acts enumerated under the long-arm statute.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
[HN6] Under the due process clause of the Fourteenth Amendment, the defendant is subject to personal jurisdiction when it has certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Defendant may be subject to personal jurisdiction either by way of general or specific jurisdiction.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
[HN7] The Fifth Amendment due process test has no applicability to a case testing personal jurisdiction over a domestic entity or individual in a federal question case where Congress has not provided a statutory basis for nationwide service of process. The Fourteenth, not Fifth, Amendment must be applied in such circumstances.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN8] The defendant is subject to general jurisdiction when it is either domiciled in the forum state, or where the defendant has continuous and systematic general business contacts with the forum.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
[HN9] In order to meet the specific jurisdiction requirements, the court applies the test articulated in Reimer Express World Corp., to (1) identify the contacts the defendant has with the forum; (2) analyze whether these contacts meet constitutional minimums; (3) whether exercising jurisdiction on the basis of these minimum contacts sufficiently comports with fairness and justice; and (4) determine whether the sufficient minimum contacts, if any, arise out of or are related to the causes of action involved in the suit.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Purposeful Availment
[HN10] In considering whether defendant's alleged contacts meet the constitutional minimum for purposes of personal jurisdiction, the court will consider whether defendant has done some act or consummated some transaction with the forum state, or performed some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Computer & Internet Law > Trademark Protection > Civil Infringement Actions > General Overview
Trademark Law > Infringement Actions > General Overview
[HN11] In trademark infringement cases where part of the alleged wrongful conduct involves Internet activities, courts consider both the traditional effects analysis, as well as the more recently articulated sliding scale analysis to determine whether personal jurisdiction should be exercised.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
Computer & Internet Law > Internet Business > General Overview
[HN12] Under the sliding scale test to determine personal jurisdiction, the court weighs the nature and quantity of the Internet activities in evaluating evidence of minimum contacts. Three categories of Internet activity have been described: whether the defendant conducts business over the Internet through its active website, whether the defendant maintains an interactive website, or whether the defendant maintains a passive website without any interactive element. Courts generally exercise jurisdiction where an active site exists and do not exercise jurisdiction for passive sites. With respect to interactive sites, the middle category, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website between the user and the host computer.

Civil Procedure > Jurisdiction > General Overview
Computer & Internet Law > Civil Actions > Jurisdiction > Constitutional Requirements
Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
[HN13] Personal jurisdiction is typically determined based not only on a defendant's Internet activities but also on its non-Internet activities.

Civil Procedure > Jurisdiction > General Overview
Torts > Procedure > Commencement & Prosecution > Personal Jurisdiction
Trademark Law > Infringement Actions > Jurisdiction > Personal Jurisdiction
[HN14] Under the traditional effects doctrine test for determining personal jurisdiction in trademark infringement cases, which sound in tort, the court considers whether (1) the defendant's intentional tortious actions, (2) expressly aimed at the forum state, and (3) causes harm to the plaintiff in the forum state, of which the defendant knows is likely to be suffered.

Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview
Computer & Internet Law > Trademark Protection > Protection of Rights > Internet Domain Names
Trademark Law > Subject Matter > Names > Internet Domains
[HN15] Simply registering someone else's trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another. There must be something more to demonstrate that the defendant directed his activity toward the forum state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Civil Procedure > Venue > Federal Venue Transfers > Improper Venue Transfers
[HN16] Even though defendant is not subject to personal jurisdiction and venue is improper, the court may consider whether the transfer of venue to another district is in the interest of justice under *28 U.S.C.S. § 1406*(a).

COUNSEL: For WATCHWORKS, INC., plaintiff: Orrin Sherwood Shifrin, Joni S. Jacobsen, Sarah Elizabeth Smith, Katten, Muchin & Zavis, Chicago, IL.

For TOTEL TIME INC., defendant: Wesley Otto Mueller, Andrea Maria Augustine, Leydig, Voit & Mayer, Ltd., Chicago, IL.

JUDGES: JOAN HUMPHREY LEFKOW, United States District Judge.

OPINION BY: JOAN HUMPHREY LEFKOW

OPINION:

MEMORANDUM OF OPINION AND ORDER

Defendant Total Time, Inc. ("Total Time") moves to dismiss the complaint of plaintiff, Watchworks, Inc. ("Watchworks"), under *Rule 12(b)(2) of the Federal Rules of Civil Procedure* for lack of personal jurisdiction.

and under Rule 12(b)(3) for improper venue. In the alternative, defendant moves under *28 U.S.C. § 1404* to transfer venue to the Central District of California. The complaint alleges that defendant is liable for trademark infringement under § 32(1) of the Lanham Act, *15 U.S.C. § 1141*(1), [*2] false designation of origin under § 43(a) of the Lanham Act, *15 U.S.C. § 1125*(a), unfair competition under California and Illinois common law, and Deceptive Trade Practices under *815 ILL. COMP. STAT. 510/1 et seq.* and 505/1 *et seq.* and the *CAL. BUS. & PROF. CODE § 17200*. For the reasons set forth below, the court grants defendant's motion to dismiss on the basis that it lacks personal jurisdiction over Total Time.

