

EXHIBIT “D”

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United States District Court,
 E.D. Michigan,
 Southern Division.
 PRIDE DISTRIBUTORS, INC., Plaintiff,
 v.
 Anthony NUZZOLO, Defendant.
 No. 05-CV-7441-DT.

April 10, 2007.

MEMORANDUM OPINION AND ORDER

DENISE PAGE HOOD, United States District
 Judge.

I. INTRODUCTION/BACKGROUND

*1 On November 22, 2005, Plaintiff Pride Distributors, Incorporated filed a complaint against Defendant Anthony Nuzzolo seeking declaratory judgment of non-infringement pursuant to 15 U.S.C. § 1114(1) and infringement under 15 U.S.C. § 1116. Plaintiff, a Michigan corporation, manufactures custom game boards which service the fund raising industry. (Complaint, ¶¶ 5-6) Plaintiff advertises and promotes its business under the mark "YOUR TOWN"-OPOLY the "YOUR TOWN" portion identifying the locale in which the boards are distributed. (Complaint, ¶ 6) The names of businesses who bought the advertising space from the fund raising organization are printed on the game boards. (Complaint, ¶ 7) Plaintiff used the "YOUR TOWN"-OPOLY service mark in 1984, receiving a U.S. Trademark Reg. No. 1,574,005 in December 1989. (Complaint, ¶ 8)

Defendant promotes a game board utilizing the trademark "STATENOPOLY" with the U.S. Trademark Reg. No. 2,633,261 registered to Defendant on October 8, 2002. (Complaint, ¶¶ 11-12) Defend-

ant issued a cease and desist letter to Plaintiff on November 10, 2005 claiming that Plaintiff's "STATEN ISLANDOPOLY" game provided to St. Christopher's Elementary School in Staten Island, New York, infringed Defendant's "STATENOPOLY" mark. (Complaint, ¶¶ 13-15)

Plaintiff filed the instant Complaint seeking a declaratory judgment that Plaintiff did not infringe Defendant's mark and to order the cancellation of Defendant's mark. Defendant seeks dismissal under Rule 12(b)(2) of the Rules of Federal Procedure, or, alternatively, a transfer of venue under 28 U.S.C. § 1404(a), claiming that the Court does not have personal jurisdiction over Defendant. Plaintiff filed a response and a hearing was held on the matter.

II. ANALYSIS**A. Standard of Review**

Rule 12(b)(2) provides dismissal for lack of jurisdiction over a person. Fed.R.Civ.P. 12(b)(2). When the issue of personal jurisdiction is raised, the burden of proof rests upon the party asserting jurisdiction. *Market/Media Research, Inc. v. Union-Tribune Publishing Co.*, 951 F.2d 102, 104 (6th Cir.1992). This burden can be met by establishing with reasonable particularity sufficient contacts between the defendant and the forum state to support personal jurisdiction. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir.2002) (quotation and citation omitted). The facts will be construed in the light most favorable to the nonmoving party. *Id.* The court need only determine whether a plaintiff presented a *prima facie* showing of jurisdiction on the face of the complaint. *Market/Media Research, Inc.*, 951 F.2d at 104. This may include the pleadings and any affidavits to support any factual allegations. *Id.* Dismissal is warranted only if all the facts plaintiff asserts "collectively [fail] to state a *prima facie* case for jurisdiction." *Id.* at 105. A district court is not re-

quired to hold an evidentiary hearing when a plaintiff's pleadings and affidavits are insufficient to make a *prima facie* showing of fact supporting the court's assertion of *in personam* jurisdiction. *Id.* at 106.

*2 The Complaint in this case alleges a federal question involving trademark claims under 15 U.S.C. § § 1114, 1116. Nationwide service is not authorized under the trademark statutes, therefore, personal jurisdiction is determined according to the law of the forum state. Fed.R.Civ.P. 4(k)(1)(A). In analyzing Michigan's long-arm statute, Michigan courts have construed the statute to bestow the greatest possible grant of personal jurisdiction consistent with due process. *See Sifers v. Horen*, 385 Mich. 195, 1999, 188 N.W.2d 623 (1971). Where a state's long-arm statute extends to the constitutional limits of the Due Process Clause, the two inquiries merge; courts must only determine whether an assertion of personal jurisdiction over the defendant violates the Due Process Clause. *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 793 (6th Cir.1996).

Based on Supreme Court cases, *Int'l Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945), *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Sixth Circuit has set forth a three-part test to determine whether due process requirements have been met:

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 must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d

147, 150 (6th Cir.1997) (known as the *Mohasco* factors set forth in *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir.1968)).

B. Cease and Desist Letter

Plaintiff claims that Defendant has purposefully availed himself and has had minimum contacts with the State of Michigan by issuing the November 10, 1995 cease and desist letter to Plaintiff. Courts that have addressed the issue of whether a cease and desist letter constitutes minimum contacts sufficient to establish personal jurisdiction have held that cease and desist letters and letters stating litigation efforts by a non-resident defendant to protect its own rights against a plaintiff do not constitute express targeting or aiming of the plaintiff rendering the defendant subject to specific jurisdiction in the plaintiff's home forum state. *Calphalon v. Corp. v. Rowlette*, 228 F.3d 718, 723 (6th Cir.2000); *Cadle Co. v. Schlichtmann*, 123 F.3d Appx. 675, 2005 WL 293666 (6th Cir. Feb.8, 2005) (unpublished); *Impact Prod., Inc. v. Impact Prod., LLC*, 341 F.Supp.2d 1186, 1191-92 (D.Col.2004); *Yahoo! Inc. v. La Ligue Contre Le Racisme e L'Antisemitisme*, 379 F.3d 1120, 1125 (9th Cir.2004); *Elima Biotronics, LLC v. Fuente Cigar Ltd.*, 291 F.Supp.2d 1182, 1184-85 (D.Nev.2003).

*3 The Court finds that the November 10, 1995 cease and desist letter issued by Defendant to Plaintiff and the negotiations thereafter to resolve the matter, do not constitute purposeful availment nor establish minimum contact by Defendant sufficient for the Court to exercise personal jurisdiction over Defendant.

C. Website

In its response to Defendant's Motion to Dismiss, Plaintiff argues that Defendant's interactive website is sufficient for the Court to exercise personal jurisdiction over Defendant. There is no mention of Defendant's website in Plaintiff's Complaint. However, Plaintiff submitted an affidavit and docu-

ments supporting its argument that Defendant's website is interactive.

The Sixth Circuit has held that the operation of "a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction," even where the website enables the defendant to do business with the residents of the forum state, because such activity does not "approximate[] physical presence within the state's borders." *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir.2002) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-18, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). "However, the operation of a website may justify specific jurisdiction, if it satisfies the three factors set forth in *Southern Machine [Mohasco]*, namely, if the operation of the website constitutes purposeful availment, is the basis of the cause of action against the defendant, and jurisdiction over the defendant is reasonable." *Cadle Co.*, 123 Fed. Appx. at 677-78, 2005 WL 293666 at ---2. The "operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state ... if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Bird*, 389 F.3d at 874 (internal quotations omitted). The Sixth Circuit has used the "*Zippo* sliding scale" approach in evaluating whether a defendant's contact with the forum state constituted purposeful availment. See, e.g., *Neogen Corp.*, 282 F.3d at 890 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa.1997)); *Cadle Co.*, 124 Fed. Appx. At 678, 2005 WL 293666 at ---3.

There are three categories of interactivity for a website: 1) highly interactive where there is the ability to download and enter into contracts; 2) middle ground interactive where information is exchanged between users in different states; and 3) passive where only information is available and there is no ability to enter into contracts and/or exchange information. *Audi AG and Volkswagon of America, Inc. v. D'Amato*, 341 F.Supp.2d 734, 742-43 (E.D.Mich.2004). In the highly interactive

end of the scale, a defendant clearly does business over the Internet if the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet. *Zippo*, 952 F.Supp. At 1124 (citing *CompuServe, Inc. v. Patterson*, 89 F.2d 1257, 1264-66 (6th Cir.1996) (The defendant had purposefully directed his business activities toward Ohio by knowingly entering into a contract with an Ohio resident and then deliberately and repeatedly transmitting files to Ohio). "If a website is "semi-interactive," the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs." *Cadle Co.*, 123 F.3d. Appx. at 678, 2005 WL 293666 at ---3 (quoting *Zippo*, 942 F.Supp. at 1124)). Interactive websites can subject the defendant to specific personal jurisdiction if a plaintiff alleges that any interaction or exchange of information occurred between the defendant and the forum state via the website. *Cadle Co.*, 123 F.3d. Appx. at 678, 2005 WL 293666 at ---3 (Because the plaintiff has not alleged that any interaction or exchange of information occurred between the defendant and the forum residents via the website, personal jurisdiction over the defendant does not exist based on the nature of the website.). Passive websites are less likely to confer such jurisdiction. *Neogen Corp.*, 282 F.3d at 889-91.

*4 Plaintiff submitted the declaration of its counsel, Robert A. Dunn, to support the argument that Defendant's website is interactive. (Ex. A to Plaintiff's Motion) Mr. Dunn indicated he placed an order for "STATENOPOLY" on May 16, 2006 to confirm operation of the website. (Dunn Aff., ¶ 3) Mr. Dunn paid via "PayPal," the order was accepted and funds were transferred from his account to sales@statenopoly.com. (Dunn Aff., ¶ 3) On May 17, 2006, a credit was issued to Mr. Dunn's account from sales@statenopoly.com with the message, "Sorry, but the game is not available at this time. We are currently not accepting any new orders." (Dunn Aff., ¶ 3; Ex. B to Aff.) Mr. Dunn fur-

ther states that he received a copy of Defendant's "Statenopoly" from his client and that "[u]pon information and belief, the "Statenopoly" game was shipped to Michigan. (Dunn Aff., ¶¶ 4-5)

Based on Mr. Dunn's affidavit, the Court finds that Defendant's website is not a highly interactive website but may be considered semi-interactive with regards to Defendant's interactions with the State of Michigan. Mr. Dunn's access to the website (not Plaintiff's) allowed Mr. Dunn to enter into a contract with Defendant's website to purchase a STATENOPOLY game from Defendant. However, Mr. Dunn's account was credited with the note indicating that the game was not available and the website was not accepting any new orders. This is the only contact Plaintiff shows Defendant had with Michigan. Plaintiff has not shown that Defendant entered into contracts with residents of Michigan that involved the knowing and repeated transmission of orders over the Internet. *See, Zippo*, 952 F.Supp. at 1124 and *CompuServe*, 89 F.3d at 1264-66. Plaintiff has not alleged that any interaction or exchange of information occurred between the defendant and the forum state via the website, other than Mr. Dunn's access to Defendant's website. The Complaint is devoid of any reference to Defendant's website.

