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EXHIBIT O

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FRANKENMUTH MUTUAL INSURANCE COMPANY and ANSUR AMERICA, Michigan Corporations, Plaintiffs, v. APPALACHIAN UNDERWRITERS, INC., A Tennessee Corporation, Defendant.

Case No. 03-10193-BC

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

2004 U.S. Dist. LEXIS 11465

June 21, 2004, Decided

DISPOSITION: Defendant's motion to dismiss for want of personal jurisdiction denied.

COUNSEL: [*1] For Frankenmuth Mutual Insurance Company, Ansur America, Plaintiffs:Emily L. Mathews, Michael W. Puerner, Scott L. Mandel, Foster, Swift, (Lansing), Lansing, MI.

For Appalachian Underwriters, Incorporated, Defendant:James C. Wright, Butler, Vines, Knoxville, TN.

For Ansur America, Frankenmuth Mutual Insurance Company, Counter Defendants:Emily L. Mathews, Scott L. Mandel, Foster, Swift, (Lansing), Lansing, MI.

JUDGES: Honorable David M. Lawson DAVID M. LAWSON United States District Judge.

OPINION BY: DAVID M. LAWSON

OPINION

OPINION AND ORDER DENYING DEFENDANT MOTION TO DISMISS

The plaintiffs in this case are a Michigan-based insurance company and its wholly-owned subsidiary who contracted with defendant Appalachian Underwriters, Inc. ("Appalachian"), a Tennessee corporation, to sell workers' compensation insurance through subagents to customers in Tennessee, Georgia, Kentucky, Virginia, North Carolina, South Carolina, Alabama, and Mississippi, and later Arkansas, Indiana, Connecticut, and Illinois. The plaintiffs contend that Appalachian sold some of the insurance policies on credit under circumstances in which Appalachian was responsible for the risk of non-payment, and consequently [*2] it owes the plaintiffs substantial sums for unpaid premiums. Appalachian has filed a motion to dismiss the case based on *Federal Rule of Civil Procedure 12(b)(2)* on the ground that the Court lacks personal jurisdiction over it. The plaintiffs have responded and the parties have engaged in considerable discovery on the issue. The Court has reviewed the submissions of the parties and finds that the relevant law and facts have been set forth in the motion papers and that oral argument will not aid in the disposition of the motion. Accordingly, it is **ORDERED** that the motion be decided on the papers submitted. *See* E.D. Mich. LR

7.1(e)(2).

The defendant argues that it was the plaintiffs that sought it out to establish a business relationship that extended well beyond the territory of Michigan and into the defendant's home state, and therefore it would be unfair and contrary to the *Due Process Clause* to require it to defend this action in a federal court in Michigan. However, the Court finds that the plaintiffs have brought forth sufficient facts that establish Appalachian's connection with this forum arising from the continuing relationship [*3] of a general insurance agent with its home office, and thus limited personal jurisdiction over the defendant exists under Michigan's long-arm statute in a manner consistent with constitutional requirements. The motion to dismiss, therefore, will be denied.

I.

Frankenmuth Mutual Insurance Company is a small Michigan insurer based in Frankenmuth, Michigan operating primarily in the Midwest. It historically concentrated its business in personal property and casualty lines and commercial products directed towards small businesses. According to John Benson, its president and chief operating officer, Frankenmuth embarked on a plan of expansion in 2000 that included the formation of wholly-owned subsidiaries that would carry Frankenmuth's business into different states. Plaintiff Ansur America was one of those subsidiaries, so named, as Benson explained, to distance itself from the ethnic overtones and the unwieldy name of its parent company.

In August 2000, Frankenmuth and Ansur representatives contacted Appalachian at its office in Clinton, Tennessee. Frankenmuth's research suggested that Appalachian could generate a sizeable block of business in nine southern states targeted by Frankenmuth [*4] for its expansion. Frankenmuth and Ansur representatives traveled to Clinton, Tennessee to negotiate a special general agency contract with Appalachian. The agreement, dated September 8, 2000, was signed on September 13, 2000 in Clinton, Tennessee by Robert Arowood, Appalachian's president. John Benson signed for Frankenmuth and Ansur, but claims that he affixed his signature to the document in Michigan.

The contract does not contain a forum selection clause. Nor does the contract contain traditional choice-of-law language, although it does provide that Appalachian's failure to remit account balances on a timely basis will allow Frankenmuth and Ansur to terminate the agency agreement "in accordance with the statutes of the State of Michigan." Contract, P 7(a). The contract also provides that Appalachian will act as a fiduciary, as required by a provision of the Michigan Insurance Code, when it comes into possession of funds received on behalf of Frankenmuth and Ansur. *Id.* at P 7(b). There is no other provision in the contract, however, that prescribes the law of any particular forum as the rules of decision for resolving disputes between the parties.

It is undisputed that the [*5] parties to this agency agreement contemplated that Appalachian would not conduct any business for the placement of insurance in Michigan, but rather would focus its efforts on the list of southern states stated in the agreement, which was later expanded to include states outside of the deep south. However, Frankenmuth asserts, and Appalachian does not contest, that Frankenmuth and Ansur representatives expected Appalachian representatives to visit Frankenmuth during the course of the relationship. The parties agree that Frankenmuth brought Appalachian representatives to the home office in Frankenmuth, Michigan on three occasions. Three Appalachian representatives visited headquarters for three days in October 2000 to meet with Ansur's staff, discuss operations, play golf, and experience the culture of the company and the community. A second three-day visit occurred in September 2001 when Appalachian representatives met with Frankenmuth executives to discuss program profitability and agency operations. A third visit occurred during two days in August 2002 to discuss business and the relationship between the insurer and the general agent. During some of these trips, addenda to the contract [*6] were signed that added new states to the territory paragraph (but never adding Michigan), and changing the percentages for the calculating profit sharing.