[HN1] In deciding a motion to dismiss for lack of personal jurisdiction, the court must take as true any jurisdictional allegations asserted by the plaintiff in the complaint; the defendant, however, may controvert these allegations with affidavits. *Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987)*. The court must resolve any conflicts of fact in favor of the plaintiff. *John Walker & Sons, Ltd. v. DeMert & Doughtery, Inc. et al., 821 F.2d 399, 402 (7th Cir. 1987)*, citing *Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1215 (7th Cir. 1984)*.

FACTS

Plaintiff is in the business of purchasing, repairing and selling fine watches. (Dec. of H. Terzian.) Since its formation [*3] as an Illinois corporation in 1978, plaintiff has had its principal place of business in the "world-renowned" Water Tower Place shopping mall located on Chicago's famous Magnificent Mile. (*Id.*) Each year, approximately 20 million shoppers visit Water Tower Place, and approximately 10 million of these shoppers are from outside Chicago. (*Id.*) Since its formation in 1978, plaintiff has used the mark "Watchworks" as a trademark in connection with its watch business and, throughout this time, plaintiff has continuously and extensively promoted the "Watchworks" mark in Illinois and throughout the United States. Plaintiff is also the owner of a federal trademark registration for "Watchworks" for use with watches (Reg. No. 1,493,033). (Pl. Resp. at p. 1.)

Defendant has been in the watch business since 1988 and operates eleven retail stores in Southern California with its sister corporation, Top Time, Inc. From 1988 through 1993, each of defendant's stores was marketed under the "Total Time" trademark. (Pl. Resp. at p. 3.) Six of its stores now operate under the name "Watch Works" and five of them operate under the name "Total Time." The stores sell watches, clocks, jewelry and other [*4] gift items, are located in various malls throughout southern California, and offer on-site repair services for various types of watches and clocks.

Defendant states that it first became aware of plaintiff on or about October 2000, when plaintiff filed a request for extension of time to oppose a trademark application for the mark "Watch Works by Total Time," filed by Total Time. Plaintiff, to the contrary, states that sometime in 1993, one of the principals of defendant with the last name Tatoulian came into the Watchworks store at the Water Tower Place shopping mall. n1 Tatoulian spoke with Harout Terzian, the Manager of Watchworks. Tatoulian advised Terzian that he had a similar store in California under the name of "Total Time" and he asked to be shown around the Watchworks store. The next year, in February 1994, defendant began opening stores under the name "Watchworks." Since that time, Terzian alleges that he has had several more conversations with Tatoulian and other employees of defendant regarding the Watchworks store in Water Tower Place.

n1 Defendant represents that the only employees of defendant with the last name Tatoulian are Ishkhan Tatoulian, Ara Tatoulian, and John Asbed Tatoulian. Each of these individuals attests that he was not in Chicago in 1993 and was not aware of any watch stores in Illinois under the name "Watchworks" until plaintiff filed an opposition to defendant's trademark application. (See Def. Reply at p. 2.) Because the facts are in dispute, the court must accept plaintiff's version as true.

[*5]

According to defendant, it does not and has never owned, operated, or had any affiliation or connection with any stores or businesses anywhere in Illinois. It is not now nor has it ever been incorporated in Illinois, manufactured any product in Illinois, had any business of any kind in Illinois, had an agent on whom service could be made in Illinois, solicited or advertised its products in Illinois, provided services of any kind in Illinois, maintained an office in Illinois, owned any real or personal property in Illinois, employed any employees or agents in Illinois, been required to or paid any taxes in Illinois, or performed any contracts or maintained any bank accounts in Illinois. In response, plaintiff points to defendant's catalog distribution and its website as the means by which defendant has established contacts within Illinois.

A potential client may receive a catalog of defendant's products in one of three ways: at one of defendant's eleven stores, in GQ magazine's West Coast distribution throughout southern California and southern Nevada, and at defendant's "watchworksonline.com" and "totaltimeonline.com" Internet website, which defendant

owns and operates. As of August 20, 2001, defendant [*6] received 45 e-mail requests for a catalog and only one was from an Illinois addressee. n2 Defendant cannot sell products or otherwise transact business via its Internet website because it has sales agreements with many of its watch and clock suppliers which specifically prohibit it from doing so. Defendant advertises itself on its website as "Southern California's Premier Watch Experts."