Plaintiff alleges that Defendant accused Plaintiff of trademark infringement by writing a letter dated November 10, 2005 to Plaintiff in Michigan. (Complaint, ¶ 13) Plaintiff's trademark infringement claim against Defendant in Count II of the Complaint makes no mention the time and place of the infringement, except for the cease and desist letter dated November 10, 2005. Although Mr. Dunn's access to Defendant's website shows that the website may be sufficiently interactive, the Court must also consider the website alongside with Defendant's other interactions with Michigan residents. *Neogen*, 282 F.3d at 891. Plaintiff has not shown that Defendant has had other interactions with Michigan residents, other than Mr. Dunn's vague statement that "[u]pon information and be-

lief, the "Statenopoly" game was shipped to Michigan."(Dunn Aff., ¶ 5) There is no allegation or affidavit to support any facts that the STATENOPOLY game Plaintiff received was ordered from and shipped by Defendant. Plaintiff has not shown that Defendant targeted any Michigan residents outside of the one access Mr. Dunn had with Defendant's website.

*5 Viewing the Complaint and the affidavit submitted by Mr. Dunn in the light most favorable to Plaintiff, Defendant's operation of the website does not constitute purposeful availment by Defendant since Plaintiff has not shown additional contacts by Defendant with Michigan other than the one time access by Mr. Dunn to the website in order to determine whether it was operational. Mr. Dunn's account was credited and the website indicated no orders were currently being taken. The Court further finds that the website was not the basis of the cause of action against Defendant since the Complaint does not allege that the website caused Plaintiff harm; rather, Plaintiff alleges that it was Defendant's November 10, 2005 cease and desist letter that forms a basis of this action. As noted above, the cease and desist letter cannot confer personal jurisdiction over Defendant. The Court, therefore finds that conferring personal jurisdiction over Defendant would not be reasonable since Plaintiff has not carried its burden of showing purposeful availment and that the website was the basis of the cause of action against Defendant.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Defendant's Motion to Dismiss (**Docket No. 8, filed May 3, 2006**) is GRANTED, the Motion to Transfer is, therefore, MOOT.

IT IS FURTHER ORDERED that this action is DISMISSED without prejudice. Plaintiff may refile its case in the appropriate United States District Court if it so wishes.

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2007 WL 1098286 (E.D.Mich.)
(Cite as: 2007 WL 1098286 (E.D.Mich.))

E.D.Mich.,2007.
Pride Distributors, Inc. v. Nuzzolo
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(E.D.Mich.)

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United States District Court,
 E.D. Michigan,
 Southern Division.
 SEE, INC., Plaintiff,

v.

IMAGO EYEWEAR PTY LTD., Seeyewear Party
 Ltd. and, Steven Ehrlich, Defendants.
 No. 03-74761.

Oct. 12, 2004.

Mark A. Cantor, Robyn S. Lederman, Brooks &
 Kushman, Southfield, MI, for Plaintiff.

James W. Stuart, Ogne, Alberts, Troy, MI, for De-
 fendants.

**OPINION AND ORDER GRANTING DEFEND-
 ANTS' MOTION TO DISMISS**

PAUL D. BORMAN, District Judge.

*1 Presently before the Court is Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. The Court heard oral argument on this matter on September 27, 2004.

BACKGROUND:

In this action, Plaintiff See, Inc. ("Plaintiff") brought suit against Imago Eyewear Pty Ltd. ("Imago") Seeyewear Party Ltd. ("Seeyewear") and Steven Ehrlich ("Ehrlich") collectively ("Defendants") based on the alleged infringement of its trademark registrations. Specifically, the Complaint contains the following counts:

Count I-Cyberpiracy

Count II-Trademark Infringement

Count III-False Designation of Origin or Sponsorship under Sections 43(d), 43(c), 32(1), and 43(a) of the United States Trademark Act of 1946, as amended, 15 U.S.C. § 1125(a) and § 1125(d).

Count IV-Violation of Michigan Consumer Protection Act under MCLA § 445.901 et. seq.

Plaintiff seeks a preliminary and permanent injunction, statutory damages under the Cyberpiracy Act in the amount of \$100,000 for each infringing domain name, compensatory damages, treble damages, attorneys's fees and costs.

Plaintiff owns United States Federal trademark registrations for "SEE" and "SEE SELECTIVE EYEWEAR ELEMENTS", and has a pending Federal application for "SEE EYEWEAR". (Complaint Exh. 2). These trademark registrations were originally filed by D.O.C. Optical Corporation ("D.O.C") and later assigned to Plaintiff. (Complaint ¶ 13, Exh, 2).

According to Plaintiff, on December 23, 1998 D.O.C. registered the domain name SEEEYEWEAR.COM to serve as the web site for Plaintiff and for products sold under the "SEE EYEWEAR" trademark.

Ehrlich is an individual domiciled in New South Wales, Australia. (Declaration of Ehrlich, ¶ 3, ¶ 4, attached to Defendant's Motion to Dismiss). He has never visited Michigan. (*Id.* at ¶ 19). Ehrlich is the founder and owner of Imago and Seeyewear both of which are Australian companies. (*Id.* at ¶ 3, ¶ 4). Ehrlich owns an Australian Trademark Registration and a World Intellectual Property Organization Trademark Registration for "SEEEYEWEAR." (*Id.* at ¶ 14, ¶ 15; See also Certificate of Registrations attached to Defendant's Motion to Dismiss).

Around April 2002, Ehrlich registered the domain name www.sceyewear.com. (*Id.* at ¶ 16). This web address is identical to Plaintiff's except that it has one less "e."^{FN1}

FN1. Both Plaintiff's and Defendants' website displays information about their eye-care products. (Declaration of Ehrlich, ¶ 19, attached to Defendant's Motion to Dismiss and Declaration of Richard Golden, ¶ 7, attached to Plaintiff's Brief in Opposition). Defendants' website displays information about its products, but the products cannot be purchased through the website. (Declaration of Ehrlich, ¶ 19, attached to Defendant's Motion to Dismiss). Defendants' website does have a feature which allows internet users to inquire about the products by filing out an online form. (*Id.* at ¶ 20). The online form asks for the user's name and postal address but not credit card information. (*Id.* at ¶ 20). The Defendants have never received an inquiry through its website by an individual identified as a resident of Michigan. (*Id.* at ¶ 21).

On November 25, 2003 Plaintiff filed its complaint primarily based upon its allegation that many of its customers are being diverted to Defendants' website because it is confusingly similar to Plaintiff's domain name. (Docket Entry 1). On April 21, 2004, Defendants filed the present motion to dismiss, arguing that, this Court cannot exercise personal jurisdiction over them. (Docket Entry 7). On June 2, 2004, Plaintiff filed its brief in opposition. (Docket Entry 11). On June 21, 2004, Defendants filed their Reply. (Docket Entry 12).

The Defendants move to dismiss Plaintiff's complaint for lack of personal jurisdiction under Fed.R.Civ.P. 12(b)(2). Defendants' claim that they have no contact with Michigan and for this court to exercise personal jurisdiction would violate due process and cannot satisfy Michigan's Long Arm Statute. Defendants' argue that they have engaged in no activities in Michigan to purposefully avail themselves in Michigan.

*2 Plaintiff counter Defendant's argument by stating that the Defendants "misinterpret the law of personal jurisdiction." (Plaintiff's brief pg. 1) The

Plaintiff asserts that in trademark cases of this type, the "effects doctrine" applies. *Id.* The "effects doctrine" examines where the plaintiff feels the harm from the infringement, and vests that forum with personal jurisdiction over the Defendant. *Id.* Plaintiff states that the operation of Defendants website is causing it harm because its customers mistakenly visit the Defendants website. *Id.* Therefore, the Plaintiff "feels" the effects of Defendants infringement in Michigan.

Furthermore, Plaintiff claims that Defendants are subject to personal jurisdiction in this court because their website is "quite interactive" by providing visitors with ample opportunity to exchange information. *Id.* Plaintiff also alleges that Defendants market goods at Exhibition throughout the world, and that attendees that include individuals and those companies from this district and that sell into this district. (Plaintiff's complaint ¶ 9).

Plaintiff also claims Defendants are subject to personal jurisdiction in this court pursuant to Fed.R.Civ.P. 4(k)(2). *Id.*

Plaintiff further argues that the declaration of Steven Ehrlich addresses only his activities, and not that of Imago or Seeyewear. Therefore, the Motion to Dismiss as to Imago and Seeyewear is unsupported and should be dismissed. (Plaintiff's brief pg.7).

Lastly, Plaintiff requests that if the Court is considering granting Defendants' Motion, it first be given an opportunity to take jurisdictional discovery to determine what additional facts favor personal jurisdiction under Rule 4(k)(2) or the Michigan Long-Arm Statute. (Plaintiff's brief pg. 17-18).

ANALYSIS

A. Standard

To avoid dismissal where there has been no evidentiary hearing, a plaintiff need only present a *prima facie* case for jurisdiction. *Niemi v. NIIK Spring Co.*, 276 F.Supp.2d 717 (E.D.Mich.2003) (citing

Kerry Steel v. Paragon Industries, 106 F.3d 147, 148 (6th Cir.1997). A court must consider all affidavits and pleadings in a light most favorable to plaintiffs, and does not weigh the controverting assertions of the party seeking dismissal. *Id.* (citing *Dean v. Motel 6 Operating, LLP*, 134 F.3d 1269, 1272 (6th Cir.1998)). However, at this stage, where the Court has not held an evidentiary hearing, “in the face of a properly supported motion for dismissal, the [plaintiffs] may not stand on [its] pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.” *Theunissen v. Mathews*, 935 F.2d 1454, 1459 (6th Cir.2002).

The Supreme Court also has noted “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.” *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 155, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

B. Personal Jurisdiction

*3 Plaintiff invokes this court's subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). Where a federal court's subject matter jurisdiction over a case stems from the existence of a federal question, personal jurisdiction over a defendant exists if the defendant is amenable to service of process under the [forum's] state's long-arm statute and if the exercise of personal jurisdiction would not deny the defendant due process. See *Bird v. Parsons*, 289 F.3d at 871 (6th Cir.2002) quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir.1992).]

With personal jurisdiction, Michigan's Long Arm Statute applies. It states:

The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise

limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:

- (1) The transaction of any business within the state.
- (2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.
- (3) The ownership, use, or possession of real or tangible personal property situated within the state.
- (4) Contracting to insure a person, property, or risk located within this state at the time of contracting.
- (5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.
- (6) Acting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within this state.
- (7) Maintaining a domicile in this state while subject to a marital or family relationship which is the basis of the claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody.

M.C.L. § 600.705.

There are two ways to assert personal jurisdiction over a foreign defendant: (1) general personal jurisdiction, where a defendant has “continuous and systematic” contacts with a forum state, see *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 445-47, 72 S.Ct. 413, 96 L.Ed. 485 (1952); and (2) limited or specific personal jurisdiction, where the subject matter of the lawsuit relates to, and arises out of, a defendant's contacts with a forum state. *Nationwide Mut. Ins. Co. v. Tryg Intl. Ins. Co.*, 91 F.3d 790, 793 (6th Cir.1996). Michigan's Long-Arm Statute

provides for general personal jurisdiction in M.C.L. § 600.711 and limited or specific jurisdiction in M.C.L. § 600.715.

The Michigan Supreme Court has construed Michigan's Long-Arm Statute to bestow the broadest possible grant of personal jurisdiction consistent with due process. *The Sports Authority Michigan, Inc. v. Justballs, Inc.*, 97 F.Supp.2d 806, 810 (E.D.Mich.2000) (quoting *Sifers v. Horen*, 385 Mich. 195, 198-99, 188 N.W.2d 623 (1971)). The determination of whether jurisdiction attaches under M.C.L. § 600.711 and § 600.715 requires a two-step analysis:

*4 First, whether the exercise of limited personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. If not, then whether the rule of statutory construction supports such an exercise of jurisdiction over defendants.

