IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

RUDE MUSIC, INC.,	)	
Plaintiff,	)	Case No. 1:12-cv-00640-(MFK)
	)	
v.	)	Judge Kennelly
	)	Magistrate Judge Finnegan
NEWT 2012, INC., *et al.*,	)	
Defendants	)	

REPLY OF THE AMERICAN CONSERVATIVE UNION
TO PLAINTIFF'S RESPONSE TO ACU'S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION

The Response of Plaintiff Rude Music, Inc. confirms that the Motion of the American Conservative Union ("ACU") to dismiss for lack of personal jurisdiction should be granted. Plaintiff did not plead any basis for invoking the Illinois long-arm statute, nor did it possess such a basis. ACU does not have the type of continuing, systematic, and substantial contacts with Illinois necessary to satisfy the demanding standard governing general presence for purposes of all claims. Nor does Plaintiff's specific claim—copyright infringement from the posting of two videos on its website of events occurring in Washington, D.C.—arise from acts by which ACU purposefully availed itself of the privileges and benefits of doing business in Illinois. Plaintiff did not make the *prima facie* factual showing of jurisdiction necessary to obtain discovery, nor would jurisdictional discovery produce anything but burden and delay. The Court should reject Plaintiff's request to engage in discovery concerning immaterial facts and dismiss the Complaint as to ACU.

I. Plaintiff's Failure to Plead Prima Facie Facts Requires Dismissal.

Plaintiff makes no attempt to show that the Complaint pleads a factual basis for long-arm jurisdiction. Plaintiff also does not dispute the showing in ACU's Memorandum (at 2-3) that the failure to plead such facts is a fatal threshold defect. Thus, Plaintiff ignores *McIlwee v. ADM*

Indus., Inc., 17 F.3d 222, 223 (7th Cir. 1994), cited in ACU's Memorandum for the principle that "[t]he threshold step [is] whether plaintiff has alleged . . . acts enumerated in the state's long-arm statute."

Although the general rule is that a federal complaint "need not include facts alleging personal jurisdiction," and cases may be found relying on that rule in long-arm cases without addressing whether such reliance makes a difference (see *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003)), abundant authority in the Seventh Circuit and elsewhere holds that a plaintiff seeking "to bring a defendant into federal court under a state long-arm statute . . . must first set forth sufficient facts in the complaint" to justify jurisdiction if true. 4 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1067.6.[1]

Plaintiff here seeks to rely on the Illinois long-arm statute. Plaintiff's failure to plead a factual basis for applying that statute requires dismissal at the threshold.

II. Plaintiff Fails to Establish a *Prima Facie* Basis for Jurisdictional Discovery.

Plaintiff does not claim that it possessed but neglected to plead a basis for long-arm jurisdiction. Instead, Plaintiff asserts ACU's motion papers create an "ambiguity or uncertainty" that justifies discovery to see if jurisdiction might exist.

The Seventh Circuit, however, has squarely held that "a *prima facie* case for personal jurisdiction . . . is required before [plaintiff] is allowed to conduct discovery" on personal

[1] Noting that the state long-arm context is an exception from the general rule that personal jurisdiction need not be pleaded and collecting extensive authority in footnote 14. See also *Turnock v. Cope*, 816 F.2d 332, 334 (7th Cir. 1987) ("[T]o establish jurisdiction under the long-arm statute, the plaintiff must allege jurisdictional facts. . . ."); *Hutter N. Trust v. Door Cnty. Chamber of Commerce*, 403 F.2d 481, 486 (7th Cir. 1968) (third-party complaint subject to dismissal because "[n]owhere therein does the plaintiff make reference to any Illinois acts").

jurisdiction. *Cent. States Se. and Sw. Areas Pension Fund v. Phencorp Reinsurance Co., Inc.,* 440 F.3d 870, 877 (7th Cir. 2006).

Plaintiff has not made the required *prima facie* showing. All it musters is speculation about the number of ACU's Illinois members, but that issue is put to rest by the Supplemental Keller Affidavit attached hereto. More fundamentally, the following discussion demonstrates that even if Plaintiff's speculation were credited as fact, there would still be an insufficient *prima facie* basis for personal jurisdiction here.