> n2 Defendant alleges that one additional request, which was made on July 23, 2001, was not fulfilled because it does not conduct business in Illinois. (Dec. of J.A. Tatoulian P 8.)

Defendant's website publishes telephone numbers, including toll-free numbers, by which users can call defendant and purchase watches over the phone and have them shipped. Besides providing users with the opportunity to join its mailing list online or to become a "preferred customer," defendant provides users with an e-mail address inviting them to communicate with it regarding sales, services, corporate gifts, or submit questions or comments. Furthermore, [*7] defendant states on its website,

> Watchworks corporate gift specialists work with clients throughout the United States. To learn more about what a Watchworks Corporate Account can offer your company, please fill out the form below or call toll-free (866) 20WATCH

During its thirteen years in business, defendant shipped only two Swiss Army brand watches, each valued at $ 130, to the same individual in Illinois, who defendant later discovered was an investigator commissioned by plaintiff. The investigator was able to order and receive two watches as well as a catalog using defendant's website and the toll-free number listed on the site. Nevertheless, the manager of defendant's Brea Mall store, which is named "Watchworks," represented to the investigator that defendant could ship watches anywhere in the United States and that she regularly sells and ships watches to customers in Chicago and the midwestern United States. Defendant, however, now has a policy against shipping anything into or through Illinois and has a policy to continue to abstain from doing business of any kind whatsoever with anyone or any company in Illinois. (Dec. of I. Tatoulian P 32.)

DISCUSSION [*8]

[HN2] "The plaintiff bears the burden of demonstrating personal jurisdiction." *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 939 (7th Cir. 2000)*, citing *RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997)*. In order to meet this burden, the plaintiff must provide sufficient evidence to establish a prima facie case of personal jurisdiction. *Michael J. Neuman & Assocs., Ltd. v. Florabelle Flowers, Inc., 15 F.3d 721, 724 (7th Cir. 1994)*. In a federal question case, the court's assertion of personal jurisdiction must satisfy the due process requirements familiarly characterized as "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154*, quoting *Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)*. n3 and the defendant must be amenable to service of process. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd. 484 U.S. 97, 104, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987)* ("Before a court [*9] may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons.").

> n3 In *International Shoe Co.*, the court applied the due process clause of the Fourteenth Amendment to a question whether defendant, a non-citizen of Washington, was within the personal jurisdiction of a Washington state court.

[HN3] Amenability to service derives from *Federal Rule of Civil Procedure 4(k)(1)*, which provides that service is effective to establish jurisdiction over the person of a defendant "(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or . . . (D) when authorized by a statute of the United States." [HN4] The Lanham Act, which governs this trademark dispute, does not provide for nationwide service of process. *see 15 U.S.C. § 1121;* [*10] *McMaster-Carr Supply Co. v. Supply Depot, Inc., 1999 U.S. Dist. LEXIS 9559*, No. 98 C 1903, *1999 WL 417352*, at *2 (N.D. Ill. June 16, 1999), so Total Time's amenability to service is governed by the Illinois long arm statute, *735 ILL. COMP. STAT. 5/2-209(a)*. *See LFG, LLC v. Zapata Corp., 78 F. Supp. 2d 731, 735 (N.D. Ill. 1999)*.

[HN5] Illinois' long arm statute provides for jurisdiction over a defendant who performs enumerated acts in connection with tort or contract, and further allows the exercise of personal jurisdiction on "any . . . basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." *735 ILL. COMP. STAT. 5/2-209(c)*, n4 Because the statute allows the ex-

ercise of personal jurisdiction to the constitutional limits, "the statutory analysis collapses into a due process inquiry, and [the courts] need not consider whether [the defendant] engaged in any of the acts enumerated under the long-arm statute." *E.g., LFG, LLC, 78 F. Supp. 2d at 735*, citing *Dehmlow v. Austin Fireworks, 963 F.2d 941, 945 (7th Cir. 1992)); see RAR, Inc., 107 F.3d at 1276.*

n4 In considering whether personal jurisdiction comports not only with the federal Constitution but also the Illinois Constitution, defendant sets out that "the Illinois constitution also requires the court to inquire whether it is 'fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.'" (See Mem. of Law in Support of Def. Total Time Inc.'s Mot. to Dismiss or in the Alternative to Transfer Venue at p. 6). This statement is from the Illinois Supreme Court's decision in *Rollins v. Ellwood, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316, 152 Ill. Dec. 384 (1990).* In examining that statement made in *Rollins*, however, the court in *RAR, Inc., 107 F.3d at 1276*, determined that "we have scant case law with which to work" as to interpreting that statement. Like the court in *RAR, Inc.*, this court will "move on to address the federal constitutional issues directly." *Id. at 1277; see Reimer Express World Corp., 230 F.3d at 940; but see Glass v. Kemper Corp., 930 F. Supp. 332, 340-42 (N.D. Ill. 1996)* (court considered due process principles under the Illinois Constitution prior to the court's decision in *RAR, Inc., 107 F.3d at 1276.).*