Id. (quoting *Walter v. M. Walter & Co., Inc.*, 179 Mich.App. 409, 412, 446 N.W.2d 507 (1989)). Under Michigan's Long-Arm Statute, the state's jurisdiction extends to the limits imposed by the Due Process Clause, and thus, the two questions become one. *Id.* (citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir.1992); *Green v. Wilson*, 455 Mich. 342, 349-50, 565 N.W.2d 813 (1997)).

In order to comply with the Due Process Clause, the plaintiff must establish that significant minimum contacts exist sufficient to satisfy "traditional notions of fair play and substantial justice." *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). The Sixth Circuit has set forth three criteria that must be met before a court will exercise personal jurisdiction:

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.

Id. (quoting *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 150 (6th Cir.1997)). The showing that the defendant purposefully availed himself of the privilege of transacting business or causing a consequence in the forum state is essential. *Id.* at 811.

A. Due Process

a. Purposeful Availment

The United States Supreme Court has expressed that the " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 474 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Keeton v. Justler Magazine*, 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). The key to this requirement is whether the defendant reached out beyond his state to create a continuous and systematic relationship with citizens of another state. *Id.* (citing *Burger King*, 477 U.S. at 473). "Purposeful availment" is something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities. The defendant will have reason to foresee being 'haled before' a Michigan court." *Id.* (quoting *Jeffrey v. Rapid Am. Corp.*, 448 Mich. 178, 187, 529 N.W.2d 644 (1995)). The Plaintiff alleges that Defendants have purposefully availed themselves in Michigan by virtue of: (1) its interactive website; and (2) the "effects doctrine."

(i) Interactive Website Analysis

*5 In the internet context, the interactivity of the website determines whether personal jurisdiction is appropriate for an out of state defendant. *Cybersell, Inc. v. Cyhersell, Inc.*, 130 F.3d 414, 418-19 (9th Cir.1997). Courts have stated that there are three categories of interactivity for website. The first category is highly interactive which is the ability to download and enter into contracts. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir.1996). This category is sufficient for a Court to exercise personal jurisdiction. *Id.* The second category is “a middle ground in which defendant maintains an interactive website which permits the exchange of information between users in another state and the defendant, which depending on the level and nature of the exchange may be a basis for jurisdiction.” *Citigroup Inc., v. City Holding Co.*, 97 F.Supp.2d 549, 564-65 (S.D.N.Y.2000). The last category is where the defendant makes information available on an otherwise passive website. *Id.* A “passive website is insufficient to establish purposeful availment for the purpose of due process.” *McGill v. Gourmet Technologies, Inc.*, 300 F.Supp.2d 501 (E.D.Mich.2004).

The Court finds that the Defendants' website is a passive one, and therefore not to the degree where the exercise of personal jurisdiction is proper. Defendants' website displays information about its products, but the products cannot be purchased through the website. (Declaration of Ehrlich, ¶ 19, attached to Defendant's Motion to Dismiss). Defendants' website does have a feature which allows internet users to inquire about the products by filing out an online form. (*Id.* at ¶ 20). The online form asks for the user's name and postal address but not credit card information. (*Id.* at ¶ 20). The Defendants have never received an inquiry through its website by an individual identified as a resident of Michigan. (*Id.* at ¶ 21).

Defendants' website is similar to the “GT site” in *McGill v. Gourmet Technologies, Inc.* In *McGill*, plaintiff brought a Patent Infringement suit against

GT involving a frozen confection apparatus, GT sells equipment and supplies to the food service industry and maintained two websites, important for our purposes is the “GT site.” The Court found that the “GT site” was a classic passive site and did not trigger jurisdiction in Michigan. The “GT site” provided information about Defendant GT's products as well as a means to contact Defendant GT, but it did not allow a site visitor to purchase products or otherwise directly transact business over the site. The Court finds that Defendants website is similar to the “GT site” and does not trigger personal jurisdiction in Michigan.

Plaintiff alleges that visitors to the website “can obtain information, view merchandise and collect model numbers, communicate with defendants and provide defendants with contact information, which presumably, defendants follow up with email or otherwise.”(Plaintiff's brief pg. 11-12). These allegations still do not rise to the level of purposeful availment. Defendants have never been contacted by a Michigan resident and the website does not allow visitors to enter into contracts or otherwise purchase goods through the website. Further Defendants have never consummated a transaction in Michigan.

*6 Plaintiff cites support for his allegations from *Audi AG & Volkswagen of America, Inc. v. Izumi*, 204 F.Supp.2d 1014, 1021 (E.D.Mich.2002), but it is distinguishable. In *Audi*, the website allowed customers to purchase items, and at a minimum, it attempted to solicit business from Michigan residents.*Id.* at 1021.Further, the *Audi* Court found that Defendant offered to sell the rights to the website to Plaintiffs. *Id.* In this matter, visitors to Defendants' website cannot purchase goods, and there is no allegation that Defendants attempted to sell the rights to the website to Plaintiffs.

Plaintiff's also cite *Publications International, Ltd. v. Burkel Triolo, Inc.* 121 F.Supp.2d 1178 (N.D.Ill.2000) to support its claim that the exercise of personal jurisdiction is proper because of Defendants interactive website. In *Publications*, the

Defendants had a website in which visitors could request an online catalog which can be directly submitted to a visitor. *Id.* at 1182. Additionally, Defendant had a sales representative in Illinois and sought out and contracted with Illinois customers. *Id.* at 1183. Thus, given the totality of defendant's contact with Illinois, the court found that its exercise of personal jurisdiction would be proper. *Id.* *Publications* can be distinguished from Defendants actions here because Defendants only contact with Michigan is the operation of its website. It has no sales representatives in Michigan and has never consummated a sale in Michigan.

For the reason explained above, the Court finds that Defendants website is "passive" and does not subject Defendants to the Court's personal jurisdiction.

(ii) "Effects Doctrine" Analysis

The Court finds that the "effects doctrine" does not apply in this case. For the "effects doctrine" to apply in this case, the Plaintiff must demonstrate that the brunt of the injury was felt in Michigan, the use of the Plaintiff's trademarks was intentional or deliberate and that the Defendant's acts were expressly aimed at the State of Michigan. *Ford Motor Co. v. Great Domains, Inc.*, 141 F. Supp.2d 763, 774 (E.D.Mich.2001). Here, Plaintiff cannot show that the use of its trademarks was intentional or deliberate.

If there is an injury to be felt by Plaintiff it would be in Michigan. The Plaintiff has its principal place of business in Michigan. (Plaintiff complaint ¶ 1). The Plaintiff alleges that Defendants have used and continued to use Plaintiff's trademarks with the knowledge that the mark is owned by Plaintiff. Plaintiff has not alleged that Defendants deliberately registered its domain name. It is important to note that "Seeyewear" had a preexisting legitimate use for the domain name based upon valid Australian trademark registrations. (Certificate of Registration attached to Defendant's Motion).

The Plaintiff's authority to support its theory under the "effects doctrine" is distinguishable from the facts here. In the cases where the "effects doctrine" allows for personal jurisdiction, the defendant specifically targeted the plaintiff with an intentional tort. In the internet context, "simply registering someone else's trademark as a domain name and posting a website on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another." *Panavision Int. L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.1998) (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir.1997)). For the "effects doctrine" to apply, there needs to be "something more" to demonstrate that the defendant directed his activity toward the forum state. *Id.* Under these facts, accepting Plaintiff's allegations as true, the Court finds at most, Defendants registered Plaintiff's trademark as a domain name and posted it on the internet. There is no evidence that Defendants directed any activity towards Plaintiff in Michigan. Furthermore, the "effects doctrine" should be applied with caution because a plaintiff always feels the effect of a legal injury in its home forum. *Ford Motor Co. v. Great Domains, Inc.*, 141 F.Supp.2d 763, 777 (E.D.2001), (quoting *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir.1998)).

*7 In *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), where the "effects doctrine" originated, the Court held that the editor of the National Enquirer was subject to jurisdiction in California. In *Calder*, the Enquirer libeled actress Shirley Jones, and the Enquirer knew that she lived and worked in California. *Id.* at 788-89. Because the Enquirer's conduct was aimed at a specific individual in California, it could anticipate being haled into court there. *Id.* In our matter, there are no factual allegations of an intentional tort aimed at the Plaintiff in Michigan.

The Plaintiff also cites the *Panavision* case to support its claim. In *Panavision*, the defendant intentionally registered the plaintiff's domain name to "extort fees" from the plaintiff. *Id.* at

1321. Plaintiff's have not alleged that Defendants intentionally registered its domain name to extort fees, so *Panavision* is not applicable here.

In *McMaster-Carr v. Supply Depot, Inc.*, 1999 WL 417352 (N.D.Illinois, 1999) (unpublished), the plaintiff sued defendant for tradename infringement. Defendant moved to dismiss the case for lack of personal jurisdiction. The Court found that "although this case presents a close question", defendant's actions satisfy the effects test. *Id.* at 12. The important fact was that the defendant "intentionally registered [plaintiff's] mark as its domain name, an act that it knew would harm Illinois-based [plaintiff]" and accordingly it could anticipate being haled into court there. *Id.* The plaintiff argued that defendant's actions were "obviously targeted" at it, whose principal place of business is in Illinois. *Id.* at 7. Here, Plaintiff makes no allegations that Defendants deliberately targeted it by registering its domain name and trademarks.

In *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Limited Partnership*, 34 F.3d 410 (7th Cir.1994), the Indianapolis Colts (previously of Baltimore) sued a Canadian football league team operating out of Baltimore which called itself the Baltimore Colts. *Id.* at 411. The Indianapolis Colts brought suit in Indiana, and defendants moved to dismiss for lack of personal jurisdiction. *Id.* The Court found jurisdiction to be proper because defendant deliberately copied the Plaintiff's trademarked team name. The Court stated "we do not doubt that the resonance of the name, and not merely the clamor of the Baltimoreans, motivated the Baltimore's team's choice of 'Colts' out of all the appealing animals in the ark." *Id.* at 412. The defendants knew that the plaintiff would be injured in Indiana and could anticipate being haled into Court there. Again, Plaintiff's have not alleged that Defendants deliberately copied its trademarks.

In *Ford Motor Co. v. Great Domains, Inc.*, 141 F.Supp.2d 763, 777 (E.D.2001), the Court took notice of the fact that the trademarks at issue,

"Volvo," Jaguar," "Stang," "Ford," "Lincoln," and "Mercury", were well known throughout the United States and England where the defendants reside. *Id.* at 774. Thus, the Court found it "highly unlikely" that the incorporation of Ford's trademarks could have resulted in negligence. *Id.* In this matter, the Plaintiff alleges that its prior rights in the "SEE EYEWEAR" Marks were "well known." However, even in a light most favorable to Plaintiff, the Court takes notice "SEE EYEWEAR" Marks do not rise to the worldwide notoriety of Ford's trademarks. More importantly, Defendants declaration provides an independent non-related reason for the creating of the trademark "SEE EYEWEAR." Defendants state that the trademark at issue here was created as a combination of Steven Ehrlich's initials "S.E." and the category of products he sells "Eyewear." (Declaration of Ehrlich, ¶ 13, attached to Defendant's motion).