As previously mentioned, Appalachian was not licensed to do business in Michigan and its sales activities occurred exclusively in other states. However, communications with Frankenmuth and Ansur between Tennessee and Michigan

were robust. Frankenmuth asserts that over the course of the relationship, Appalachian submitted an excess of 8,300 referrals to Frankenmuth seeking rate quotes and submitted more than 6,500 endorsement requests for prospective insureds in states other than Michigan. In addition, Frankenmuth contends, and Appalachian does not dispute, that the general agent communicated with headquarters by telephone and telefax several times each business day, and it remitted more than $ 33 million in premiums for policies actually written by Frankenmuth and Ansur. According to the pleadings, approximately $ 400,000 in unpaid premium is in dispute in this case. However, Appalachian observes that it never remitted funds to Frankenmuth in Michigan; rather, it effectuated payment by wire transfer to Frankenmuth's bank in Pennsylvania.

[*7] Disputes that arose in the relationship apparently proved to be irreconcilable, and on November 11, 2002 Frankenmuth and Ansur representatives notified Appalachian that the relationship would be terminated. Appalachian stopped writing new policies on behalf of the insurer on February 12, 2003, and approximately two weeks later Appalachian ceased administering renewals of existing policies on behalf of the insurer.

This lawsuit was filed August 22, 2003, and the defendant filed its motion to dismiss on jurisdictional grounds on December 12, 2003. The parties have filed responses and supplements, and the matter is now ready for decision.

II.

In a motion to dismiss for want of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, the plaintiffs have the burden of proving the court's jurisdiction over the defendant. *Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 887 (6th Cir. 2002)*. 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." *Ibid.* In the absence of an evidentiary hearing, the "court will not [*8] consider facts proffered by the defendant that conflict with those offered by the plaintiff." *Ibid.* The defendant suggests that the plaintiff's burden is more rigorous when it "has received all of the discovery it sought with respect to personal jurisdiction and there does not appear to be any real dispute over the facts relating to jurisdiction." *International Technologies Consultants, Inc. v. Euroglas S.A., 107 F.3d 386, 391 (6th Cir. 1997)*. However, the Court is satisfied that it is the *prima facie* standard that governs, *see Serras v. First Tenn. Bank Nat'l Ass'n, 875 F.2d 1212,1214 (6th Cir. 1989)*, subject to the rule that "in the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)*.

"In a diversity case, personal jurisdiction must be appropriate both under the law of the state in which the district court sits and the *Due Process Clause of the Fourteenth Amendment*." *Bagsby v. Gehres, 195 F. Supp. 2d 957, 961 (E.D. Mich. 2002)* [*9] (citing *Neogen Corp., 282 F.3d at 888*). In Michigan, jurisdiction over the person can exist on the basis of general personal jurisdiction, *see Mich. Comp. Laws §§ 600.701and 600.711*, or limited personal jurisdiction, *see Mich. Comp. Laws §§ 600.705and 600.715*. General personal jurisdiction exists over any corporation that is incorporated in Michigan, consents to jurisdiction, or engages in continuous and systematic business in Michigan. *Mich. Comp. Laws § 600.711*. Limited personal jurisdiction may be exercised over a defendant who has certain minimum contacts with the forum, but only over claims that arise from or relate to those contacts. *Theunissen, 935 F.2d at 1460*. However, even a single contact with the forum state may suffice for personal jurisdiction if it is directly and substantially related to the plaintiff's claim. *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1359 (Fed. Cir. 1998)*.

The plaintiffs do not contend that Appalachian is subject to general personal jurisdiction in Michigan. However, Michigan's "long [*10] arm statute" contains a list of activities that will subject a corporation to the exercise of limited personal jurisdiction by Michigan courts. It includes transacting "any" business within the state, doing an act or causing consequences to occur in Michigan, owing or using tangible personal property in the state, insuring a risk within the state, and entering into a contract for services or materials within the state. *Mich. Comp. Laws. § 600.715*. Once the provisions of the long-arm statute are deemed satisfied, the Court then decides whether an assertion of jurisdiction over the defendants would comport with the notions of fundamental fairness required by the *Due Process Clause*. *Cole v.*

Mileti, 133 F.3d 433, 436 (6th Cir. 1998). The Court determines compliance with the *Due Process Clause* under the following test:

> 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 [*11] state to make the exercise of jurisdiction over the defendant reasonable.

Neogen, 282 F.3d at 890 (quoting *Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968))*.

In Michigan, it is necessary to analyze separately the question of limited personal jurisdiction under the state's long-arm statute and under the *Due Process Clause*. Although it has been suggested that Michigan's long-arm statute is coextensive with the *Due Process Clause*, and that there accordingly is no reason to conduct a two-part inquiry, *see Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 954 F.2d 1174, 1176 (6th Cir. 1992)*, the Court notes that the Sixth Circuit's prediction on this point has since been proven incorrect. Since *Griepentrog* was issued, the Michigan Supreme Court has clarified that its statute does *not* automatically extend to the limits of the *Due Process Clause*. Thus, if the defendant's conduct is not covered by the longarm statute, there is no need to conduct a Due Process analysis. *Green v. Wilson, 455 Mich. 342, 350-51, 565 N.W.2d 813, 816-17 (1997)*.

Although this Court [*12] generally must follow Circuit construction of state law, even if it believes it erroneous, *Perez v. Brown & Williamson Tobacco Corp., 967 F. Supp. 920, 925 (S.D. Tex. 1997)*, it need not do so if an intervening decision of the supreme court of that state makes it clear that the Circuit's previous construction of state law was incorrect. *Burleson v. Liggett Group, Inc., 111 F. Supp. 2d 825, 827 (E.D. Tex. 2000)*.

A.