[*11]

[HN6] Under the due process clause of the Fourteenth Amendment, n5 the defendant is subject to personal jurisdiction when it has "certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *RAR, Inc., 107 F.3d at 1277*, quoting *International Shoe Co., 326 U.S. at 316 (1940)*, (internal citations and quotations omitted). Defendant may be subject to personal jurisdiction either by way of general or specific jurisdiction. *E.g., id.*

n5 Some cases indicate that in a federal question case the Fifth Amendment due process clause applies and is satisfied if the defendant passes a threshold of "minimum contacts" with the United States, *e.g., McMaster-Carr Supply Co., 1999 U.S. Dist. LEXIS 9559, 1999 WL 417352*, at *2, citing to *United States v. de Ortiz, 910 F.2d 376, 381 (7th Cir. 1990)*, and then proceed to analyze whether under the Illinois long arm statute, the "minimum contacts" test of *International Shoe Co.*, a Fourteenth Amendment due process standard, is met. The Fifth Amendment language derives from cases involving personal jurisdiction over foreign nationals or foreign corporations, *e.g., United Rope Distribs. v. Seatriumph Marine Corp., 930 F.2d 532, 535-36 (7th Cir. 1991)*, and has also been used in instances where Congress by statute has authorized nationwide service of process.

The court in *de Ortiz*, for example, cites *Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671-72 (7th Cir. 1987)*, and *Fitzsimmons v. Barton, 589 F.2d 330, 332-35 (7th Cir. 1979)*, for the proposition that in federal question cases "due process requires only that each party have sufficient contacts with the United States as a whole rather than any particular state or other geographic area," noting that *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd. 484 U.S. 97, 102 n.5, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987)*, specifically did not decide that issue to the contrary. The courts in *Lisak* and *Fitzsimmons*, however, relied on a statutory provision for nationwide service of process in reaching their decisions rather than a doctrine that minimum contacts with the United States is all that due process requires in a federal question case. As explained in *Lisak, 834 F.2d at 671*, "Service of process is how a court gets jurisdiction over the person," and the court rejected an argument that a statute providing for nationwide service of process would violate due process if minimum contacts with the forum state were lacking. *De Ortiz* also determined that there was an implicit statutory basis for nationwide service of process. *910 F.2d at 382* (Title *21 U.S.C. § 853(l)* "underscores the court's jurisdiction to enforce a forfeiture regardless of the location of the property and therefore, by implication, over persons who possess the property but reside outside the state or district in which the court is found.").

[HN7] The Fifth Amendment due process test has no applicability to a case testing personal jurisdiction over a domestic entity or individual in a federal question case where Congress has not provided a statutory basis for nationwide service of process. *See L.H. Carbide Corp. v. Piece Maker Co., 852 F. Supp. 1425, 1431 (N.D. Ind.*

> *1994)* (The Fourteenth, not Fifth, Amendment must be applied in such circumstances.).

[*12]

A. Whether defendant is subject to general jurisdiction

[HN8] The defendant is subject to general jurisdiction when it is either domiciled in the forum state, *see Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824, 833 (N.D. Ill. 2000)*, or "where the defendant has continuous and systematic general business contacts with the forum[,]" *RAR, Inc., 107 F.3d at 1277*, quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)* (internal quotations omitted). Plaintiff argues that defendant is subject to general jurisdiction based on its website, which states that it "work[s] with clients throughout the United States" under the name "Watchworks," and an admission by the manager of defendant's Brea Mall store that she regularly sells and ships watches to customers in Chicago and the midwestern United States. (Pl.'s Opp'n to Mot. to Dismiss or in the Alternative to Transfer Venue at p. 4.) In response, defendant relies on the court's decision in *Euromarket Designs, Inc., 96 F. Supp. 2d at 833*, in which the court held that it lacked [*13] general jurisdiction over the defendant, stating, "The defendant's mere maintenance of an Internet website is not sufficient activity to exercise general jurisdiction over the defendant" even though the defendant made several sales through its website to Illinois residents and it had contacts with Illinois suppliers. (See Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss or in the Alternative to Transfer Venue at p. 3.)