*8 The *Ford* Court stated five factors to assess the level of individual targeting needed under the "effects doctrine" and they are as follows:

- (1) whether the trademark owner has been directly solicited to purchase the domain name, *see Panavision Int'l. L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir.);
- (2) whether the domain name registrant has registered domain names incorporating other protected marks, *see id.*;
- (3) whether the domain has been offered for sale by the current registrant and, if so, the price sought;
- (4) whether the registrant has a preexisting, legitimate use for the domain name; and
- (5) any other factors which demonstrate that the act of incorporating the protected mark into a domain name was "expressly aimed" at the forum where trademark owner resides." *Id.* at 777.

Here, every *Ford* factor above favors Defendants, Plaintiff has not alleged any facts otherwise. Plaintiff has not alleged Defendants solicited it to

purchase the domain name, or that Defendants have registered domain names incorporating other protected marks. Further, Plaintiff does not allege that Defendants have offered the current domain name for sale, and Defendants do have a preexisting legitimate use for its domain name. Lastly, Plaintiff's have not alleged any other factors which demonstrate that Defendants activities were "expressly aimed" at Michigan.

Although Plaintiff alleges Defendants intended its mark to be confused with Plaintiff's, Plaintiff alleges no independent facts to support the allegation. At this stage, where the Court has not held an evidentiary hearing, "in the face of a properly supported motion for dismissal, the [plaintiffs] may not stand on [its] pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Theunissen v. Mathews*, 935 F.2d 1454, 1459 (6th Cir.2002). Important to note Plaintiff has not alleged contrary facts to Defendants assertion that the trademark at issue here was created as a combination of Steven Ehrlich's initials "S.E" and the category of products he sells "Eyewear." (Declaration. of Ehrlich, ¶ 13, attached to Defendant's motion).

Plaintiff does allege that Defendants have knowingly used its trademarks for the purpose of diverting customers to its website. (Plaintiff's complaint § 49). The knowledge that Plaintiff alleges is essentially the knowledge that was provided in its cease and desist letter of October 8, 2003. However, the fact that Defendants continued to operate its website after receiving a letter indicating its trademarks may be in dispute by a United States company is different than the "knowledge" required under the "intentional acts" and "expressly aimed" requirements under the "effects doctrine." The "effects doctrine" requires deliberate acts expressly aimed at the forum where plaintiff resides. Plaintiff provides no allegations that state that the time Defendants registered its domain name and posted its website, Defendants deliberately aimed to infringe upon its trademark. Plaintiff do not allege any facts

that indicate Defendants knew of its trademarks prior to October 8, 2003. The fact that Defendants continued to use its domain name after the cease and desist letter of October 8, 2003 is irrelevant to this analysis because they had a preexisting legitimate use of its trademark and domain name.

*9 For the reasons stated above, the Court finds that the "effects doctrine" does not apply in this case because the Plaintiff cannot demonstrate that the use of its trademarks was intentional or deliberate and that Defendants' acts were expressly aimed at the State of Michigan. *Ford Motor Co. v. Great Domains, Inc.*, 141 F .Supp.2d 763, 774 (E.D.Mich.2001).

In conclusion, the Court holds that Plaintiff's allegations fall short of a prima facie showing as to the "purposeful availment" requirement. Viewing all the facts in a light most favorable to and drawing all reasonable inferences in favor of Plaintiff, Plaintiff has not established a prima facie showing that Defendant engaged in a systematic relationship with a Michigan resident, and caused significant and substantial events to occur in the state of Michigan. Haling Defendants into this Court, based upon the actions described above, would be based on "random," "fortuitous," or "attenuated" contacts. Accordingly, Defendants have not "purposefully availed" themselves of the benefits of transacting business or causing events to occur in Michigan.

b. Forum-Related Activities

The second element evaluated in the personal jurisdiction inquiry is whether the current controversy is related to Defendant's forum-related activities. The Plaintiff claims that this prong is satisfied because its cause of action arises out of Defendants' contacts with Michigan. (Plaintiff's brief pg. 12). However, the Court still finds that personal jurisdiction here would violate due process because Defendants forum-related activities are insufficient for "purposeful availment" under the first element.

c. Reasonableness

Where the first two elements of the test for personal jurisdiction are met, there is an inference that the exercise of jurisdiction is reasonable. *Id.* (citing *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir.1996)). In this case, however, the exercise of jurisdiction is unreasonable. The factors to consider in assessing reasonableness are:

... the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. [A court] must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution, of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Id. (quoting *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)).

In this case, the exercise of jurisdiction over Defendant is not reasonable because of Defendants' limited contacts in Michigan.. Further, the injury alleged by Plaintiff arose out of Defendants' preexisting legitimate use of its trademark as the domain name for its Australian website. (Certificate of Registration attached to Defendants Motion to Dismiss). The benefit of the State of Michigan here to protect its citizens from alleged trademark infringement is outweighed by the burden on Defendants to travel thousands of miles to defend a lawsuit brought against its valid Australian trademark.

*10 Accordingly, based upon the entirety of the discussion above, the Court holds that the exercise of personal jurisdiction over Defendant in this case does not comport with the notions of Fair play and substantial justice required by the Due Process Clause of the United States Constitution.

C. Fed.R.Civ.P. 4(k)(2)

The Plaintiff argues that Fed.R.Civ.P. 4(k)(2)

provides an alternative basis for personal jurisdiction in this case.^{FN2} Rule 4(k)(2) states:

FN2. It should be noted that the Lanham Act does not authorize nationwide service of process. 15 U.S.C. § 1121.

If the exercise of jurisdiction is consistent with the Constitution and law of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction of the courts of general jurisdiction of any state.

Three conditions must be satisfied under Rule 4(k)(2):

(1) the plaintiff's claim must be one arising under federal law;

(2) the putative defendant must be beyond the jurisdictional reach of any state court of general jurisdiction; and

(3) the Federal Courts' exercise of personal jurisdiction over the defendant must not offend the Constitution or other federal law. *Sunshine Distribution, Inc. v. Sports Authority Mick, Inc.*, 157 F.Supp.2d 779, 788 (E.D.Mich.2001).

Rule 4(k)(2) does not provide an alternative basis for jurisdiction because the Plaintiff cannot satisfy the third condition above, namely that the Court's exercise of personal jurisdiction does not offend the Constitution. As explained above, Plaintiff was unable to make a due process showing. Plaintiff also states that Defendants have demonstrated contacts with the United States through its domain address, internet website, website advertising, attendance at trade shows and by filing trademark applications at the United States Patent and Trademark Office. (Plaintiff's brief pg. 17). Haling Defendant into this Court, based upon the allegations described above, would be based on "random," "fortuitous," or "attenuated" contacts.

Defendants' domain address and internet website

addressed above are insufficient to satisfy the due process clause of the Constitution under the "effects doctrine." Defendants attendance at a trade show in either 1996 or 1997 New York is not a sufficient contact with the United States particularly when it is not related to Plaintiff's cause of action. Plaintiff also alleged in its complaint that Defendants market goods at Exhibitions where attendees include individuals and companies from tin's district, and that sell into this district. (Plaintiff's complaint ¶ 9). Defendants state that he has not attended a trade show in the United States since either 1996 or 1997. (Ehrlich's declaration ¶ 26, attached to Defendant's Motion to Dismiss). Plaintiff makes no specific allegations that Defendants market its goods to the United States. Defendant, however, states that Seeyewear sells its products in Australia, New Zealand, Singapore and the Netherlands, and Imago sells its products in Australia and New Zealand. (*Id.* ¶ 23, 24). Plaintiff also provides no authority for the assertion that by filing trademark application in the United States, one could anticipate being sued there.

*11 Accordingly, the Court holds that Rule 4(k)(2) does not provide an alternative basis for personal jurisdiction for Plaintiff given the attenuated nature of Defendants' contacts with the United States.

D. Insufficiency of Ehrlich's Declaration as to Seeyewear and Imago

Plaintiff's claim that the Motion to Dismiss as to Imago and Seeyewear is unsupported and should be dismissed because the declaration of Steven Ehrlich addresses only his activities, and not those of Imago or Seeyewear. This request is denied. (Plaintiff's brief pg. 7). Steven Ehrlich's declaration states that he is the founder, President and owner of both companies. (Ehrlich's declaration ¶ 3-4, attached to Defendant's Motion to Dismiss). For this reason, the Court accepts his declaration on behalf of Imago and Seeyewear because in the declaration it is clear that he is speaking on behalf of his companies as well as himself.

E. Jurisdictional Discovery

Plaintiff requests that if the Court is considering granting Defendants' Motion, it first be given an opportunity to take jurisdictional discovery to determine what additional facts favor personal jurisdiction under Rule 4(k)(2) or the Michigan Long-Arm Statute. (Plaintiff's brief pg. 17-18 citing *Toys "R" Us, Inc. v. Step Two S.A.*, 318 F.3d 446).

A district court's decision to deny jurisdictional discovery is reviewed for abuse of discretion. *Toys "R" Us* (quoting *Brumfield v. Sanders*, 232 F.3d 376, 380 (3rd Cir.2000)). In *Toys "R" Us*, the plaintiff trademark holder sued defendant, a toy retailer for trademark infringement, unfair competition and cybersquatting. *Id.* at 376. The retailer was a Spanish Corporation which did not operate any stores in the United States, but a portion of its merchandise was purchased from United States vendors. *Id.* at 449. Its president attended the New York City Toy fair once a year. *Id.* The company also maintained a website which the district court held to be "passive." *Id.* The district court held that Plaintiff had not shown that the defendant had sufficient contacts to support personal jurisdiction. *Id.* The Court, however, held that the district court erred when, it denied plaintiff's request for jurisdictional discovery. *Id.* at 448. The Court held "that the District Court appears to have focused entirely on the web site, thereby preventing further inquiry into non-Internet contacts." *Id.* at 456. The Court stated that the other internet and non-internet contacts alleged by plaintiff, if explored, might provide the "something more" needed to bring defendant within its jurisdiction. *Id.*

There are no such allegations here. It is undisputed that the Defendants contacts with the United States are through its domain address, internet website, website advertising, attendance at trade shows and by filing trademark applications at the United States Patent and Trademark Office. (Plaintiff's brief pg. 17). As stated above, even accepting all of these allegations as true, that they are not sufficient to satisfy the due process clause. Thus, jurisdiction-

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 5569067 (E.D.Mich.)
(Cite as: 2004 WL 5569067 (E.D.Mich.))

al discovery in this case is not appropriate.

CONCLUSION

*12 For the reasons stated above, the Court
GRANTS Defendants' Motion to Dismiss.

SO ORDERED.


E.D.Mich.,2004.
See, Inc. v. Imago Eyewear Pty Ltd.
Not Reported in F.Supp.2d, 2004 WL 5569067
(E.D.Mich.)