Here, the question of whether Appalachian has conducted "any" business in Michigan is not difficult to answer. The plaintiffs correctly point out that Appalachian's business dealings in Michigan need not be extensive or prolonged, since the Michigan statute allows "any" business dealings to suffice, and "any" includes even the slightest amount. *See Sifers v. Horen, 385 Mich. 195, 199 n.2, 188 N.W.2d 623, 624 n.2 (1971)*. The Michigan Court of Appeals has broadly defined the concept of transacting business:

> The phrase "transaction of any business" is not defined in the statute. Therefore, it is proper to rely on dictionary definitions in determining the meaning of that provision. *Popma v. Auto Club Ins. Ass'n, 446 Mich. 460, 470, 521 N.W.2d 831 (1994)*. [*13] "Transact" is defined as "to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement." *Random House Webster's College Dictionary* (1997). "Business" is defined as "an occupation, profession, or trade . . . the purchase and sale of goods in an attempt to make a profit."

Oberlies v. Searchmont Resort, Inc., 246 Mich. App. 424, 430, 633 N.W.2d 408, 413 (2001) (holding that extensive marketing efforts directed toward Michigan consumers satisfied *Mich. Comp. Laws § 600.715(1)*).

Appalachian's extensive referrals and insurance placements with the Michigan-based insurer constitute the transaction of business in this state within the meaning of *Mich. Comp. Laws § 600.715(1)*. The defendant directed

communications to its contracting counterpart multiple times each day and arranged for the placement of insurance by the Michigan insurer on numerous occasions over the three-year duration of the agency contract. "Neither the presence of the defendant in the state, nor the actual contract formation need take place in the forum state for the defendant to do business in that state." *Lanier v. American Board of Endodontics, 843 F.2d 901, 907 (6th Cir. 1988).* [*14] As the Supreme Court observed in *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." A defendant who is not physically present in a state may conduct business there, and the Court finds that Appalachian's commercial dealings with Frankenmuth satisfied the first component of *Mich. Comp. Laws § 600.715(1)*.

As noted above, however, the plaintiffs' cause of action must also arise from the business transacted in the forum. The court of appeals addressed this component of the test in *Lanier, 843 F.2d at 908-09*. There, a female plaintiff sued the Illinois-based American Board of Endodontics alleging that she was denied a license by the Board on the basis of gender. The Board filed a motion to dismiss, arguing that it had insufficient minimum contacts with the State of Michigan. The court of appeals disagreed. First, the court found that the Board had [*15] transacted business within Michigan by exchanging correspondence and telephone calls with the plaintiff, in addition to collecting her application fee. Second, the court found that the plaintiff's cause of action arose out of those business transactions. Two possible theories defining the "arising from" requirement were considered: one was whether the business transactions "made possible" the cause of action, and the other was whether the cause of action arose in the "wake" of the business transactions. Under either theory, the court held that the discrimination was made possible and occurred in the wake of the plaintiff's filing her application, which the court previously had found to constitute the transaction of business in Michigan by the Board. *Id. at 908*.

In this case, the plaintiffs' claims arise primarily from the performance of the agency contract, not its formation. The alleged failure to remit premium payments occurred in the wake of the transactions involving the placement of that insurance with Frankenmuth or Ansur in Michigan. The Court finds, therefore, that both components of *Mich. Comp. Laws § 600.715(1)* have been satisfied.

[*16] B.

However, the main thrust of the defendant's argument against this Court's exercise of personal jurisdiction over it is that it is fundamentally unfair for Appalachian to be haled into a court in Michigan when it was Frankenmuth that courted it in Tennessee and signed it up as an agent to operate exclusively in southern states. Appalachian relies heavily on the decisions of *Calphalon Corp. v. Rowlette, 228 F.3d 718 (6th Cir. 2000)*, and *International Technologies Consultants, Inc. v. Euroglas S.A., supra*, in support of its argument that the *Due Process Clause* forbids the exercise of personal jurisdiction over this defendant in Michigan. It claims that it was Frankenmuth and Ansur that reached out beyond their Michigan borders to establish the relationship with Appalachian in Tennessee, and that its only contacts with this forum came from mandatory visits to Frankenmuth's headquarters. These contacts, and the extensive communication between the defendant and the plaintiffs via telephone and telefax noted above, Appalachian claims, were entirely fortuitous. Appalachian states that Frankenmuth summoned the Appalachian representatives to Michigan [*17] for a round of golf, a sample of the culture, and a lawsuit; and the latter activity is barred by the *Due Process Clause*.

Frankenmuth argues that the defendant's cited authority is distinguishable, and this case ought to be governed by the principles announced by the Supreme Court in *Burger King Corp. v. Rudzewicz*.

In neither*Calphalon* nor*Euroglas* did the court of appeals depart from the basic test for due process first announced in *Southern Machine Company, 401 F.2d at 381*, which requires purposeful availment, a cause of action arising from the defendant's activities in the forum, and a connection of the defendant to the forum sufficient to make the exercise of jurisdiction over it reasonable. However, the results in those cases turn on their unique facts, since there are no

"talismanic jurisdictional formulas" and "the facts of each case must [always] be weighed in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King, 471 U.S. at 462, 485-86.*

1.

Generally, "purposeful availment" occurs when "the defendant's contacts with the forum state proximately result from actions by [*18] the defendant *himself* that create a substantial connection with the forum State." *Neogen, 282 F.3d at 890* (citing *Burger King, 471 U.S. at 475*). "This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Ibid.*

In *Euroglas*, a Michigan-based consultant, International Technologies, approached a European manufacturer, Glas Trosch, about building a plant in France to manufacture glass using technology that the consultant had developed. When the manufacturer went forward with the project without the consultant's participation, he sued the European company in Michigan for misappropriating the technology. The district court dismissed for want of personal jurisdiction, and the court of appeals affirmed. It noted that the defendant's employees "were present in the forum state only episodically, in furtherance of a contract (solicited by the plaintiff in Europe) under which the plaintiff agreed to provide the European purchaser with plans for a manufacturing facility [*19] to be built in Europe." *107 F.3d at 392*. Nor did the contract supposedly breached by the defendant deal with any Michigan activity. "The contract in question is a European contract, of course, and the alleged misuse of the intellectual property purchased thereunder occurred outside the forum state." *Ibid.* The court concluded by stating that "Glas Trosch expressly invoked the benefits and protection of Swiss law in negotiating and signing, on Swiss soil, the contract under which the validity of International Technologies' claims will ultimately have to be determined. By its terms, the contract is to be interpreted under Swiss law. There was no purposeful availment of the benefits and protections of Michigan law here, and the defendants' 'contacts' with Michigan are too 'fortuitous' and 'attenuated' to suggest otherwise." *Id. at 396.*