The court agrees with defendant that plaintiff has failed to establish that defendant is subject to general jurisdiction. It is undisputed that defendant's stores are located in the southwest United States. Other than a mere visit by a principal of defendant to plaintiff's store at Water Tower Place, there is no indication that defendant has ever owned, operated, or had any affiliation or connection with any stores or businesses anywhere in Illinois. It is not now nor has it ever been incorporated within Illinois, manufactured any product in Illinois, had an agent upon whom service could be made in Illinois, provided services of any kind in Illinois, maintained an office in Illinois, owned any real or personal property in Illinois, employed any employees or agents [*14] in Illinois, been required to or paid any taxes in Illinois, or maintained any bank accounts in Illinois. *See Millennium Enter., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 910 (D. Or. 1999)*. There is no evidence from which a fair inference can be drawn that Total Time has continuous and systematic general business contacts within Illinois. *See id.*

B. Whether defendant is subject to specific jurisdiction

[HN9] In order to meet the specific jurisdiction requirements, the court applies the test articulated in *Reimer Express World Corp., 230 F.3d at 942-43*, to

> . . . (1) identify the contacts the defendant has with the forum; (2) analyze whether these contacts meet constitutional minimums . . . [(3)] whether exercising jurisdiction on the basis of these minimum contacts sufficiently comports with fairness and justice; [and (4)] determine whether the sufficient minimum contacts, if any, arise out of or are related to the causes of action involved in the suit.

See, e.g., Euromarket Designs, Inc., 96 F. Supp. 2d at 834. n6

> n6 Both parties rely on a different three step test applied by several district courts and the ninth circuit. This test provides that:
>
> > 1) The defendant must have sufficient minimum contacts with the forum state, that is, he must do some act or consummate some transaction with the forum state, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws; 2) The claim asserted must be one which arises out of or results from the defendant's forum related activities; and 3) the exercise of jurisdiction must be reasonable.
>
> *E.g., Euromarket Designs, Inc., 96 F. Supp. 2d at 834.* That three step test may be incorporated under the test of *Reimer Express World Corp., 230 F.3d at 942-43*, as that court took into account the same standards.

[*15]

1. Whether defendant has contacts with the forum

Again, plaintiff points to Total Time's Internet-related activities via a website registered under the domain names "watchworksonline.com" and "totaltimeonline.com" in which an individual can obtain defendant's toll-free number and call defendant, order a catalog or one of its products and have it shipped to Illinois. Other alleged contacts include one of defendant's employees visiting plaintiff's store in 1993, coincidentally opening stores under the name Watchworks in 1994, defendant being aware of plaintiff's opposition to its application for a registered trademark in 2000, and a sale and shipment to plaintiff's investigator in Illinois.

2. Whether these contacts meet constitutional minimums

[HN10] In considering whether defendant's alleged contacts meet the constitutional minimum, the court will consider whether defendant has done "some act or consummated some transaction with the forum state, or performed some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws[.]" *Euromarket Designs, Inc., 96 F. Supp. 2d at 834.* [*16] [HN11] In trademark infringement cases where part of the alleged wrongful conduct involves Internet activities, courts consider both the traditional "effects" analysis, as well as the more recently articulated "sliding scale" analysis. *See id. at 835.*

[HN12] Under the sliding scale test, the court weighs the nature and quantity of the Internet activities in evaluating evidence of minimum contacts. *E.g. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)* ("Our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles."). Three categories of Internet activity have been described: whether the defendant conducts business over the Internet through its active website, whether the defendant maintains an interactive website, or whether the defendant maintains a passive website without any interactive element. *E.g. School Stuff, Inc. v. Sch. Stuff, Inc., 2001 U.S. Dist. LEXIS 23382,* No. 00 C 5593, *2001 WL 558050,* at *3 (N.D. Ill. May 21, 2001). [*17] Courts generally exercise jurisdiction where an active site exists and do not exercise jurisdiction for passive sites. *LFG, LLC, 78 F. Supp. 2d at 736.* With respect to interactive sites, the middle category, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website[,]" *id.; Zippo Mfg. Co., 952 F. Supp. at 1124,* between the user and the host computer. *School Stuff Inc., 2001 WL 558050,* at *3.

