

IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT AT NASHVILLE

FILED
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BILLY CULLEN, CLAUDETTE CULLEN,
 TRACY CULLEN, JERRY FROELICH,
 DANA BARRETT, KAREN SAWYER, and
 MIKE GREEN,

Plaintiff,

v.

PHILLIP YBARROLAZA and JOHN DOES 1-10,

Defendants.

RICHARD A. RUCKER, CLERK

D.C.

Case No. 04 C 197

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT PHILLIP YBARROLAZA'S
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

NOW COMES defendant, Phillip Ybarrolaza ("Defendant Ybarrolaza"), and respectfully submits this Reply Memorandum in Support of his Motion to Dismiss Plaintiffs' Amended Complaint ("Motion to Dismiss").¹ In further support of his Motion to Dismiss, Defendant Ybarrolaza states as follows:

This Court lacks personal jurisdiction over Defendant Ybarrolaza. In their Response, the Plaintiffs attempt to use arcane precepts to suggest that Defendant Ybarrolaza has somehow waived his right to contest personal jurisdiction. The Plaintiffs' arguments remain unavailing. The Plaintiffs contend that Defendant Ybarrolaza has submitted to the jurisdiction of Tennessee through conduct that constitutes a general appearance. See Response, p. 10 (citing Patterson v.

¹ Defendant Ybarrolaza limits his discussion in this Reply Memorandum to those legal issues raised for the first time in Plaintiffs' Response in Opposition to Defendant Phillip Ybarrolaza's Motion to Dismiss Plaintiffs' Amended Complaint ("Response"). Defendant Ybarrolaza reserves opportunity to respond more fully to the additional legal arguments raised by Plaintiffs at oral argument set for January 28, 2005. Further, Defendant Ybarrolaza objects to the conversion of his motion to dismiss to one of summary judgment. Should the Court

Rockwell Int'l, 665 S.W.2d 96, 99 (Tenn. 1984) (superseded on other grounds)). Plaintiffs contend that through the filing of a Motion for Admission *Pro Hac Vice* of his Chicago counsel, participation of his Chicago counsel in a telephonic agreement to reschedule a court ordered status conference, and completing an order at the conclusion of the rescheduled status conference, Defendant Ybarrolaza has waived his right to challenge personal jurisdiction. See Response, p. 9. The Tennessee Supreme Court expressly disagrees with Plaintiffs. In Landers v. Jones, the Tennessee Supreme Court made explicitly clear:

Initially, we note that there is a modern legal trend away from the technical requirement that a defendant must enter a special appearance to contest personal jurisdiction. For example, both the Federal Rules of Civil Procedure and the Tennessee Rules of Civil Procedure allow a defendant to raise all defenses, including a challenge to the personal jurisdiction of the court, in either a pre-trial motion or in a responsive pleading. See, e.g., Fed. R. Civ. P. 12(b) and Tenn. R. Civ. P. 12.02 ("No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."). Under both the state and federal civil procedure rules, therefore, a defendant is permitted to raise the defense of lack of personal jurisdiction at the same time other defenses are raised. *Waiver occurs only if there is no objection to personal jurisdiction in the first filing, either a Rule 12 motion or an answer.* The authors of Gibson's Suits in Chancery § 146 (6th ed. 1982) have commented in that connection that Rule 12 of the Tennessee Rules of Civil Procedure eliminates a "trap for the unwary." Ld. Wright v. Universal Tire, Inc., 577 S.W.2d 194 (Tenn. App. 1987); see generally 3 Nancy F. MacLean & Bradley A. MacLean, Tennessee Practice, § 12.5 (West 2nd ed. 1989); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1344 and § 1362 (West 1990).

Landers v. Jones, 872 S.W.2d 674, 676 (Tenn. 1994) (emphasis added).²

Here, Defendant Ybarrolaza has not filed an Answer. The Plaintiffs do not suggest anything to the contrary. See Response, pp. 9-10. The motion to dismiss filed on December 8, 2004 represents Defendant Ybarrolaza's first Rule 12 motion. The Plaintiffs do not suggest

consider this, Defendant Ybarrolaza respectfully requests the opportunity to more fully address the factual misrepresentations of Plaintiffs and the arguments related thereto.

² The Plaintiffs also cite Akers v. Gillentine, 231 S.W.2d 372, 376 (Tenn. 1950). In Landers v. Jones, the Tennessee Supreme Court expressly states that Akers relied upon an arcane rule espoused in the "early 1912

anything to the contrary. See id. Consequently, Defendant Ybarrolaza has not engaged in any conduct that has waived his right to challenge personal jurisdiction. See Landers, 872 S.W.2d at 676. Moreover, Defendant Ybarrolaza's local counsel represented to this Court that Defendant Ybarrolaza intended to file a motion to dismiss at the status conference and in the context of discussing the scheduling order entered by the Court. Thus, Defendant Ybarrolaza has not acted inconsistently with his contention that this Court lacks personal jurisdiction over him.