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H

United States District Court,
E.D. Michigan,
Southern Division.
INNOVATION VENTURES, LLC d/b/a Living Es-
sentials, Plaintiff,
v.
N2G DISTRIBUTING, INC., Alpha Performance
Labs, and Jeffrey Diehl, Defendants.
No. 08-10983.
Dec. 2, 2008.

West KeySummary

Trademarks 382T  **1558**

382T Trademarks

382TIX Actions and Proceedings

382TIX(A) In General

382Tk1557 Jurisdiction

382Tk1558 k. In General. Most Cited

Cases

A corporate executive of an energy drink distributor was entitled to dismiss, for lack of personal jurisdiction, a trademark infringement claim brought against him in his personal capacity. The nutritional and dietary supplement company alleging infringement did not establish that the corporate executive had sufficient, purposeful minimum contacts with the state. At best it showed that the corporate executive may have played a role in naming the product and its packaging design, but this was not necessarily specifically intended to cause an effect in the state. While the corporate executive admitted that his company delivered products in the state for distribution he denied that he, in his individual capacity, targeted advertising or marketing towards the state.

Marc Lorelli, Mark A. Cantor, Brooks & Kushman, Southfield, MI, for Plaintiff.

Jeffrey G. Heuer, Jonathan C. Myers, Jaffe, Raitt, Heuer & Weiss, P.C., Southfield, MI, Peter M.

Falkenstein, Jaffe Raitt Heuer & Weiss, PC, Ann Arbor, MI, for Defendants.

ORDER (1) GRANTING DIEHL'S MOTION TO DISMISS WITHOUT PREJUDICE; (2) DENYING N2G DISTRIBUTING, INC. AND ALPHA PERFORMANCE LABS PARTIAL MOTION TO DISMISS; AND (3) DENYING N2G DISTRIBUTING, INC. AND ALPHA PERFORMANCE LABS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PAUL D. BORMAN, District Judge.

*1 Before the Court is Defendant Jeffrey Diehl's ("Diehl") motion to dismiss, filed September 2, 2008 (Doc. No. 46), and Defendants N2G Distributing and Alpha Performance Labs' ("N2G" "Alpha" collectively "Defendants") partial motion to dismiss and/or for partial summary judgment, filed August 20, 2008 (Doc. No. 43). The Court held a motion hearing on November 24, 2008. Having considered the entire record, and for the reasons that follow, the Court GRANTS Diehl's motion to dismiss without prejudice and DENIES N2G and Alpha's motion to dismiss, and for partial summary judgment.

I. BACKGROUND

This lawsuit arises from Plaintiff's allegations that Defendants' "6 Hour Energy" and "Pure Energy" drinks infringe upon Plaintiff's trademark, copyright and trade dress for its "5 Hour Energy" products.

Plaintiff is a Michigan limited liability company with its headquarters in Novi, Michigan. (Compl.¶ 1). N2G Distribution is a California corporation. (Compl.¶ 2). Alpha Performance Labs is a Nevada corporation. (Compl.¶ 3). Diehl is the President and CEO of N2G Distributing Inc. and the principal of

Alpha Performance Labs. (Second Amended Compl. ¶ 4 [hereinafter "SAC"]). Diehl resides in San Bernadino, California. (Doc. No. 46-2, Diehl Decl. ¶ 3).

Plaintiff is a national marketer and distributor of nutritional and dietary supplements. (SAC ¶ 8). This lawsuit concerns two of Plaintiff's products: 5 Hour Energy and Extra Strength 5 Hour Energy, which are 2-ounce liquid energy supplements. (SAC ¶¶ 2, 13). Plaintiff has used the 5 Hour Energy trademark since 2004, and registered it with the United States Patent and Trademark Office on September 27, 2005. (SAC ¶¶ 9-10). Plaintiff asserts that it has used the 5 Hour Energy trade dress for its 5 Hour Energy products since 2004; Extra Strength 5 Hour Energy was introduced in 2008. (SAC ¶ 13).

Defendants market and distribute competing 2-ounce liquid energy shots called 6 Hour Energy, Nitro2Go Instant Energy and Pure Energy. (SAC ¶¶ 6-7). Plaintiff discovered Defendants' "6 Hour Energy Shot" drink at a trade show in Nevada. (Defs.' Br. Ex. B, Henderson Decl. ¶ 15).

Thereafter, on March 7, 2008, Plaintiff filed a Complaint in this Court, alleging the following causes of action:

Count I: Federal Trademark Infringement & Counterfeiting (15 U.S.C. § 1114)

Count II: False Designation of Origin, False Sponsorship, and Trade Dress (15 U.S.C. § 1125(a))

Count III: Common Law Trademark Infringement.

On March 13, 2008, Plaintiff moved for a preliminary injunction, arguing that Defendants had infringed on its trademark and trade dress by copying Plaintiff's packaging design and caution statement. (Pl.'s Mot. Prelim. Injunc. ¶ 16). This Court granted Plaintiff's motion for a preliminary injunction at the motion hearing on April 7, 2008, and entered an order on April 9, 2008. (Doc. No. 23). Defendants were enjoined from "manufacturing, distributing,

shipping, advertising, marketing, promoting, transferring, selling, or offering to sell Defendants' Enjoined Product during the pendency of this case." (Order Granting Prelim. Injunc., April 9, 2008). The "Enjoined Product" is 6 Hour Energy. (*Id.*) Defendants were further enjoined from manufacturing, marketing and distributing any product that use the 5 Hour Energy trade dress or use confusingly similar packaging during the pendency of the action, and ordered to recall the 6 Hour Energy shots out on the market. (*Id.*)

*2 After the preliminary injunction issued, Plaintiff moved for leave to file an amended complaint. (Doc. No. 38). Defendants acquiesced to Plaintiff's request, and a stipulated order allowing Plaintiff to file an amended complaint was entered on August 5, 2008. (Doc. No. 42). In the second amended complaint, Plaintiff added Jeffrey Diehl as a defendant, and alleged the following new claims: copyright infringement (Count IV), inducement of trademark infringement (Count V), inducement of trade dress infringement, and contributory and/or vicarious liability for copyright infringement (Count VII).

On August 20, 2008, Defendants N2G Distributing, Inc. and Alpha Performance Labs filed the instant motion to dismiss Plaintiff's second amended complaint, or in the alternative, for summary judgment. Defendant Diehl filed his motion to dismiss on September 2, 2008. Plaintiff filed responses to the motions to dismiss on September 29, 2008.

II. ANALYSIS

In deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), "[t]he court must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir.2001). The Supreme Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct.

1955, 1974, 167 L.Ed.2d 929 (2007), that a complaint must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted if the complaint does not plead “enough facts to state a claim to relief that is plausible on its face.” Under Rule 12(b)(6), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65 (citations omitted); *Association of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir.2007). Even though a complaint need not contain “detailed” factual allegations, its “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 127 S.Ct. at 1965 (citations omitted).

A. Diehl's Motion to Dismiss

Diehl raises a jurisdictional issue in his motion to dismiss.^{FN1} Diehl argues that this Court does not have personal jurisdiction over him because he has insufficient contacts with the forum state to subject him to either general or limited personal jurisdiction in this Court. (Diehl Mot. to Dismiss ¶ 5). In response, Plaintiffs admit that discovery is necessary to fully assess the extent of Diehl's contacts with Michigan and, in the alternative, request that the Court deny Diehl's motion based on Diehl's admitted involvement in the infringing activities alleged. (Pl.'s Diehl. Resp. 5).

FN1. If this Court concludes that it has personal jurisdiction over Diehl, Diehl joins Defendants N2G and Alpha's motion to dismiss. (Diehl's Mot. to Dismiss ¶ 6).

*3 In the context of a Rule 12(b)(2) motion, a plaintiff bears the burden of establishing the existence of jurisdiction. *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir.1989). When a district court relies solely on written sub-

missions and affidavits to resolve a Rule 12(b)(2) motion, rather than resolving the motion after either an evidentiary hearing or limited discovery, the burden on the plaintiff is “relatively slight,” *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir.1988), and “the plaintiff must make only a prima facie showing that personal jurisdiction exists in order to defeat dismissal.” *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991). The pleadings and affidavits submitted must be viewed in a light most favorable to the plaintiff, and the district court should not weigh “the controverting assertions of the party seeking dismissal.” *Id.* at 1459.

Personal jurisdiction over an out-of-state defendant arises from “certain minimum contacts with [the forum] such that 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, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). Personal jurisdiction can be invoked either via general jurisdiction, where the defendant has ‘continuous and systematic’ contact with the forum state, see *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-47, 72 S.Ct. 413, 96 L.Ed. 485 (1952), or via limited jurisdiction, where the subject matter of the lawsuit is related to the defendant's contacts with the forum state.” *Sports Authority Michigan, Inc. v. Justballs, Inc.*, 97 F.Supp.2d 806, 810 (E.D.Mich.2000). In this case, it is undisputed that Plaintiff is asking this Court to invoke limited personal jurisdiction. Therefore, “[t]he Court must first determine “whether the exercise of limited personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.” *Audi AG and Volkswagon of America, Inc. v. D'Amato*, 341 F.Supp.2d 734, 741-742 (E.D.Mich.2004). “If not, then whether the rule of statutory construction supports such an exercise of jurisdiction over defendants.” *Id.* at 742. Because “[t]he Michigan Supreme Court has construed Michigan's Long-Arm Statute to bestow the broad-

Slip Copy, 2008 WL 5110603 (E.D.Mich.), 2008 Copr.L.Dec. P 29,664
(Cite as: 2008 WL 5110603 (E.D.Mich.))

est possible grant of personal jurisdiction consistent with due process,” *Id.* at 741, “the two questions become one.” *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir.1992).

In order to comply with the Due Process Clause, Plaintiff has to establish that significant minimum contacts exist sufficient to satisfy “traditional notions of fair play and substantial justice.” *Int'l Shoe Co.*, 326 U.S. at 310. The Sixth Circuit has set forth three criteria that must be met before a court will exercise personal jurisdiction:

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.

*4 *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 150 (6th Cir.1997).

Diehl contends that he has not purposefully availed himself of the privilege of conducting business in Michigan. (Diehl Br. 7).“ ‘Purposeful availment’ is something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities. The defendant will have reason to foresee being ‘haled before’ a Michigan court.”*Id.* (quoting *Jeffrey v. Rapid Am. Corp.*, 448 Mich. 178, 187, 529 N.W.2d 644 (1995)).

Plaintiff alleges that Diehl is personally liable for the trademark, trade dress and copyright infringement due to his: “(1) direct participation; (2) knowing and intentional inducement of or material contribution to the infringement; (3) vicarious liability; (4) his status as an alter ego of N2g and Alpha

Labs; and/or (5) the doctrine of piercing of the corporate veil.”(SAC ¶ 30). Plaintiff also argues that Diehl was “directly involved in naming 6 HOUR ENERGY and designing its packaging.”(Pl.'s Diehl Resp. 13). Plaintiff infers that Diehl was directly involved from Diehl's statement that, “[w]e decided to name the new drink ‘6Hour Energy Shot,’” and Diehl's description of how the label graphics were chosen in which he again uses the “we” pronoun. (Doc. No. 10, Diehl Aff. ¶¶ 11, 14). Plaintiff has not alleged any facts relating to its allegations that Diehl is vicariously liable, or an alter ego of the companies, or to support a piercing of the corporate veil. Diehl admits that N2G delivers products to Michigan for distribution, but denies that he, in his individual capacity, targeted advertising or marketing towards Michigan. (Diehl Decl. ¶ 8). Diehl is the chief executive of both defendant companies, but that fact does not get Plaintiff across the goal-line.