Euroglas is readily distinguishable from the matter before the Court. In this case, the defendant's contacts with the forum were regular, continuous and frequent. Performance of the contract contemplated activity both within Michigan (setting premiums, insuring risks, adjusting claims, paying losses) and without. The [*20] agreement between Frankenmuth and Appalachian was continuing rather than one devoted to a single project. *Euroglas* does not control the outcome of this case; however, the facts in *Calphalon* present a much closer question.

In *Calphalon*, the court of appeals found that an out-of-state sales representative for an Ohiobased cookware manufacturer could not be sued in Ohio because he did not purposefully avail himself of the benefits of Ohio law. In that case, Calphalon entered into an agreement with Jerry Rowlette, a resident of Minnesota, for Rowlette to "promote the sale of Calphalon's products, to keep Calphalon informed of market conditions, and to develop sales plans for customers." *Calphalon, 228 F.3d at 720*. During the term of the agreement, Rowlette corresponded with Calphalon in Ohio via telephone, telefax, and mail, and Rowlette made two physical visits to Ohio: one for a mandatory sales meeting and another to accompany a client on a tour of the Calphalon facilities. The court observed that Rowlette's contacts with Ohio were fortuitous and occurred only because the manufacturer chose to be headquartered there, "not because Rowlette sought to further [*21] its business and create 'continuous and substantial' consequences there." *Id. at 722.*

That holding - that a manufacturer's representative with a continuing relationship with its manufacturer did not engage in conduct that had an effect on that manufacturer in its own state - seems to conflict with the holding in *Burger King*. In that case, John Rudzewicz, a Michigan accountant, entered into an agreement with fast food franchisor Burger King, based in Miami, Florida, to operate a restaurant in Michigan. The agreement licensed Rudzewicz to use Burger King's trademarks and service marks in leased, standardized restaurant facilities for a period of twenty years. The governing contracts provided that the franchise relationship was established in Miami and governed by Florida law, and it called for payment of all required monthly fees, including payment of royalties, advertising and sales promotions fees, to Burger King's Miami headquarters. In performing the agreement, Rudzewicz's partner attended mandatory training

courses in Miami, but Rudzewicz never visited Florida. Rudzewicz fell behind in monthly payments and Burger King attempted to terminate the franchise agreement, [*22] but it eventually commenced a lawsuit in federal court in the Southern District of Florida. Rudzewicz moved to dismiss the case claiming that because he was a Michigan resident and Burger King's claim did not "arise" within Florida, the district court lacked personal jurisdiction over him. The district court denied the motion but the court of appeals reversed. The Supreme Court reversed the court of appeals and held that personal jurisdiction existed. The Court stated that the contract alone with a Florida resident did not make Rudzewicz subject to suit in Florida. However, the contract in this case was observed to be an "intermediate step" in a continuing relationship that "contemplated future consequences" that could be felt in the franchisor's forum. *471 U.S. at 479*. The Court then stated:

> In this case, no physical ties to Florida can be attributed to Rudzewicz other than [his partner]'s brief training course in Miami. Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of a contract which had a *substantial* connection with that State. . . . Eschewing [*23] the option of operating an independent local enterprise, Rudzewicz deliberately "reached out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long- term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. . . . Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated."

Id. at 479-80 (citations and internal quotes omitted).

The Court finds it difficult to reconcile the holding in *Calphalon* with the Supreme Court's pronouncements in *Burger King*. In both cases, a national organization entered into an affiliation relationship with a representative in another state. There were no unique or geographically significant features that were apparent from the manufacturer's or franchisor's choice of the forum [*24] state as business headquarters in either case. The representatives in each case entered into a contractual relationship that contemplated regular dealings with the main organization at its headquarters over an extended period of time. Both contracts contained choice-of-law provisions denominating the law of the forum state as the rules of decision governing disputes. Nonetheless, the *Calphalon* court found that the defendant's contacts with Ohio were fortuitous and attenuated, while the Court in *Burger King* held exactly the opposite.

The *Calphalon* court determined that the teaching of *Burger King* requires evaluation of the defendant's contacts with the forum state by focusing on the "quality" of the parties' relationship rather than the quantity of the contacts or the duration of the relationship. *228 F.3d at 722*. Thus, it observed that its precedent established that no purposeful availment occurs when no facts connect the performance or subject matter of a contract with the forum; nor do the economic effects in the forum state resulting from a contract breach become material to the consideration unless the obligation arises from a "privilege" exercised [*25] by the defendant in the forum state; nor will the location of the plaintiff in the forum be determinative unless the defendant attempts to exploit a market for its products there. *Id. at 722-23*. Therefore, the court concluded, Rowlette's activities in developing a market for Calphalon's products outside of Ohio, in which customers other than Rowlette remitted payment for Calphalon's goods with Rowlette merely earning commissions, did not display an intent by Rowlette to create "continuous and substantial consequences" in Ohio. *Id. at 723*.