III. Plaintiff Makes No *Prima Facie* Showing of General Jurisdiction.

Plaintiff does not deny that ACU's office, personnel, and key operations all are in Washington, D.C. It does not assert that ACU owns property, maintains any facility, or otherwise has an ongoing physical presence in Illinois. None of the conventional grounds for general personal jurisdiction are alleged.

Instead, Plaintiff claims general personal jurisdiction may exist because of ACU's website, Illinois members and financial supporters, a brief ACU ad campaign in one Illinois race for federal office, new ACU plans for a future meeting in Illinois this June, and ACU's announced intention to track the voting records of various state legislators, including those in Illinois. As the attached Supplemental Keller Affidavit shows, Plaintiff's speculations about these activities were mistaken. But Plaintiff's assertions would not establish general jurisdiction here even if they were true.

Plaintiff's reliance on future ACU activities in Illinois is misplaced. General jurisdiction turns on contacts existing at the time the Complaint was filed. See *Cent. States Se. and Sw. Areas Pension Fund, supra,* 440 F.3d at 877, citing *Wild v. Subscription Plus, Inc.,* 292 F.3d 526, 528 (7th Cir. 2002) ("jurisdiction is normally determined as of the date of the filing of the suit").

See also *Klinghoffer v. Achille Lauro Lines*, 937 F.2d 44, 52 (2d Cir. 1991) ("[P]ersonal jurisdiction depends on the defendant's contacts with the forum state at the time the lawsuit was filed."). No ACU meeting in Rosemont had occurred and no Illinois legislator tracking was under way at the time of filing. Sup. Keller Aff. ¶¶5, 7. These future ACU activities cannot establish personal jurisdiction over ACU in Illinois with respect to this lawsuit.

Moreover, the same types of assertions Plaintiff makes about ACU's website activities and Illinois supporters often are made in unsuccessful attempts to establish that colleges and universities are generally present outside their home states. Many colleges and universities actively recruit students and faculty from across the United States. They have alumni across the country with whom they communicate and from whom they solicit and receive donations. Their students, faculty, and employees travel widely for academic, research, administrative, and competitive purposes. Virtually all have interactive websites available to persons from all states. In addition to providing all sorts of information, such websites typically recruit students and faculty and permit on-line applications. They describe events of all types and often permit on-line registration and ticket purchases. They sell logoed products. They display video of events. And so on.

Yet such contacts do not add up to general personal jurisdiction. Cases concerning general jurisdiction over colleges and universities were comprehensively collected and evaluated just weeks ago in *American Univ. Sys. v. American University*, 2012 WL 847035, *6 - *7 (N.D. Tex. Mar. 13, 2012). There are many such cases, and they typically involve the types of forum contacts just described. Yet "courts have unanimously determined that the institution is not subject to general personal jurisdiction where its only contacts with the forum state are its

involvement in activities that are typical of a nationally prominent university." *Id.* at *6 (emphasis added) (collecting and discussing cases).

This is easy to understand. As the Supreme Court emphasized last June, general personal jurisdiction is proper only where a defendant has such continuing, systematic, and substantial contacts that it is fairly regarded as actually "at home" so that it may be sued there on any claim, regardless of where it arose. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851, 2854 (2011) ("A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state." (citation omitted)). See also *uBid, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 426 (7th Cir. 2010) (General jurisdiction "is a demanding standard that requires the defendant to have such extensive contacts with the state that it can be treated as present in the state for essentially all purposes."); *Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010) ("The threshold for general jurisdiction is high; the contacts must be sufficiently extensive and pervasive to approximate physical presence."); *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) ("These contacts must be so extensive to be tantamount to [the defendant] being constructively present in the state . . . ."). It would be absurd to suggest that the types of Illinois contacts alleged by Plaintiff should render ACU subject to suit in Chicago for any claim arising anywhere.