Based on the facts alleged in the complaint, and Diehl's sworn statements, this Court does not have personal jurisdiction over Diehl. Plaintiff has not established that Diehl has had sufficient, purposeful minimum contacts with Michigan such that Diehl could foresee being haled before a Michigan court. *See Griepentrog*, 954 F.2d at 1176. At best, Plaintiff has established that Diehl, as a corporate executive, may have played a role in naming the product and its packaging design, actions which were undertaken as a corporate officer and not necessarily specifically intended to cause an effect in Michigan. Plaintiff admits as much in its response to Diehl's motion to dismiss. (Pl.'s Diehl Resp. 8-12). Plaintiff requests that this Court deny Diehl's motion to dismiss, and allow it to conduct discovery on the personal jurisdiction issue.

Although it is within the Court's discretion to grant discovery before ruling on a 12(b)(2) motion, this Court will not exercise its discretion here because Plaintiff has proffered no facts to support this claim. *Intera Corp. v. Henderson*, 428 F.3d 605, 614 n. 7 (6th Cir.2005). Plaintiff has not established

that Diehl has had any contacts with the forum state or adduced any evidence showing that it is probable that Diehl purposefully availed himself of the privilege of conducting business in Michigan. Accordingly, the Court dismisses Diehl as a defendant without prejudice. However, because Diehl has proffered an affidavit in this case and is the CEO of both defendant corporations, he is subject to discovery.

B. N2G and Alpha Performance Labs' Partial Motion to Dismiss, and/or Motion for Partial Summary Judgment

*5 N2G and Alpha Performance Labs ("Defendants") move to dismiss Plaintiff's copyright infringement and trade dress claims. (Mot. to Dismiss ¶ 5). Defendants contend that Plaintiff's medical caution statement is not entitled to copyright protection. (Mot. to Dismiss ¶¶ 6-7). Defendants further argue that Plaintiff cannot establish a trade dress claim because there is no unique, distinctive, and consistent label configuration running through the entire product line. (Mot. to Dismiss ¶ 8). Plaintiff responds that Defendants' motion to dismiss should be denied because it alleged a *prima facie* case of copyright infringement and alleged a viable claim of trade dress infringement. (Pl.'s Resp. 5, 12).

1. Plaintiff's Copyright Claims

In the complaint, Plaintiff alleges that its medical caution statement ^{FN2} is a work subject to protection under the Federal Copyright Act, 17 U.S.C. § 101 *et seq.* (SAC ¶ 54). Plaintiff further alleges that Defendants copied, and induced others to copy, the medical caution label without Plaintiff's permission. (SAC ¶ 56).

FN2. The medical caution statement reads: "Contains about as much caffeine as a cup of coffee. Limit caffeine products to avoid nervousness, sleeplessness, and occasionally rapid heartbeat. You may experience a

Niacin Flush (hot feeling, skin redness) that lasts a few minutes. This is caused by Niacin (Vitamin B3) increasing blood flow near the skin."

To establish a copyright infringement claim, a plaintiff must show: 1) ownership of a valid copyright; and 2) that the defendant copied protectable elements of the work. *See Feist Publ 'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358, (1991); *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir.2003). The first prong tests the originality and non-functionality of the work, both of which are presumptively established by the copyright registration. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir.2004). In this case, it is undisputed that Plaintiff possesses a registered copyright for the medical caution statement. (Pl.'s Resp. Ex C, Cert. of Registration). The second prong tests whether any copying occurred (a factual matter) and whether the portions of the work copied were entitled to copyright protection (a legal matter). *Lexmark*, 387 F.3d at 534.

Defendants acknowledge that Plaintiff registered the medical caution statement with the Copyright Office (Defs.' Br. 6), an action which constitutes *prima facie* evidence of the copyright's validity. *See* 17 U.S.C. § 410(c). Also, Defendants do not dispute that they copied Plaintiff's medical caution statement. (Defs.' Br. 6). Indeed, a review of the pictures of the medical caution statements on Plaintiff and Defendants' product contained in the complaint reveals that Defendants' medical caution statement is identical to Plaintiff's. (SAC ¶ 28). Because 5 Hour Energy was on the market before any of Defendant's products, and the medical caution statements featured on Defendants' labels are identical to Plaintiff's medical caution statement, it is reasonable to infer that Defendants copied Plaintiff's medical caution statement. *See Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir.2004) ("Since direct evidence of copying is rarely available, a plaintiff may establish an infer-

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ence of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue.”). Because Plaintiff has plead a plausible claim of copyright infringement, this Court denies Defendant's motion to dismiss.

*6 This Court will also examine Plaintiff's claims under Rule 56(c), and consider Defendants' arguments rebutting the presumptive validity of Plaintiff's copyright. *Lexmark*, 387 F.3d at 534 (citing *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1095 (6th Cir.1995)). Primarily, Defendants argue that Plaintiff's medical caution statement lacks originality. (Defs.' Br. 6).

The second part of the second prong of the *Feist* test requires courts to decide whether whether the work is entitled to copyright protection as a matter of law. See *Lexmark*, 387 F.3d at 534. In order to enjoy copyright protection, the work must contain “originality.” *Tiseo Architects, Inc. v. B & B Pools Service and Supply Co.*, 495 F.3d 344, 347 -348 (6th Cir.2007). “Originality ... means only that the work was independently created by the author (as opposed to copied from other works), and that it possess at least some minimal degree of creativity.” *Feist*, 499 U.S. at 345. However, even if a work is in somewhat “original” under 17 U.S.C. § 102(a), it still may not be copyrightable because § 102(b) provides that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of [its] form.” *Lexmark*, 387 F.3d at 534. Copyright protection is bestowed not upon the idea, but the expression of the idea. *Id.*

In deciding whether a work is an idea or an expression of an idea, between process and non-functional expression, courts have looked to the two copyright doctrines of merger and scenes a faire. *Lexmark*, 387 F.3d at 535. If the “expression is essential to the statement of the idea,” or where there is only one way or very few ways of expressing the idea,

the idea and expression are said to have “merged.” *Id.* (quoting *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 68 (2d Cir.1994)). If the idea and expression merge, the expression is not entitled to copyright protection because granting protection to the expressive component of the work would also protect the uncopyrightable idea as well. *Id.* (citation omitted). The doctrine of “scenes a faire”^{FN3} applies when external factors constrain the choice of expressive vehicle, i.e. if the expression is a standard phrase or stock expression, the expression is not copyrightable. *Id.*

FN3. “Scènes à faire are those ‘incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.’” *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 319 (6th Cir.2004) (quoting *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295 (D.C.Cir.2002)).

Defendants argue that Plaintiff's medical caution statement is unoriginal because there is only one way or very few ways to express the facts contained in the medical caution statement. (Defs.' Br. 7). Defendants thus contend that the idea and expression have merged, and the medical caution statement is uncopyrightable. (Defs.' Br. 7). In so arguing, Defendants liken Plaintiff's medical caution statement to instructions, which are not entitled to copyright protection because instructions generally do not contain “ ‘stylistic flourishes or any other forms of creative expression that somehow transcend the functional core of the directions.’” (Defs.' Br. 7, quoting *National Nonwovens, Inc. v. Consumer Products Enterprises*, 397 F.Supp.2d 245, 256 (D.Mass.2005)).

*7 In trying to discern whether the merger or “scenes a faire” doctrines apply, courts tend to “focus on whether the idea is capable of various modes of expression.” *Lexmark*, 387 F.3d at 536 (quoting *Mason v. Montgomery Data, Inc.*, 967

F.2d 135, 138 (5th Cir.1992)). In this case, there is evidence that the idea is capable of various modes of expression. Defendants attached pictures of the medical caution statements published on other energy shot labels. (Defs.' Br. Ex. 2). Although the medical caution statements are substantially similar, in that they all express the same basic facts, the statements are not identical. Indeed, the word choice and word order differs among the labels. These differences indicate that the idea and expression have not merged and that there is not a standard way of expressing the idea, such that the "scenes a faire" doctrine would apply. Moreover, the medical caution statement is unlike instructions because the medical caution statement does not merely delineate the steps of an established process. Instead, each manufacturer has chosen different language and word order to emphasize or de-emphasize various aspects of the medical warning. In other words, the medical caution statement is a narrative. Because the medical caution statements appearing on the energy shots have appreciable differences, and stylistic flourishes may be inserted in the statement, the medical caution label has the minimum level of originality necessary to warrant copyright protection as a matter of law. Accordingly, this Court denies Defendants' motion for summary judgment. *See Totes Isotoner Corp. v. Int'l Chemical Workers Union Council/UFCW Local 664C*, 532 F.3d 405, 411-12 (6th Cir.2008) (internal citations omitted). ("Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law.")

2. Plaintiff's Trade Dress Claims

Defendants argue that this Court should dismiss Plaintiff's trade dress claims because Plaintiff has not stated, with specificity, the elements of the claimed trade dress. (Defs.' Br. 12). Plaintiff responds that it sufficiently pleaded its trade dress claim, and it is entitled to identify its trade dress

elements post-discovery. (Pl.'s Br. 12-13).

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), protects from infringement the unregistered "trade dress" of a product. "The trade dress of a product is essentially its total image and overall appearance. It involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n. 1, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992) (internal quotation marks and citations omitted). The elements of trade dress infringement under § 43(a), are: 1) the trade dress is distinctive in the marketplace, "thereby indicating the source of the good it dresses," 2) the trade dress is primarily non-functional, and 3) the trade dress of the competing good is confusingly similar. *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir.2002).

*8 Defendants argue that Plaintiff's trade dress claim cannot survive a motion to dismiss because Plaintiff did not list the elements of its trade dress. (Defs.' Br. 12-13). "[I]t will not do to solely identify in litigation a combination as 'the trade dress.' Rather, the discrete elements which make up that combination should be separated out and identified in a list." *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 415 (6th Cir.2006) (quoting McCarthy on Trademarks § 8:3 (4th ed.2001)). However, at the motion to dismiss stage, Plaintiff has to do no more than state enough facts to support a plausible claim for trade dress. *See Twombly*, 127 S.Ct. at 1974. Beyond pleading facts sufficient to put Defendants on notice of the claims against them, there is no requirement that Plaintiff plead its trade dress claim with further specificity. *See Abercrombie*, 280 F.3d at 629. Here, as in *Abercrombie*, 280 F.3d at 629, Plaintiff included pictures of its products and Defendants allegedly infringing products. (SAC ¶ 39). If this case proceeds further, Plaintiff will be expected to list the elements of the designs and the unique combinations it seeks to

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protect. See *Abercrombie*, 280 F.3d at 629. However, at the motion to dismiss stage, there is no such requirement. As such, Defendants' argument fails, and this Court denies Defendants' motion to dismiss Plaintiff's trade dress claims.