If there is a distinction to be made between the critical facts in *Calphalon* and *Burger King*, it perhaps can be derived from the absence of any activity by Rowlette himself directed into the forum state. For all that can be determined from the opinion in that case, it appears that Rowlette simply arranged sales in other states and reported on market conditions there. He never remitted payment for any goods to Calphalon's headquarters, nor did he "reach out

beyond" Minnesota for the purpose of deriving the benefit of affiliating with a "nationwide organization," as did John Rudzewicz in the *Burger King* [*26] case. Moreover, the lawsuit in that case was a declaratory judgment action in which Calphalon sought a ruling that it owed nothing to Rowlette, not that Rowlette had damaged Calphalon. Rudzewicz, on the other hand, refused "to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries." *Burger King, 471 U.S. at 479-80.*

The Court believes that the facts of the present case and the relationship of the parties more closely resemble the scenario in *Burger King* rather than the one in *Calphalon*. Here, although Frankenmuth and Ansur made the initial overtures, Appalachian readily entered into a contractual relationship that by its very nature authorized it to act as Frankenmuth's agent. It acted as a key link in establishing an insurer-insured relationship with a regional company headquartered in Michigan and regulated by the Michigan Insurance Code. The "business of insurance" [*27] has been recognized as uniquely the subject of regulation by the individual States, according to the *McCarran-Ferguson Act. See 15 U.S.C. § 1012(a)*; *see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 156 L. Ed. 2d 376, 123 S. Ct. 2374, 2393-94 (2003)*. Appalachian's extension of credit in the name of Frankenmuth or Ansur for premium payments and its failure to remit payments for the risk assumed by the Michigan insurer, the Court finds, "caused foreseeable injuries to the corporation in" Michigan. *See Burger King, 471 U.S. at 480.* Appalachian's extensive contacts with Frankenmuth were purposely directed into the forum; they were not fortuitous, and certainly cannot be found to be random or attenuated. The Court determines, therefore, that the purposeful availment component of the*Southern Machine* test has been satisfied.

2.

A cause of action arises from purposeful availment if the cause of action would not exist but for the contacts cited. *See Theunissen, 935 F.2d at 1461*; *Payne v. Motorists' Mutual Insurance Cos., 4 F.3d 452, 456 (6th Cir. 1993)*. "Only [*28] when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contract." *Southern Mach. Co., 401 F.2d at 384 n.29.*

The cause of action in this case arose from the continuing obligation the defendant created with the plaintiffs who were residents of the forum. The operative facts of this controversy arise from the defendant's activity of creating obligations on the part of the plaintiffs to pay workers' compensation losses without the benefit of the premium it charged in exchange for assuming those risks. The plaintiffs' liability for those potential losses were governed and regulated by the Michigan Insurance Code, and therefore it was readily foreseeable that the consequences of the alleged breach would be felt by the plaintiffs in Michigan. The Court determines, therefore, that the plaintiffs have established the second prong of the *Southern Machine* test.

3.

Appalachian insists that it is unreasonable to make it answer the complaint in Michigan because it never sought out a relationship with Frankenmuth or Ansur here, and the customers it developed for [*29] Frankenmuth's business were all located in other states. However, the reasonableness of asserting jurisdiction is assessed by considering "the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the interest in other states in securing the most efficient resolution of controversies." *Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1268 (6th Cir. 1996)*.

The Court has already noted that Frankenmuth was the party that initiated the contact and sought out Appalachian to work as its general agent. However, contracts are mutual things, and Appalachian readily agreed to become part of Frankenmuth's extraterritorial network of agents in states beyond its Michigan borders. Of course, placing a policy, or two, or a dozen out of state likely would not be sufficient to evince an intent to cement a long-term business relationship with consequences for both parties in their respective States. But when Appalachian's employees were contacting the

Frankenmuth home office several times each work day to make referrals, obtain quotes, and place coverage, it is reasonable to expect that the forum state would have an interest in enforcing [*30] those obligations. As the Supreme Court observed, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King, 471 U.S. at 473* (quoting *Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647, 94 L. Ed. 1154, 70 S. Ct. 927 (1950))*.

Michigan has an interest in regulating its insurance companies and providing a forum for resolving disputes concerning the obligations of those who deal with them. The burden on Appalachian in defending the case in a Michigan federal court is not substantial, especially in the modern era of telecommunication, electronic filing, and teleconferencing. Moreover, even if the case were pending in Tennessee, the parties still would have to travel between both states to take the depositions of the respective witnesses located there. Tennessee likewise would have an interest in ensuring the just resolution of a dispute between an insurer and a Tennessee-based general agent, and by the same reasoning noted earlier, Frankenmuth and Ansur equally would be subject to the [*31] jurisdiction of the courts in Tennessee. However, that fact does not augur against the exercise of jurisdiction in Michigan, given the substantiality of Appalachian's contacts with Frankenmuth here and the effect on a resident of this forum of a breach of the continuing obligations that the parties established. The Court believes that *Southern Machine*'s third element has been satisfied.

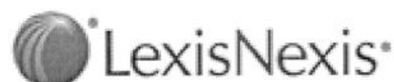
III.

The Court finds that the plaintiffs adequately have set forth facts establishing personal jurisdiction over the defendant under both Michigan's long-arm statute and the *Due Process Clause*. The defendant properly is subject to suit in this Court.

Accordingly, it is **ORDERED** that the defendant's motion to dismiss for want of personal jurisdiction [dkt # 13] is **DENIED**.

s/David M. Lawson DAVID M. LAWSON

United States District Judge



LEXSEE 1999 US DIST LEXIS 9559

McMASTER-CARR SUPPLY COMPANY, an Illinois corporation, Plaintiff, v. SUPPLY DEPOT, INC., a California corporation, Defendant.

No. 98 C 1903

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

1999 U.S. Dist. LEXIS 9559

June 14, 1999, Decided
June 16, 1999, Docketed

DISPOSITION: [*1] Defendant's motion to dismiss for lack of personal jurisdiction denied.

COUNSEL: For MCMASTER-CARR SUPPLY COMPANY, plaintiff: Eric H. Weimers, William A. Von Hoene, Jr., Arthur Gollwitzer, Jenner & Block, Chicago, IL.

For MCMASTER-CARR SUPPLY COMPANY, plaintiff: Horace William Jordan, Jr., Jenner and Block, Lake Forest, IL.