Despite defendant's initial assertion that its website is passive, plaintiff demonstrates that defendant's website is actually an interactive site by which users can send information to defendant's host computer. *See Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1330 (E.D. Mo. 1996).* The website provides users with the opportunity to join its mailing list or become a "preferred customer," and invites users to communicate with defendant regarding its sales, corporate gifts, and to submit questions or comments. n7 Plaintiff argues that the court [*18] has personal jurisdiction over a defendant whose website, like Total Time's, features only contact pages by which users could e-mail the defendant and join its mailing list, citing to several cases, principally *LFG, LLC, 78 F. Supp. 2d at 737, Publications International, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178, 1182-83 (N.D. Ill. 2000),* and *Martiz, Inc., 947 F. Supp. at 1330.*

> n7 Plaintiff further adds that defendant has clients throughout the United States, which includes Illinois, but does not provide any evidence of a client except the purchases of two watches by an investigator.

In response, defendant asserts that plaintiff fails to establish that it specifically targeted Illinois residents, relying on *Transcraft Corp. v. Doonan Trailer Corp., 1997 U.S. Dist. LEXIS 18687, 45 U.S.P.Q.2D (BNA) 1097, 1100 (N.D. Ill. 1997)* and *Trost v. Bauer, 2001 U.S. Dist. LEXIS 10311,* No.01 C 2038, *2001 WL 845477,* at *3 (N.D. Ill. July 24, 2001). In those [*19] cases, the courts found that the defendants were not subject to personal jurisdiction even though their websites were viewable and accessible in Illinois, provided residents of Illinois with toll-free numbers and addresses, provided sales information for the defendants' products and invited residents within Illinois to contact them via telephone or email.

The cited cases reflect that [HN13] personal jurisdiction is typically determined based not only on a defendant's Internet activities but also on its non-Internet activities. *See, e.g., Publications Int'l, Ltd., 121 F. Supp. 2d at 1182-83.* For example, in *Publications International, Ltd.*, the court held that the defendant was subject to personal jurisdiction where, similarly to the situation in *Martiz, Inc.*, it maintained a website in which Illinois users who access the site could complete a form request for a catalog and submit it directly to the defendant. As defendant points out, however, the court in *Publications*

International, Ltd. further found that the defendant extensively distributed the infringing materials in Illinois. n8 Thus, as the court did in *McMaster-Carr Supply Co., 1999 U.S. Dist. LEXIS 9559, 1999 WL 417352,* [*20] at *3, this court will refer also to the "effects" analysis to determine whether defendant's contacts meet constitutional minimums.

> n8 As noted earlier, plaintiff also relies on *LFG, LLC, 78 F. Supp. 2d at 737,* and *Martiz, Inc., 947 F. Supp. at 1330.* In *LFG, LLC, 78 F. Supp. 2d at 736-37,* the court weighed in favor of exercising personal jurisdiction, not only emphasizing that defendant's website was actually an Internet portal but also that 25 Illinois residents requested to be placed on defendant's mailing list. In *Maritz, Inc., 947 F. Supp. at 1330, 1333,* the court had evidence that defendant was targeting plaintiff and Missouri because defendant's website had been accessed at least 311 times in Missouri, 131 times presumably by regular Missouri residents and 180 times by the plaintiff and its employees. Here, plaintiff provides evidence only of Terzian and its investigator accessing the website and no evidence of other Illinois residents accessing the website or requesting that it be placed on defendant's mailing list. Furthermore, as set forth in the text, the court examines the content of defendant's website and determines that defendant distinguishes itself as a Southern California retailer on its website.

[*21]

[HN14] Under the traditional effects doctrine test in trademark infringement cases, which sound in tort, *Bunn-O-Matic Corp. v. Bunn Coffee Serv. Inc., 1998 U.S. Dist. LEXIS 7819, 46 U.S.P.Q.2D (BNA) 1375, 1377 (C.D. Ill. 1998),* the court considers whether "1) the defendant's intentional tortious actions 2) expressly aimed at the forum state 3) causes harm to the plaintiff in the forum state, of which the defendant knows is likely to be suffered." *Euromarket Designs, Inc., 96 F. Supp. 2d at 835,* citing *Calder v. Jones, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984).* In *McMaster-Carr Supply Co., 1999 U.S. Dist. LEXIS 9559, 1999 WL 417352,* at *3, the court ruled (in part) that even though defendant maintained only a passive website under the same domain name as plaintiff's mark, the domain name and site in combination infringed. The court distinguished *Transcraft Corp.* on the facts, stating that the defendant "has not only just promoted the sale of an allegedly infringing product on-line; the on-line activity itself is the alleged infringement." Further, the court found that any additional "entry" requirement could be based on the defendant's [*22] intentional registration of the plaintiff's trademark, explaining,

> Supply Depot intentionally registered MCS's mark as its domain name, an act that it knew would harm Illinois-based MCS in Illinois, its principal place of business. The targeting of MCS in Illinois is the something more, the entrance into the forum, the act beyond just establishing the web site that makes it reasonable for Supply Depot to anticipate being haled into court in Illinois. Indeed, this fact makes *Cybersell [v. Cybersell, Inc., 130 F.3d 414, 415 (9th Cir. 1997)* distinguishable, and creates a strong resemblance between this case and *Panavision [International, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).* Just as in *Panavision*, here Defendant directed activity toward the forum state by its allegedly improper use on the Internet of a mark registered to a business in that state, which action harmed the business in the forum.