Plaintiff relies (at 5) on cases that invoke the so-called "sliding scale" approach to websites and personal jurisdiction. See *George S. May Intern. Co. v. Xcentric Ventures, LLC,* 409 F.Supp.2d 1052 (N.D. Ill. 2006). The Seventh Circuit, however, has repudiated that doctrine. See *Illinois v. Hemi Group LLC,* 622 F.3d 754, 758 (7th Cir. 2010) ("Although several other circuits have explicitly adopted the sliding scale approach, our court has expressly declined

to do so." (internal citation omitted)); *Tamburo v. Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010) ("[W]e hesitate to fashion a special jurisdictional test for Internet-based cases."). And other courts in the Circuit have specifically rejected the general jurisdiction reasoning of *George S. May*. See *uBid, Inc. v. GoDaddy Group, Inc.*, 673 F.Supp.2d 621, 627 n.2 (N.D. Ill. 2009) (holding that no general jurisdiction exists because the court "does not agree with the reasoning" of *George S. May*), *aff'd in relevant part,* 623 F.3d 421, 425 (7th Cir. 2010) (affirming the denial of general jurisdiction but finding specific jurisdiction).[2]

In short, general personal jurisdiction does not exist here.

IV. Nor Does Plaintiff Make a *Prima Facie* Showing of Specific Jurisdiction.

Plaintiff disavows (at 6-7) the type of specific jurisdiction that arises when a defendant expressly aims to cause injury in the forum. Indeed, Plaintiff makes no claim that ACU knew there might be a copyright issue with *Eye of the Tiger* or that a possible owner of the copyright was located in Illinois.

Instead, Plaintiff asserts (at 7) that personal jurisdiction exists under a purposeful availment theory. Plaintiff does not question that, as discussed in ACU's Memorandum (at 5), to prevail on that theory Plaintiff must (1) identify ACU forum contact(s) that its infringement claim "arises out of or [is] related to," and then (2) show that those specific contacts were ones "by which [ACU] purposefully avail[ed] itself of the privilege of conducting activities within the

[2] Plaintiff also asserts (at 5) the fact that some ACU members reside in Illinois is important to the jurisdictional analysis. But the residence of corporate shareholders—or even a controlling shareholder and officer—is irrelevant to jurisdiction over the corporation. *Stutzman v. Rainbow Yacht Advent., Ltd.*, 2007 WL 415355, *10 (N.D. Tex. Feb. 7, 2007); *Duravest, Inc. v. Vizcards, A.G.*, 581 F.Supp.2d 628, 636 n.6 (S.D.N.Y. 2008) (no known case relies on the residence of shareholders). Members of non-profit corporations provide even less basis for personal jurisdiction of the entity.

forum State, thus invoking the benefits and protections of [the State's] laws." *Id.* (citations omitted). Plaintiff does neither.

Plaintiff refers to two sets of contacts with Illinois. First, it makes the conclusory assertion that ACU committed "distribution of the infringing video . . . within Illinois." Second, it says that ACU "cultivates members and donors within Illinois, promotes Illinois candidates, targets liberal activists within Illinois, tracks the performance of Illinois state legislature, and is staging a conference in Rosemont in June."

The allegation of distribution in Illinois is too vague and abstract to be meaningful. What video does it refer to (the Complaint mentions at least two)? How, when, and to whom did ACU "distribute" the video in Illinois? Apparently this is merely an advocate's way of saying ACU posted allegedly infringing videos on a website that was available to everyone in the world, including persons in Illinois. But in making those postings ACU did not invoke the benefits and protections of Illinois law. It is uncontroverted that a plaintiff cannot establish specific jurisdiction "by simply showing that the defendant maintained a website accessible to residents of the forum state and alleging that the defendant caused harm through the website." *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 446 (7th Cir. 2010). See also *be2 LLC v. Ivanov,* 642 F.3d 555, 558 (7th Cir. 2011) ("If the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution."). Thus, the website postings cannot support personal jurisdiction here.

The second set of ACU's supposed contacts with Illinois are a vague jumble that bear no relationship to the website postings that are the subject of Plaintiff's infringement claims against

ACU. Some are mere future plans (for an ACU meeting or an assessment of legislators) that cannot support personal jurisdiction of a Complaint filed months ago. See *supra* at 3. But the overarching fact is that Plaintiff's infringement claim simply does not arise from or relate to any of these alleged contacts. Thus, these alleged contacts also cannot support specific personal jurisdiction of the infringement claim.