For SUPPLY DEPOT INC, defendant: Scott William Petersen, Robert Morton Ward, Robert James Depke, Hill & Simpson, Chicago, IL.

JUDGES: REBECCA R. PALLMEYER, United States District Judge.

OPINION BY: REBECCA R. PALLMEYER

OPINION

MEMORANDUM OPINION AND ORDER

McMaster-Carr Supply Co. (MCS) sues Supply Depot, Inc. for service mark and trade name infringement under the Lanham Act, *15 U.S.C. § 1051 et seq.* and Illinois statutory and common law. Supply Depot now moves to dismiss for lack of personal jurisdiction pursuant to *FED. R. CIV. P. 12(b)(2)*, or alternatively for transfer of venue under *28 U.S.C. § 1404(a)*. For the reasons that follow, the court denies Defendant's motion to dismiss and directs the parties to brief the venue motion.

BACKGROUND

MCS bears the burden of establishing a prima facie case of personal jurisdiction. The court accepts the [*2] allegations in MCS's complaint as true unless controverted by Defendant's affidavits, resolving any conflicts in the affidavits in favor of MCS. *Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987)*. The allegations of the complaint are as

follows. MCS, an Illinois corporation, is an industrial supplier of a variety of maintenance, office and industrial supplies, with national and international sales. (Compl. PP 4, 5.) Supply Depot, a California corporation, sells industrial equipment and supplies, in competition with MCS. (*Id.* PP 8, 9.) MCS uses the names and marks McMASTER and McMASTER-CARR, and owns pending trademark applications on those marks. (*Id.* PP 6, 7.)

MCS displays commercial information and markets its products on the Internet. [1] (*Id.* PP 5, 13.) MCS operates an Internet website accessible through the domain names "mcmaster.com," "mcmaster-carr.com," "mcmaster-car.com," "mcmastercar.com," "mcmastercarrsupply.com," "mcmastercarrsupplyco.com," "macmaster-carr.com," and "macarco.com." (*Id.* P 14.) From this website, MCS customers can review information and order products. [2] (*Id.*)

1 For a background discussion of the Internet and the World Wide Web, see *Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1999 WL 232014*, at *4 (9th Cir. 1999).

[*3]

2 The record suggests that Plaintiff registered these domain names only after learning of Defendant's activities, described below.

Supply Depot has registered the domain name "supplydepotinc.com," which provides users access to Supply Depot's website. (*Id.* P 15.) Supply Depot has also registered the domain name "mcmastercarr.com." (*Id.* P 16.) As Plaintiff alleges--and the court itself has observed--visitors to the website connected to this domain name find Supply Depot's name prominently displayed, along with a message which reads "DANGER CONSTRUCTION AREA." (*Id.* Ex. 2.)

Supply Depot is not authorized to use McMaster-Carr's name and mark. (*Id.* P 17.) Plaintiff alleges that Supply Depot's use of the mcmastercarr.com domain name creates a likelihood of confusion with McMaster-Carr's names and marks; a visitor to the site connected to mcmastercar.com could conclude that MCS does not market its products over the Internet. (*Id.* P 19.) Plaintiff further alleges that existing and potential MCS customers in Illinois have visited Supply Depot's website, believing it to be MCS's, [*4] and have been confused by what they found. (*Id.*)

MCS's complaint contains several counts. MCS claims Supply Depot's use of the mcmastercarr.com domain name constitutes infringement of MCS's names and marks (Count I), false designation and description of Supply Depot's goods and services (Count II), and dilution of MCS's famous names and marks (Count III), in violation of Sections 1114, 1125(a) and 1125(c), respectively, of the Lanham Act. (Compl. PP 23-31.) MCS also claims unfair competition under the common law (Count IV), (*id.* PP 32-35), trademark dilution under Illinois law (Count V), (*id.* PP 36-38 (citing 765 ILCS 1035/15)), and violation of the Illinois Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud and Deceptive Business Practices Act (Count VI), (*id.* PP 39-42 (citing 815 ILCS 510, 815 ILCS 505)). MCS seeks a declaratory judgment, injunctive relief, money damages and attorney's fees.

DISCUSSION

To determine whether exercise of personal jurisdiction over a defendant in a federal question case is proper, a federal court asks (1) whether bringing the defendant into the court accords with *Fifth Amendment* due process principles; [*5] and (2) whether the defendant is amenable to process. *See United States v. Martinez De Ortiz, 910 F.2d 376, 381 (7th Cir. 1990)*. Due process under the *Fifth Amendment* is satisfied where the defendant in a federal question case has "sufficient contacts with the United States as a whole rather than any particular state or other geographic area." *Id.* Defendant, a California corporation engaged in business in the United States, satisfies this test.

As to the second question, the court looks to *FED. R. CIV. P. 4(k)*, under which a defendant is amenable to process "when authorized by a statute of the United States," or if the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." *FED. R. CIV. P. 4(k)(1)(A), (D)*. The Lanham Act does not authorize nationwide service of process. *See 15 U.S.C. § 1121 (1995)*; *Johnson Worldwide Assoc., Inc. v. The Brunton Co., 12 F. Supp. 2d 901, 906 (E.D. Wis. 1998)*. The court therefore examines whether Defendant Supply

Depot would be subject to the jurisdiction of an Illinois state court. In Illinois, a court's exercise of jurisdiction must meet the requirements [*6] of the United States Constitution, the Illinois Constitution, and the Illinois long arm statute, *735 ILCS 5/2-209*, *see RAR v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997)*, and the court considers each of these in turn.