Defendants next argue that this Court that they are entitled to summary judgment on Plaintiff's trade dress claims because Plaintiff has not demonstrated that its series or line of products has a recognizable and consistent overall look. (Defs.' Br. 13). Defendants point to the fact that Plaintiff did not include the decaffeinated version of its 5 Hour Energy drink, which has a blue and green label, a sun, and a runner silhouette, to illustrate its argument that Plaintiff's 5 Hour Energy Product line does not have recognizable and consistent overall look. (Defs.' Br. 14). Plaintiff responds that the Court should only consider the products for which it seeks trade dress protection, and the slight variation in the labels does not affect the overall consistent look of the products. (Pl.'s Br. 16-17). Plaintiffs further argue that summary judgment is premature because it has not had sufficient opportunity to conduct discovery on whether Defendants' products are likely to cause confusion in the marketplace. (Pl.'s Br. 18).

Courts that have decided the issue of whether all, or part of a product line should be considered in deciding whether a product has a recognizable and consistent overall look, have held that a plaintiff asserting a trade dress claim may choose the products the court examines when deciding a trade dress claim. In *Rose Art Indus., Inc. v. Swanson*, 235 F.3d 165, 172-75 (3d Cir.2000), the Third Circuit opined:

We agree with the District Court that "if a plaintiff seeking trade dress protection cannot show that its packages have a 'consistent overall look,' the trade dress that the defendant is allegedly infringing 'does not exist,' " and the defendant must prevail....

*9 In endorsing the "consistent overall look" stand-

ard, however, we do not require that the appearance of the series or line of products or packaging be identical.... Certainly the fact that Rose Art packages the same product in several different types of packaging does not prevent Rose Art from seeking trade dress protection for one of these packaging designs....

Even if Rose Art distributed the same products, for example, generic crayons, markers, and colored pencils in fifteen different package designs for each of fifteen different customers, this fact alone would not prevent Rose Art from obtaining trade dress protection for one of the fifteen different packaging styles. One or more of the package designs could be recognizable trade dress as long as it had a "consistent overall look."

* * *

We conclude that when applying the "consistent overall look" standard, that is, when determining whether the trade dress alleged by the plaintiff is recognizable, protectable trade dress, a trial court should consider only the products or packaging for which the plaintiff is seeking trade dress protection.

The Seventh Circuit has since adopted the *Rose Art* consistent overall look standard. *AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 814 (7th Cir.2002).

Defendants' argument fails under *Rose Art* because the Court does not have to consider all of Plaintiff's products in deciding whether the line has a consistent overall look. Rather, this Court will only consider the products and packaging for which Plaintiff is seeking trade dress protection. *Rose Art*, 235 F.3d at 175. For this reason, the Court denies Defendants' motion for summary judgment on Plaintiffs' trade dress claims.

III. CONCLUSION

For the reasons discussed above, this Court:

- 1) GRANTS Diehl's motion to dismiss for lack of personal jurisdiction, and dismisses Diehl as a defendant without prejudice;
- 2) DENIES Defendants' motion to dismiss Plaintiff's copyright claims;
- 3) DENIES Defendants' summary judgment motion on Plaintiff's copyright claims;
- 4) DENIES Defendants' motion to dismiss Plaintiff's trade dress claims;
- 5) DENIES Defendants' summary judgment motion on Plaintiff's trade dress claims.

SO ORDERED.

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Only the Westlaw citation is currently available.

United States District Court,
 E.D. Michigan, Southern Division.
 UNITED STATES OF AMERICA, ex rel. Fayiz M.
 Hadid, and Fayiz M. Hadid a/k/a Fred Hadid,
 Plaintiffs,
 v.
 JOHNSON CONTROLS, INC. and Readiness Man-
 agement Support LLC, Defendants.
 No. 04-60146.

July 7, 2005.

Raymond Guzall, III, Barry A. Seifman Assoc.,
 Farmington Hills, MI, for Plaintiffs.

John F. Birmingham, Jr., Foley & Lardner, Detroit,
 MI, for Defendants.

*ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANTS' MOTION TO DISMISS, OR,
 IN THE ALTERNATIVE, TO TRANSFER VENUE*

BATTANI, J.

*1 Before the Court is Defendants Johnson Controls, Inc. ("JCI") and Readiness Management Support, LLC's ("RMS") Motion to Dismiss, or, in the Alternative, to Transfer Venue (Doc. # 7). Defendants argue that the Court lacks personal jurisdiction over Readiness Management Support L.C. ("RMS") and that Defendant Johnson Controls, Inc. ("JCI") is not a proper party to the lawsuit. Defendants ask this Court to transfer this case to the Northern District of Florida on the basis of improper venue, or, in the alternative, for the convenience of the parties and in the interest of justice.

The Court heard oral argument on November 2, 2004. For reasons more fully stated on the record at a hearing held on November 2, 2004, the Court

found that it lacked personal jurisdiction over Defendant RMS in the absence of the existence of an alter-ego relationship between Defendants. Therefore, the Court allowed limited discovery on the issue of the Defendants' relationship and instructed the parties to file supplemental briefs at the close of the discovery period. Those briefs have been filed and reviewed by the Court.

For the reasons stated below, the Court GRANTS in part and DENIES in part Defendants' Motion and TRANSFERS this action to the United States District Court for the Northern District of Florida.

I. STATEMENT OF FACTS

Plaintiff, Fayiz M. Hadid, entered into an employment relationship with Defendant RMS, a Florida-based company, in December 2002. According to Hadid, he learned of RMS through Sam Farhat, an RMS employee, who gave Hadid's name and phone number to RMS. Hadid asserts that he was hired during a phone conversation, then traveled to Florida to sign an employment agreement with RMS, pursuant to which he worked as a engineer in the Middle East. Pl.'s Ex. 8, Hadid Aff. at ¶ 8; see Defs.' Ex. A, Employment Agreement. RMS terminated the contract shortly before it was due to expire. According to RMS, Plaintiff improperly solicited cash payments from other contractors. Plaintiff alleges that he was terminated because he advised the United States government that Defendants' proposals were inflated by millions of dollars. Compl. at ¶ 21,

Plaintiff filed this law suit in which he asserts claims against RMS and JCI for breach of contract and violation of the Michigan Whistleblowers' Protection Act,^{FN1} Mich.Comp.L. § 15.361etseq. According to Plaintiff, JCI and RMS are one and the same company.

FN1. Plaintiff also pleaded a violation of the Federal False Claims Act, Claims Act,

28 U.S.C. §§ 1346(b), 2671etseq., which has been dismissed without prejudice pursuant to the parties' stipulation.

II. STANDARD OF REVIEW

A motion to dismiss under Fed.R.Civ.P. 12(b)(2) challenges the sufficiency of the jurisdictional facts regarding the existence of personal jurisdiction over a defendant. The plaintiff has the burden of establishing the existence of personal jurisdiction. *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1151 (6th Cir.1990). When a court decides whether it has personal jurisdiction on the basis of written submissions alone, the plaintiff "may not rest on his pleadings to answer the movant's affidavits, but must set forth, by affidavit or otherwise ... specific facts showing that the court has jurisdiction." *Scrras v. First Tennessee Bank Int'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir.1989). If a plaintiff's pleadings and affidavits state the facts with sufficient particularity, a court must ignore contrary assertions by a defendant. *Id.* at 1215. "Dismissal is proper only if all the specific facts which the plaintiff ... alleges collectively fail to state a prima facie case for jurisdiction." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991).

*2 Because this Court is relying only on the pleadings and affidavits of the parties, the plaintiff "need only make a prima facie showing of jurisdiction." *Id.* In the absence of an evidentiary hearing, the "court will not consider facts proffered by the defendant that conflict with those offered by the plaintiff." *Id.* The Court views the facts in the light most favorable to the nonmoving party. *Scrras*, 875 F.2d at 1214.

III. ANALYSIS

A. May the Court exercise personal jurisdiction over RMS?

When a federal court's subject matter jurisdiction over a case stems from the existence of a federal

question, as is the case here, personal jurisdiction over a defendant exists if the defendant is amenable to service of process under the [forum's] state's long-arm statute^{FN2} and if the exercise of personal jurisdiction would not deny the defendant due process. See *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir.2002) (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir.1992)). In *Green v. Wilson*, 455 Mich. 342, 350-51, 565 N.W.2d 813, 816-17 (1997), the Michigan Supreme Court clarified that the statute does not automatically extend to the limits of the Due Process Clause; consequently, if a defendant's conduct is not covered by the statute, there is no need to conduct a due process analysis. If it is covered, they share the same outer boundary. The parties do not address whether the long-arm statute is satisfied so the Court assumes that it is and addresses only whether the exercise of personal jurisdiction over RMS comports with due process.

FN2. There is no contention that the Court has general jurisdiction over RMS, only limited jurisdiction. The Michigan long-arm statute extends "limited" jurisdiction over non-resident corporations pursuant to M.C.L. 600.715, which provides that limited jurisdiction will exist between a corporation or its agent and the forum state in claims "arising out of the act or acts which create [certain] relationships[.]" including "the [defendant's] transaction of any business within the state." *Id.*

Under the Due Process Clause of the Fourteenth Amendment, "[a] state court may exercise personal jurisdiction over a nonresident defendant so long as there exists 'minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). In the Sixth Circuit, such jurisdiction is established only when the following three conditions are satisfied:

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.

Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir.2000) (citing *Southern Mach. Co. v. Mo-hasco Indust.*, 401 F.2d 374, 381 (6th Cir.1968)).

1. Purposeful availment

The United States Supreme Court has expressed that the “ ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quotations omitted). “ ‘Purposeful availment’ is something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities. The defendant will have reason to foresee being ‘haled before’ a Michigan court.” *Audi AG & Volkswagon of Am., Inc. v. D’Amato*, 314 F.Supp.2d 734, 742 (E.D.Mich.2004) (citation omitted).

*3 [T]he existence of a contract with a citizen of the forum state, standing alone, will not suffice to confer personal jurisdiction over a foreign defendant. *Burger King*, 471 U.S. at 478. Rather, “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing ... must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.” *Id.* at 479. Further, “[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact

with the forum State.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

Here, Plaintiff maintains that the Court has limited personal jurisdiction over RMS because RMS contacted Plaintiff by phone to tell him he was hired and began his employment while he was in Michigan. See Pl.’s Ex. 8, ¶ 1. Plaintiff asserts that he should not be expected to conduct his lawsuit in Florida when he resides in Michigan, and RMS contacted him. In addition, Plaintiff contends that the “Long Term Assignment” label in the employment agreement evidences a continuing relationship that subjects RMS to jurisdiction in Michigan. The Court disagrees.

It is undisputed that RMS is incorporated in Florida. RMS has no offices, facilities or employees in Michigan. At most, RMS, through an intermediary, solicited Hadid’s resume and application for employment for an overseas job assignment. Hadid was residing in Michigan at the time, but it appears that he traveled to Florida to sign the employment contract. Even viewing the facts in the light most favorable to Plaintiff, the Court cannot hold that RMS, by entering into a contract with a Michigan resident purposefully availed itself of the benefits and protections of Michigan law. See *Kerry Steel, Inc. v. Paragon Indus. Inc.*, 106 F.3d 147, 151 (6th Cir.1997) (finding no purposeful availment where defendant had no employees or offices in Michigan, and no employee had ever been in Michigan for the purpose of conducting business).