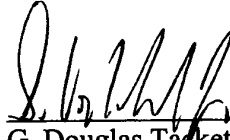
Indeed, Defendant Ybarrolaza resides and lives in California; has never been to Tennessee as of January 26, 2005; operates the website Teamster.net from California; and, does not direct Teamster.net to any specific jurisdiction, particularly Tennessee. See Aff. of Phillip Ybarrolaza, ¶¶ 1-4 (attached hereto as Exhibit A). As Defendant Ybarrolaza did not author the communications at issue (a fact undisputed by Plaintiffs), Defendant Ybarrolaza did not direct the communications to any person, community, or location. Indeed, prior to being contacted by Plaintiffs and/or their counsel, Defendant Ybarrolaza had no knowledge of the specific communications at issue. See id. ¶¶ 5-8. Therefore, Defendant Ybarrolaza has not subjected himself to the jurisdiction of this Court or waived his right to challenge the exercise of personal jurisdiction over him. See Landers, 872 S.W.2d at 676.

This Court lacks personal jurisdiction over Defendant Ybarrolaza. The Plaintiffs have failed to present any persuasive arguments to the contrary. Therefore, the Plaintiffs' Amended Complaint must be dismissed in its entirety as to Defendant Ybarrolaza.

For the foregoing reasons and those in Defendant Ybarrolaza's memorandum in support of his motion to dismiss Plaintiffs' Amended Complaint, Defendant Ybarrolaza respectfully moves this Court to dismiss Plaintiffs' Amended Complaint in its entirety as to him.

decision Rowsey v. Burkhead, 3 Tenn. Civ. App. 361 (1912) that has been superseded by the modern Tennessee Rules of Civil Procedure 12.02." See Landers, 872 S.W.2d at 676-677.

Respectfully submitted,



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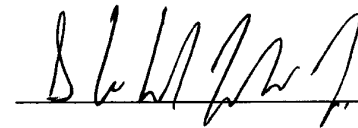
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered, via hand delivery, on this the 26th day of January 2005, to:

James G. Stranch III, Esq.
Branstetter, Kilgore, Stranch & Jennings
227 Second Avenue North
Nashville, Tennessee 37201



FROM : THE CENTRAL OFFICE

FAX NO. : 7075767041

Jan. 26 2005 11:02AM P1

**IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT AT NASHVILLE**

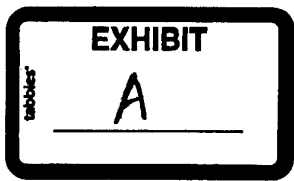
BILLY CULLEN, CLAUDETTE CULLEN,)	
TRACY CULLEN, JERRY FROELICH,)	
DANA BARRETT, KAREN SAWYER, and)	
MIKE GREEN,)	Case No. 04 C 197
)	
Plaintiffs,)	
)	
v.)	
)	Judge Walter C. Kurtz
PHILLIP YBARROLAZA and JOHN DOES 1-10,)	
)	
Defendants.)	

AFFIDAVIT OF PHILLIP YBARROLAZA

I, PHILLIP YBARROLAZA, being duly sworn, do depose and say:

1. I am a citizen of the State of California, am over eighteen (18) years of age, and reside in Petaluma, Sonoma County, California. I am qualified and competent to testify as to the matters asserted herein, if so called.
2. As of this date, I have never been to Tennessee.
3. I operate the website Teamster.net from California.
4. I do not direct Teamster.net specifically to residents of Tennessee or any specific jurisdiction. However, Teamster.net is available to anyone in the world with access to the Internet and the World Wide Web.
5. Third-party individuals posted communications on public fora on Teamster.net about the Plaintiffs, including Billy Cullen, that the Plaintiffs claim to be false ("Cullen Communications").

My Commission Expires: 1.14.07



FROM : THE CENTRAL OFFICE

FAX NO. : 7075767041


Jan. 26 2005 11:04AM P1

6. Until the Plaintiffs (I believe through their counsel) contacted me regarding the Cullen Communications, I had no awareness of the Cullen Communications or any specific Cullen Communication.

7. Not being the author of the Cullen Communications, I did not direct the Cullen Statements to any person, community, or location.

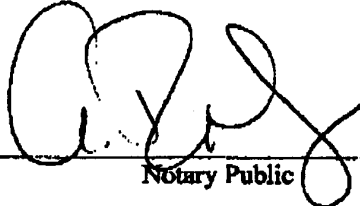
8. By signing below, I hereby attest my signature as verifying the accuracy and truth of the foregoing statements.

Dated at Santa Rosa, CA. this 26 day of January 2005.

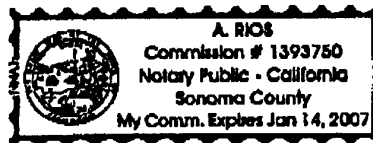

Phillip Ybarrolaza

STATE OF CALIFORNIA)
) SS:
COUNTY OF SONOMA)

Subscribed and sworn to before me this 26th day of January 2005, by Phillip Ybarrolaza.



Notary Public



My Commission Expires: 1.14.07