Federal Constitutional Principles

Federal constitutional personal jurisdiction jurisprudence speaks of "specific jurisdiction," meaning the plaintiff's claims "arise out of or relate[] to the defendant's contacts with the forum," and "general jurisdiction," where the defendant has continuous and systematic contacts in the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 416*, nn.8-9, *80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)*. Defendant maintains it does not have the substantial contacts with Illinois required for general jurisdiction, and MCS does not contest this point. The dispute between the parties focuses on whether Plaintiff can show grounds for specific jurisdiction. Defendant discusses the "effects" doctrine outlined in *Calder v. Jones, 465 U.S. 783, 789-90, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)*, and argues that it is not sufficient that Illinois is the situs of the alleged injury: in addition, [*7] Plaintiff must show "entrance" into the forum, *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, 34 F.3d 410, 412 (7th Cir. 1994)*, or, at least, "something more," *Panavision Int'l v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998)*. Supply Depot contends that Plaintiff cannot make this showing, because Supply Depot has done no more than establish a passive website, the domain name for which arguably contains MCS's mark.

MCS responds that Supply Depot committed a tort outside the forum, the effects of which are felt inside the forum. Because of Supply Depot's improper use of MCS's marks, MCS contends, potential MCS customers in Illinois are stymied when they use the mcmastercarr.com domain name, and instead are transported to a site that contains no information about MCS. MCS argues that Supply Depot's actions obviously are targeted at MCS, whose principal place of business is Illinois, and have and will cause harm to MCS in Illinois, [3] and consequently personal jurisdiction is proper.

3 MCS has produced documentation, in the form of records of site "hits," (*see* Usmiller Dec., Ex. B), of Illinois users accessing the website connected to the mcmastercarr.com domain name, presumably to no avail.

[*8]

A court's exercise of specific personal jurisdiction satisfies the requirements of federal due process where a defendant has minimum contacts with the forum, meaning the defendant could reasonably anticipate being haled into court there, and the exercise of jurisdiction is reasonable. *See RAR, Inc., 107 F.3d at 1276*. In *Calder v. Jones*, the plaintiff sued those responsible for placing an allegedly defamatory article about her in a national newspaper, and claimed they should be subject to jurisdiction in her home state of California. The California trial court dismissed the plaintiff's claims on jurisdictional grounds, and the court of appeals reversed. The Supreme Court agreed with the appellate court that jurisdiction was proper, and established the effects doctrine, holding that minimum contacts were satisfied where a defendant's intentional and allegedly illegal actions were expressly aimed at the forum and caused harm, the brunt of which the defendant knew would be felt in the forum. *465 U.S. at 789-90*. The Court concluded that jurisdiction under these circumstances comported with "traditional notions of fair play and substantial justice." *Id. at 788* (citation omitted).

[*9] The Seventh Circuit discussed *Calder*'s applicability to the intellectual property context in the case of *Indianapolis Colts.* In that case, the Court of Appeals court considered whether a team in the Canadian Football League infringed the trademarks of the Indiana-based Colts, and reasoned:

> The defendants assumed the risk of injuring valuable property located in Indiana. Since there can be no tort without an injury . . . the state in which the injury occurs is the state in which the tort occurs, and someone who commits a tort in Indiana should, one might suppose, be amenable to suit there. This

> conclusion is supported by the Supreme Court's decision in *Calder v. Jones* . . . holding that the state in which the victim of the defendant's defamation lived had jurisdiction over the victim's defamation suit.

34 F.3d at 411-12 (citation omitted). Although Judge Posner, writing for the court, suggested this was adequate grounds for jurisdiction, he nonetheless declined to rest the court's decision on "so austere a conception." *Id. at 412*. The defendant had also "entered" Indiana by arranging for cable broadcasts in Indiana of games to be played by the team using [*10] the allegedly infringing mark. This action, in conjunction with the harm resulting in the forum, was a sufficient basis for the district court to exercise personal jurisdiction. *Id.*

Two recent Ninth Circuit decisions are also instructive. In the first, *Cybersell Inc. v. Cybersell Inc.*, an Arizona company brought an infringement action against a Florida company of the same name because the Florida company used the plaintiff's trademarked name on its website. *130 F.3d 414, 415-16 (9th Cir. 1997)*. When the defendant chose the name Cybersell, the plaintiff had no home page on the World Wide Web, and there was no indication the defendant intentionally directed its actions toward the plaintiff in Arizona; indeed, the defendant changed its name to WebHorizons, Inc. and removed the Cybersell logo from the top of its web page within a month of notification from the plaintiff that Cybersell was a service mark of the Arizona company. *Id.* The plaintiff nonetheless filed suit several days later, perhaps because WebHorizons's page still said "Welcome to CyberSell!" The court decided that the simple maintenance of a homepage which was accessible over the Internet, by Arizonans as well [*11] as everyone else, was insufficient to warrant the exercise of personal jurisdiction. *Id. at 419-20*.

Approximately six months later, the Ninth Circuit again examined these issues in *Panavision.* There, a California company, owner of a trademark in the name Panavision, sued an Illinois resident who had registered the domain name "panavision.com." The plaintiff claimed the defendant was a so-called cybersquatter, in the business of stealing trademarks, registering them as domain names, and then selling the domain names to the trademark owners. *141 F.3d at 1319*. The court, citing *Cybersell*, "agreed that simply registering someone else's trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another"; there must be "something more." *Id. at 1322* (quotes omitted). The court concluded, however, that the defendant's "conduct, as he knew it likely would, had the effect of injuring Panavision in California where Panavision has its principal place of business," and this amounted to something more. *Id.* Consequently, the court held that the defendant's actions met the requirements of the [*12] effects test. *Id.*

Although this case presents a close question, the court concludes, extrapolating from *Indianapolis Colts, Cybersell*, and *Panavision*, that Supply Depot's actions, as characterized in Plaintiff's complaint, satisfy the effects test. Supply Depot intentionally registered MCS's mark as its domain name, an act that it knew would harm Illinois-based MCS in Illinois, its principal place of business. The targeting of MCS in Illinois is the something more, the entrance into the forum, the act beyond just establishing the web site that makes it reasonable for Supply Depot to anticipate being haled into court in Illinois. Indeed, this fact makes *Cybersell* distinguishable, and creates a strong resemblance between this case and *Panavision.* Just as in *Panavision*, here Defendant directed activity toward the forum state by its allegedly improper use on the Internet of a mark registered to a business in that state, which action harmed the business in the forum. This parallel, in combination with the Seventh Circuit's broad reading of *Calder* in *Indianapolis Colts*, leads the court to conclude that Supply Depot has minimum contacts with Illinois.