Similarly, in *Panavision International, L.P., 141 F.3d at 1322,* the court held that defendant could not be subject to personal jurisdiction based only on defendant's registering plaintiff's trademark [*23] as a domain name and posting a website but also based on his engaging in a scheme to register the plaintiff's trademark for the purpose of extorting money from the plaintiff. The court specifically stated,

> We agree that [HN15] simply registering someone else's trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another. *Cybersell, 130 F.3d at 418.* As we said in *Cybersell*, there must be "something more" to demonstrate that the defendant directed his activity toward the forum state. *Id.* Here, that has been shown. Toeppen engaged in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision. His conduct, as he knew it likely would, had the effect of injuring Panavision in California where Panavision has its principal place of business and where the movie and television industry is centered. Under the "effects

test," the purposeful availment requirement necessary for specific, personal jurisdiction is satisfied.

Panavision Int'l, 141 F.3d 1316, 1322 (9th Cir. 1998).

With regard to *Euromarket Designs, Inc., 96 F. Supp. 2d at 836,* [*24] in which the court held that Illinois had jurisdiction over a non-resident defendant whose website allegedly infringed the mark of Illinois-based retailer Crate & Barrel, the court also relied on the fact that defendant intentionally targeted the Illinois-based Crate & Barrel, where defendant was aware of the company, its decision to register the retailer's trademark as its domain name was aimed at the forum state, and the defendant should have known that the retailer could be injured in Illinois. n9 Furthermore, the court found that "[defendant] pursued and established vendors and suppliers in Illinois, some of which are also [plaintiff's] suppliers, and attended trade shows in Illinois designed to promote its business in Illinois and the United States, potentially causing confusion between [plaintiff] and [defendant] in the eyes of Illinois vendors suppliers, customers and businesses in Illinois." *Id.*

n9 In arguing that the injury caused by defendant's infringement will be felt by plaintiff in its principal place of business, plaintiff also relies on *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. P'ship, 34 F.3d 410, 411 (7th Cir. 1994),* in which the court found that the defendant's broadcast of its football games in Indiana resulted in an injury that would be felt primarily in Indiana where the trademark owner's principal place of business was located. In disputing that the injury would not be felt in plaintiff's principal place of business, defendant relies on *Transcraft Corp., 45 U.S.P.Q.2D (BNA) at 1100,* in which the court intimated that the court in *Indianapolis Colts, Inc.* relied not only on the defendant's cable broadcast but also considered "the defendant's additional entrance [into the state] in the form of cable broadcasts."

Defendant fails to acknowledge that it knew about plaintiff's trademark as early as October 2000, when plaintiff filed a request for an extensive of time to oppose a trademark application for the mark "Watch Works by Total Time," filed by defendant. Furthermore, as the court is to credit the declaration of Terzian over those of the Tatoulians, defendant may have known of plaintiff as early as 1993. Either way, defendant was well aware that it may be infringing on plaintiff's mark approximately eight months before plaintiff initiated this present litigation. Based on the court's analysis under the sliding scale test, *see Bunn-O-Matic Corp., 46 U.S.P.Q.2D (BNA) at 1377* ("defendant's actions in setting up a website accessible to residents of plaintiff's home state would certainly meet this very low 'entry' threshold."), defendant should have known that its injury might be felt in Illinois, *see Euromarket Designs, Inc., 96 F. Supp. 2d at 836.* On the other hand, plaintiff does not acknowledge that, under *Euromarket Designs, Inc.*, the court should engage in a more lengthy analysis as set forth above.

[*25]

Plaintiff's facts are sparse in comparison to the facts considered by the courts in *Euromarket Designs, Inc., McMaster-Carr Supply Co.* and *Panavision International, L.P.* Unlike these courts, here the court cannot infer from the evidence before it that defendant was intentionally registering and targeting its website at Illinois or Watchworks based on the content of its website. Rather, an individual who accesses the website would learn that defendant directs its business at consumers within its purported market area of southern California.