2. Cause of action

The parties disagree as to whether the terminated contract was the contract that resulted from RMS’s phone call to Plaintiff or a second contract that was negotiated in the Middle East. For purposes of this motion, the Court assumes that Plaintiff correctly characterizes the contract as an “extension” of the original contract. The Court nevertheless finds that Plaintiff’s cause of action does not arise out of

RMS' activities in Michigan. The facts supporting this decision include the following: Plaintiff signed his contract in Florida and worked on assignment overseas; the contract did not contemplate any future consequence in Michigan; Plaintiff did not perform any duties in Michigan; and the decision to terminate Plaintiff's contract occurred in Florida while Plaintiff was overseas. Plaintiff's causes of action are neither connected to nor arise from RMS' contact with Michigan. *See Youn v. Track, Inc.*, 324 F.3d 409, 419 (6th Cir.2003) ("the 'arising from' requirement is satisfied if the cause of action is 'related to' or 'connected with' the defendant's forum contacts").

3. Nature of connection

*4 In *Int'l Tech. Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 395-96 (6th Cir.1997), the Sixth Circuit examined contacts similar to those here, albeit for a different cause of action, and found them insufficient to establish personal jurisdiction. In that case the defendants had communicated with the plaintiff in Michigan by letter, telephone and facsimile. The court nevertheless held that the defendant was not trying to exploit any market for its products in Michigan and would have been pleased to communicate with the plaintiff wherever he wished. *Id.* The Court likewise should not exercise jurisdiction over RMS based on its limited contact with Michigan. RMS merely needed to hire an engineer; it would have been pleased to contact Plaintiff regardless of his location. It cannot be said that RMS's contact with Michigan was substantial enough to render the exercise of jurisdiction over it reasonable.

In sum, the Court finds that it lacks personal jurisdiction over RMS because Plaintiff fails to make a prima facie showing of personal jurisdiction under all three elements of the *Mohasco* test. The Court therefore directs its attention to whether RMS should be treated as an alter ego of JCI for purposes of jurisdiction.

4. Piercing the corporate veil

In the alternative, Plaintiff observes that JCI created RMS "to coordinate contingency support as part of the Air Force Contract Augmentation Program, which supports noncombatant operations worldwide." *See* Pl.'s Ex. 2. Based upon that fact, Plaintiff concludes that for purposes of jurisdiction Defendants are one and the same. Based upon that representation, the Court allowed the parties to engage in limited discovery in order to ascertain whether Plaintiff could make even a prima facie showing that RMS's acts may be attributed to JCI, thereby justifying the exercise of jurisdiction over RMS in Michigan. Plaintiff's conclusion is not supported by the facts, even when viewed in the light most favorable to Plaintiff.

Courts have long presumed the institutional independence of related corporations. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1935); *Schwartz v. Electronic Data Sys.*, 913 F.2d 279 (6th Cir.1990); *Wells v. Firestone Tire & Rubber, Co.*, 421 Mich. 641, 364 N.W.2d 670 (1984). "When formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent. *Schwartz*, 913 F.2d at 283. Consequently, personal jurisdiction over RMS does not arise merely because the forum state properly asserts jurisdiction over JCI. Furthermore, unless the plaintiff clearly shows otherwise, the Court will presume that companies holding themselves out as parent and subsidiary are in fact separate entities. *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1273-74 (6th Cir.1998).

Michigan courts have generally required that a subsidiary must "become 'a mere instrumentality' of the parent" before its separate corporate existence will be disregarded. *Maki v. Copper Range Co.*, 121 Mich.App. 518, 524, 328 N.W.2d 430 (1982). Anything short of that type of relationship is not enough because in a typical parent/subsidiary relationship,

the parent, by definition, is able to exert control over a subsidiary based on its ownership. *Id.*

*5 In this case, JCI is the parent company of Johnson Controls World Services, Inc., which is the parent company of RMS.^{FN3} As a parent company, it is not liable for the acts of subsidiaries absent a showing of complete identity between the parent and the subsidiary. The evidence advanced by Plaintiff on that issue falls short of his burden. Specifically, Plaintiff relies upon the following facts: JCI provided health care and dental benefits^{FN4} to Plaintiff; *see* Pl.'s Ex. 2, provided ethics courses, which Plaintiff needed to complete prior to employment; *see* Pl.'s Exs. 3, 4, concurred with JCI as to Plaintiff's compensation and employment; *see* Pl.'s Ex. 5 (e-mail from Linda G. Ramsey, Senior Manager of JCI Human Resource Operations), and provided Plaintiff's COBRA coverage, *see* Pl.'s Ex. 6.

FN3. Neither party addresses the significance of the successive links in the corporation ownership; therefore, the Court assumes for purposes of this motion that JCI is the parent of RMS.

FN4. Johnson Controls World Services, Inc. is identified on the dental plan, not JCI.

To rebut Plaintiff's contention that JCI and RMS are alter egos, Defendants offer undisputed testimony showing that corporate formalities have been observed. According to RMS Chairman, Dwight Clark, RMS maintains its own financial records and bank accounts; has its own bylaws and board of directors; determines its own policies and decisions; and maintains its own office in Florida. Clark Decl. at ¶ 5. Moreover, the persuasive value of Plaintiff's evidence is minimal: the relationship of owner to owned/parent to subsidiary contemplates a close financial connection and certain degree of direction and management. Broad oversight is acceptable, and the provision of administrative services by a parent for a subsidiary does not trigger personal jur-

isdiction over RMS. The facts here create no inference that JCI exercised pervasive or continual control so that RMS was nothing more than its instrumentality. What is missing from Plaintiff's proofs is evidence that JCI directed the day-to-day operations of RMS. Based upon the facts presented to the Court, only one conclusion can be drawn: there is no basis for piercing the corporate veil as a means to exercise personal jurisdiction over RMS.

B. Is JCI a proper party to this law suit?

Because there is no basis for piercing the corporate veil, Defendants assert that JCI is not a proper party to this lawsuit and, therefore, must be dismissed. Defendants note that JCI is not a party to the employment contract and that it had no involvement in the government contracts described in the Complaint.

Although Defendants do not identify the procedural rule upon which they seek dismissal, the standards under Fed.R.Civ.P. 12(b)(6) govern this request. A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a plaintiff's claims, and a court considering such a motion must "construe the complaint in the light most favorable to the plaintiff [and] accept all factual allegations as true." *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir.1996). A complaint should not be dismissed unless a plaintiff can prove no set of facts in support of her claims that would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

*6 The relevant allegations contained in the Complaint are sparse. Plaintiff makes one allegation as to the relationship of Defendants: "RMS is a wholly owned subsidiary of JCI." Pl.'s Ex. 1, ¶ 3. Although this allegation, standing alone, is insufficient to establish a basis for bringing in JCI as a defendant in this lawsuit, the Complaint also includes allegations reflecting Plaintiff's position that both RMS and JCI were his employer. *See* g. Compl. at ¶¶ 6-13. Moreover, in his subsequent pleadings, Plaintiff ar-

articulates more explicitly his contention that RMS and JCI were joint employers.

In this case, Plaintiff's theory is legally sufficient. Further, the exhibits provided by Plaintiff to dispute this motion demonstrate that a basis to question the nature of the relationship between Plaintiff and Defendants exists. JCI provided courses, benefits and concurred with a "completion bonus." Pl.'s Ex. 5. In addition, Plaintiff contends that JCI holds itself out to the public as RMS, and points to a Monster.com website as evidence. There has been no discovery on the issue of whether JCI is a joint employer, a determination that is fact intensive. Accordingly, Defendants' motion for dismissal of JCI is denied.

C. Is Venue in the Eastern District of Michigan proper?

Subject matter jurisdiction in this case is based on both federal question and diversity; therefore, venue is analyzed pursuant to 28 U.S.C. § 1391(b). Under § 1391(b), when jurisdiction is not founded solely on diversity of citizenship a civil action

may ... 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.

Id. Plaintiff bears the burden of proving that venue is proper. *Audi AG & Volkswagen of Am., Inc. v. Izumi*, 204 F.Supp.2d 1014, 1017 (E.D.Mich.2002). In cases with multiple defendants, venue must be proper with respect to each and every defendant. *IA, Inc. v. Thermacell Technologies, Inc.*, 963 F.Supp. 697, 700 (E.D.Mich.1997).

For purposes of the venue statute, "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jur-

isdiction at the time the action is commenced." *See Schultz v. Ary*, 175 F.Supp.2d 959, 965 (W.D.Mich.2001); 28 U.S.C. § 1491(c). RMS does not reside in Michigan. Therefore, even though JCI resides in Michigan, this judicial district is not appropriate, and Section (b)(1) is unavailable as a basis for venue. Further, Plaintiff may not rely on subsection (b)(2) because a substantial part of the events giving rise to Plaintiff's claims did not occur in Michigan. Plaintiff was employed outside of Michigan, the events leading to his termination occurred outside of Michigan, and the decision to terminate Plaintiff was made outside of Michigan. Finally, venue is not proper under § 1391(b)(3) because although JCI is found here, there is another district where this lawsuit may be brought.

*7 In their motion, Defendants request that the Court dismiss the case or in the alternative transfer this case to the Northern District of Florida, pursuant to 28 U.S.C. § 1406(a) or § 1404(a).^{FN5} Although the Court indicated at oral argument that it was inclined to dismiss the case in the absence of personal jurisdiction over RMS, upon further reflection, the Court finds that the interests of justice are better served by transferring this matter to a district where it might have been brought.

FN5. Under 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 1406(a) allows a district court to grant a change of venue when venue was improper in the original forum. Specifically, section 1406(a) provides that a district court with a case "laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Unlike section 1404(a), however, section 1406(a) does not require that the district court have personal jurisdiction over the defendants before transferring the case. *See Goldlawr*,

Inc. v. Heiman, 369 U.S. 463, 466-67, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962) (utilizing section 1406(a) to transfer a case where there was both improper venue and lack of personal jurisdiction in the transferor forum). Thus, Section 1406(a) authorizes the district court to transfer a case to avoid an obstacle to adjudication on the merits due to lack of personal jurisdiction or improper venue.

In situations where venue is proper for one defendant but not for another, the court may transfer the entire case to another district that is proper for both defendants or sever the claims. *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 296 (3d Cir.1994). Here, the conduct of RMS is central to the claims raised by Plaintiff, and the Court concludes that the better course of action is to transfer the action in its entirety to the Northern District of Florida. The Northern District of Florida is an appropriate forum and there is no contention before this Court that venue would not be proper with respect to both Defendants.

V. CONCLUSION

For the reasons stated above, the Court DENIES Defendants' request to dismiss JCI. The Court further finds that it lacks personal jurisdiction over RMS, but that the interests of justice are better served by GRANTING Defendants' request to change venue.

Accordingly, this matter is TRANSFERRED to the United States District Court for the Northern District of Florida.

IT IS SO ORDERED.

CERTIFICATE OF SERVICE

Copies of this Order were mailed to Raymond Guzall, III and John Birmingham on this date by ordinary mail and electronic filing.

E.D.Mich.,2005.

U.S. ex rel. Hadid v. Johnson Controls, Inc.
Not Reported in F.Supp.2d, 2005 WL 1630098
(E.D.Mich.)

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