During [*13] oral argument, Defendant's counsel emphasized two points. First, he noted that the mcmastercarr.com domain name connects users to a passive site, containing no links or even information. [4] Plaintiff alleges, however, that the domain name and site in combination infringes its mark even though inactive. The court assumes the truth of those allegations in deciding a motion to dismiss for lack of personal jurisdiction, *see Turnock, 816 F.2d at 333*; in any event, the court recognizes that Defendant's use of Plaintiff's name in an inactive website might be confusing to an Internet user, including potential MCS customers. In the same vein, counsel pointed out that the plaintiff's scheme in *Panavision* was illegal, while Supply Depot, far from being a "cybersquatter," was simply pursuing legitimate business objectives. Again, the legitimacy of Supply Depot's actions is currently an unresolved issue, and the court treats Plaintiff's assertion of illegal activity as true at this stage. Therefore the court cannot view Defendant's actions as relatively benign business

practices, and Defendant's attempts to distinguish *Panavision* on this basis are unavailing. Defendant could reasonably [*14] anticipate being haled into court in Illinois.

4 Notably, Defendant has acknowledged that its purpose in registering the domain name is essentially to siphon off potential customers from MCS. (*See* Declaration of Jeffrey Dillon P 26.)

This result is not inconsistent with *Transcraft Corp. v. Doonan Trailer Corp., 1997 U.S. Dist. LEXIS 18687, 45 U.S.P.Q.2D (BNA) 1097 (N.D. Ill. 1997)*, a recent decision in this district that explored personal jurisdiction and Internet law in some depth. *Transcraft* involved a suit by an Illinois company against a Kansas company for infringement on trademarked cargo trailer design. The defendant promoted the sale of its allegedly infringing trailers on the Internet. 45 U.S.P.Q.2D (BNA) at 1098. The court concluded that the defendant's Internet presence alone did not create personal jurisdiction, but also noted that, under *Indianapolis Colts* and the prevailing state of "web" jurisdiction jurisprudence, the defendant's Internet presence in combination with some additional "entrance" into [*15] the forum would have sufficed. *Id. at 1103*. This is essentially the same standard utilized here. In any event, *Transcraft* is factually distinguishable: Defendant Supply Depot has not just promoted the sale of an allegedly infringing product on-line; the on-line activity itself is the alleged infringement.

The court's federal constitutional inquiry is not complete, however. Due process also requires that the exercise of personal jurisdiction be reasonable; where, as here, the defendant has directed its actions at the forum and the plaintiff's claim arises out of those actions, the defendant must show a compelling reason why jurisdiction is unreasonable. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*. Reasonableness in this instance is a function of numerous factors, including

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, 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 [*16] policies.

Id. (quotes omitted). The parties have devoted relatively little argument to these considerations, perhaps because many of the same issues arise in a motion to transfer venue, a topic the parties have not yet briefed. The only factor that potentially favors Supply Depot significantly is "the burden on the defendant," and given the information the court has before it, this factor does not weigh so heavily for Supply Depot as to render jurisdiction unconstitutional. Furthermore, because this is the sort of concern which is also relevant to a motion to transfer venue, *see id.* ("a defendant claiming substantial inconvenience may seek a change of venue"), Defendant can argue this issue at greater length in connection with its motion to transfer this case. In sum, the court holds that personal jurisdiction over Supply Depot in Illinois is reasonable under the federal constitution.

Illinois Constitutional Principles

There is also the matter of the Illinois constitution, however. Whether the limits of Illinois and federal due process should be considered coextensive is not entirely clear. *Compare RAR, 107 F.3d at 1276* ("The Illinois Supreme Court has [*17] made clear that the Illinois due process guarantee is not necessarily co-extensive with federal due process protections."), *with Klump v. Duffus, 71 F.3d 1368, 1371-72 & n.4 (7th Cir. 1995)* (equating reasonableness under minimum contacts with the Illinois Constitution's "fair, just and reasonable" requirement). As a general rule, "'jurisdiction [under the state constitution] is to be asserted only when it is fair, just, and reasonable . . . considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.'" *RAR, 107 F.3d at 1276* (quoting *Rollins v. Ellwood, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316, 152 Ill. Dec. 384 (1990))*. As the *Rar* court observed, however, the Illinois Supreme Court has "given little guidance" as to how state due process protection differs from federal constitutional protection. *RAR, 107 F.3d at 1276*. Without such guidance, courts often focus on interpretations of the federal Due Process Clause. *See Mors v. Williams, 791 F. Supp. 739, 743 (N.D. Ill. 1992)*. Absent a clear indication that exercise of jurisdiction here violates the Illinois Constitution, the court relies on

[*18] the previous analysis, and concludes that jurisdiction in this case also comports with due process under the Illinois Constitution.

Long-Arm Statute

Finally, as to the Illinois long-arm statute, Section 2-209(c) states, "A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." *735 ILCS § 5/2-209(c)*. The court has found jurisdiction permissible under both the state and federal constitution, as discussed above, and consequently jurisdiction is proper under this provision of the long-arm statute.

CONCLUSION

Defendant's motion to dismiss for lack of personal jurisdiction is denied. Defendant also moves in the alternative for a transfer of venue pursuant to *28 U.S.C. § 1404(a)*, in the event the court exercises personal jurisdiction over Supply Depot, and requests leave to file supplemental materials in support of this motion. Supply Depot may file a brief in support of its motion to transfer venue by June 25, 1999, and MCS has until July 2, 1999 to file a response.

ENTER:

Dated: June 14, 1999

REBECCA R. PALLMEYER

United States District [*19] Judge