Defendants say this case is most analogous to *Illinois v. Hemi Group LLC*, 622 F.3d 754 (7th Cir. 2010). In fact, the differences between this case and *Hemi* make clear why personal jurisdiction is lacking here. In *Hemi*, the defendant sold cigarettes to some states but not others through a website. In placing each order, the customer specified his address. Thus, Hemi knowingly received specific payments from residents of Illinois and, in response, shipped specific products into Illinois. The product, cigarettes, is legal for some purchasers but is highly regulated and taxed. The State's claim was that Hemi had failed to comply with an Illinois law requiring it to give the State information that would allow it to collect cigarette taxes from Illinois purchasers. The Seventh Circuit held that these facts did not establish general personal jurisdiction over Hemi. However, the particular transactions in which it knowingly calculated a state-specific price for each Illinois purchaser, knowingly received payment of that Illinois-specific price from each Illinois customer, and then made extensive commercial shipments into Illinois were held to constitute acts of purposeful availment. Because the duty to report purchases arose directly from the Illinois purchases, specific personal jurisdiction for that claim existed. Plaintiff makes no comparable showing here. It does not show that its infringement claim arises from transactions knowingly and specifically directed to particular recipients in Illinois.

The only other case Plaintiff relies upon directly (at 7-8) is similarly distinguishable. *Dental Arts Lab., Inc.v. Studio 360 The Dental Lab, LLC*, 2010 WL 4877708 (N.D. Ill. Nov. 23, 2010), found specific personal jurisdiction over trademark infringement claims that arose directly out of a defendant's solicitation of orders from Illinois customers, including three regular Illinois customers, knowing acceptance of payment from them, and knowing shipment to them in Illinois, all using the infringing mark. As in *Hemi* (which *Dental Arts* relied upon), the specific claims asserted arose directly from defendant's knowing and purposeful commercial dealings with the forum.

Plaintiff offers two "see also" cites, both of which turn on the *Calder* theory of express aiming that Plaintiff explicitly disavows (at 6-7). *Indianapolis Colts, Inc. v. Metro. Balt. Football Club, Ltd.*, 34 F.3d 410, 411-12 (7th Cir. 1994), involved a long-standing feud triggered by the midnight flight of the Colts NFL football franchise from Baltimore to Indianapolis. When Baltimore got a new team, it was also named the Colts, knowing of the Indiana team's similar mark. *Id.* The Seventh Circuit relied on *Calder* express aiming to find specific personal jurisdiction in Indiana for claims growing out of the knowingly targeted attack on the Indiana plaintiff. By contrast, ACU did not make a knowingly targeted attack on an Illinois plaintiff.

Plaintiff's other "see also" case, *be2 LLC v. Ivanov*, 642 F.3d 555, 558-59 (7th Cir. 2011), held there was no personal jurisdiction because the forum had not been targeted by the defendant. The same result, for the same reasons, should occur here. The *be2 LLC* court said, *id*. at 558, that its ruling was explained by *Tamburo v. Dworkin*, 601 F.3d 693, 702 (7th Cir. 2010). There the Seventh Circuit discusses the *Calder* express aiming standard—the theory Plaintiff has abandoned here.

Because Plaintiff's infringement claim here does not arise from ACU's purposeful availment of the privilege of doing business in Illinois, that claim does not give rise to specific jurisdiction over ACU in this state.

CONCLUSION

Plaintiff invoked the Illinois long-arm statute without pleading or possessing a factual basis for doing so. ACU's motion to dismiss for lack of personal jurisdiction should be granted.

Dated: March 28, 2012

Respectfully submitted,

AMERICAN CONSERVATIVE UNION

By: */s/ Thomas W. Kirby*
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, I electronically filed the foregoing **Reply of the American Conservative Union to Plaintiff's Response to ACU's Motion to Dismiss for Lack of Personal Jurisdiction** via this Court's CM/ECF system, and counsel of record have been served as follows:

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