Moreover, plaintiff relies considerably on its investigator accessing defendant's website and, using toll-free numbers to contact one of defendant's stores in California, purchasing two watches, which were subsequently shipped to the investigator in Illinois, and defendant's manager representing to the investigator that she regularly sells and ships watches to customers in Illinois. These facts, however, suggest the dilemma of manufactured jurisdiction addressed in *Millennium Enterprises, Inc., 33 F. Supp. 2d at 911.* In *Millennium Enterprises, Inc.*, the defendants operated a music store in South Carolina and sold their [*26] products through their retail stores and Internet website. While defendants sold fifteen compact discs to nine separate customers in six states and one foreign country, totaling $ 225, they sold only one of those compact discs to a customer in Oregon. That customer was requested by an attorney associated with the plaintiff to purchase a compact disc from the defendants. The court held that the defendants could not have purposefully availed themselves of the protections of Oregon "when it was an act of someone associated with plaintiff, rather than defendants' product into this forum." n10 *Id.*

n10 The court further concluded that, as the case was one of trademark infringement, the plaintiff could "hardly argue that such action 'caused a likelihood of confusion' regarding plain-

> tiff's and defendants' trade names; [the customer] knew exactly with whom she was dealing and knew that defendants were not associated in any way with plaintiff." *Millennium Enter., Inc., 33 F. Supp. 2d at 911.*

This [*27] court agrees. Despite the manager's representations that she sells and ships to Illinois and defendant's representations on its website that its corporate specialists work with clients throughout the United States, there simply is no hard evidence that in fact defendant has done business in Illinois. Plaintiff has not controverted defendant's representations that other than its Internet website and its stores, its catalogs are available only in GQ Magazine's distribution for southern California and southern Nevada and that throughout its 13-year history, it has only shipped two watches to Illinois (to the investigator). Further, the manager attests that the sale representative who originally answered the investigator's phone call gave that call to the manager because "it was the first time that we had ever received a call from someone outside of California asking to purchase something." (Dec. of A. Gomez P 5.) The evidence before the court is persuasive that defendant is a corporation that owns and operates "brick & mortar" shops and its website is designed to provide information to its customers within its limited market area. (Dec. of I. Tatoulian P 29). Because plaintiff fails to [*28] meet its burden that defendant's contacts meet the minimum contacts necessary to guarantee due process to defendant, the court finds that it lacks jurisdiction over defendant. n11

> n11 As a footnote on the last page of plaintiff's brief, Watchworks asks should the court conclude that it lacks jurisdiction over the defendant, that the court grant it leave to take discovery of facts relevant to jurisdiction. The court denies this request as untimely. Although the court will normally grant discovery of such matters, it is not willing to spend the hours necessary to full and fair consideration of the motion only to find a buried request for discovery when it should have been obvious to plaintiff that discovery might have been needed in order to carry its burden of proof.

C. Defendant's motion to dismiss for improper venue and alternative motion to transfer venue

Defendant further moves this court to dismiss plaintiff's complaint based on improper venue under *28 U.S.C. § 1406*(a), [*29] or, in the alternative, requests that should the court decide that it has jurisdiction over it, that the court transfer venue to the Central District of California under the provisions of *28 U.S.C. § 1404*. Although it is plain enough that a California court would have jurisdiction over defendant, plaintiff has not urged the court to transfer venue should it not prevail on the jurisdictional issue. *See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67, 8 L. Ed. 2d 39, 82 S. Ct. 913 (1962)* [HN16] (Even though defendant is not subject to personal jurisdiction and venue is improper, the court may consider whether the transfer of venue to another district is in the interest of justice under *28 U.S.C. § 1406*(a)). Thus, it is not clear that plaintiff wishes to litigate in a distant forum, or that California is the only possible forum for plaintiff to pursue the litigation. For these reasons, the court will not consider whether venue is proper or whether to transfer venue.

ORDER

Wherefore, and for the reasons stated above, this court grants defendant's motion to dismiss for lack of personal jurisdiction [# 5-1]. The court [*30] denies defendant's motion to dismiss for improper venue and its alternative motion to transfer venue [# 5-2] as moot. This case is dismissed without prejudice to filing in an appropriate district.

ENTER:

JOAN HUMPHREY LEFKOW

United States District Judge

Dated: March 18, 2002

JUDGMENT IN A CIVIL CASE

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion to dismiss for lack of personal jurisdiction is granted. Defendant's motion to dismiss for improper venue and its alternative motion to transfer venue is denied as moot. This case is dismissed without prejudice to filing in an appropriate district.

Date: 3/18/2002