

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OPTIMAL BEVERAGE COMPANY, INC.;	§	
dba DEEZEL BEVERAGE COMPANY,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-06-1386
	§	
UNITED BRANDS COMPANY, INC.	§	
	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER
GRANTING THE DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Now before the Court is the defendant United Beverage Company, Inc.'s ("United") motion to dismiss for lack of personal jurisdiction. After considering the pleadings, arguments of counsel, the governing law, and for the reasons stated below, the motion is granted. Because the action is dismissed, the Court does not reach United's alternative request for a transfer of venue.

A. The Parties

The plaintiff Optimal Beverage Company, Inc. ("Optimal"), a Texas Corporation with its principal place of business in Houston, manufactures and sells an energy drink called "Deezel" on a nationwide basis. Optimal is the registered owner of the Deezel mark and name. United, a California corporation with its principal place of business in California, manufactures and sells an energy drink called "Diesel." Optimal brought this suit in Texas alleging that United's use of the name Diesel violates Optimal's rights in the registered Deezel mark.

United has no physical presence in Texas. Though both Optimal and United sell their products on a nationwide basis, there is almost no evidence showing whether and to what extent

United's products are sold in Texas. Optimal alleges that it has evidence of customer confusion in Minnesota and New Jersey, but it has provided no evidence nor has it made any allegation of confusion in Texas.

B. United's Websites

United maintains websites for several of its products. The website for its Diesel beverage (www.dieseldrink.com) provides general information about the product, contains articles about Diesel from various publications, and allows customers to submit their comments and contact information. Customers cannot order the Diesel beverage directly from the website.

The website for another United energy drink, "U.S. Energy," allows customers to place orders online and receive U.S. Energy anywhere in the United States. Apparently, United maintains the same website content at two different addresses: www.unitedbrandsco.com and www.usenergydrink.com. See Resp. Exh. D1-E3. United also maintains a website for its 3 Sum beverage (www.3sumdrink.com), though like the Diesel website, customers cannot order the product directly from the website.

Optimal alleges that United "owns, operates, and advertises on many Internet websites," including the Beverages & More website (www.bevmo.com) and the Bevnet website (www.bevnet.com). (Resp. ¶ 6) United insists that it owns neither Beverages & More nor Bevnet. United has provided some evidence that both sites are owned by third-parties. See Reply, Exh. A (www.bevmo.com), Exh. H (www.bevnet.com).

C. The October 24 Purchase

On October 24, 2006, Houston resident Raj Tharkar accessed the Beverages & More website and searched for Optimal's product Deezel. In response, Tharkar was given the option to order United's Diesel product. *Id.* Tharkar ordered three cans of Diesel, which were shipped from

California to Tharkar's address in Houston. *Id.* The October 24 purchase is the only occasion in the evidence in which any of the defendants' products reached Texas.

II. PARTIES' CONTENTIONS

United argues that it is not subject to personal jurisdiction because it has not made any voluntary efforts to sell or market Diesel in Texas. Optimal responds with three arguments:

- (1) United's product websites and Internet marketing provide sufficient contacts with Texas to justify personal jurisdiction;
- (2) the Diesel website specifically targets Texas customers; and
- (3) the October 24 purchase and the subsequent delivery of Diesel here in Houston establish specific jurisdiction.

III. LEGAL STANDARD

In a civil case in the federal district court, personal jurisdiction is established by service of process. Fed. R. Civ. P. 4(k)(1). In most cases, service is only effective 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). To determine whether a Texas state court could exercise personal jurisdiction over a non-resident defendant, a court need only look to the "due process" limitations of the Fourteenth Amendment to the federal Constitution. *See, e.g., Revell v. Lidov*, . *Lidov*, 317 F.3d 467, 469-70 (5th Cir. 2002). Texas's long-arm statute reaches to the full extent constitutionally permissible. *Id.*

The due process inquiry is whether the defendant has "purposefully established minimum contacts in the forum state." *Seifert*, 472 F.3d at 271 (quoting *Asahi Metal Ind. Co. v. Super. Ct.* , 480 U.S. 102, 108-09 (1987)).

Personal jurisdiction can be general or specific. If a defendant's contacts with the forum state are continuous and systematic, a court may exercise general jurisdiction over any action brought against that defendant, regardless of whether the action is related to the forum contacts. If a defendant has relatively few contacts, a court may still exercise specific jurisdiction in a suit arising out of or related to the

defendant's contacts with the forum.

Seifert v. Helicopteros Atuneros, 472 F.3d 266, 271 (5th Cir. 2006). Whichever theory the plaintiff asserts, it must prove that the defendant "purposefully availed [itself] of the benefits and protections of the forum state." *Revell*, 317 F.3d at 470.

"The plaintiff bears the burden of establishing [personal] jurisdiction but is required to present only *prima facie* evidence." *Seifert*, 472 F.3d at 270. The court "must accept the plaintiff's 'uncontroverted allegations, and resolve in his favor all conflicts between the facts contained in the parties' affidavits and other documentation.'" *Revell*, 317 F.3d at 469 (quoting *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000)).

IV. ANALYSIS

In this case, there is no evidence that United "purposefully availed itself of the benefits and protections" of Texas. *See id.* According to uncontradicted portions of its president's affidavit, United "has never sold any product within the state of Texas, nor has United brands imported product into the state of Texas," and United has no "employees, sales agents or offices in Texas." (Michail Aff. ¶¶ 7-8) With the exception of the October 24 purchase, there is no evidence or allegation that United products have been sold in Texas by third-parties. Contrary to Optimal's argument, neither the October 24 purchase nor United's nationwide marketing establish personal jurisdiction in this case.

A. The October 24 Purchase

This Court's personal jurisdiction over United cannot be based upon the October 24 purchase. The plain language of Rule 4(k) indicates that in a civil case, the federal district court's personal jurisdiction is established (if ever) at the time the defendant is served with a summons. Fed. R. Civ. P. 4(k)(1). If, at that time, the defendant would be amenable to service by a state court in the forum

state, then service of the federal summons is sufficient to establish personal jurisdiction. Fed. R. Civ. P. 4(k)(1)(A). But if the defendant could not be served by a forum-state-court, and if service is not otherwise authorized by 4(k), then the federal court's personal jurisdiction is never established. Therefore, if United did not have "minimum contacts" with Texas at the time it was served (September 11, 2006, *see* Dkt. No. 8), then service was ineffective to establish personal jurisdiction in this Court. Even assuming that the October 24 purchase established sufficient minimum contacts with Texas, those contacts cannot retroactively give rise to personal jurisdiction in this case.

B. General Jurisdiction

It is clear that United's contacts with Texas do not rise to the level required to establish general jurisdiction. Though the Fifth Circuit has suggested that a non-resident defendant's Internet marketing activities might be sufficient to create general jurisdiction, there is no evidence that United's Internet activities rise to the necessary level. *See Mink v. AAAA Development, L.L.C.* , 190 F.3d 333, 336-37 (5th Cir. 1999); *but c.f. Revell* , 317 F.3d at 470-71 ("[E]ven repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction."). In *Mink*, the Court of Appeals applied a "spectrum" test to decide if a non-resident defendant's Internet activity would establish general jurisdiction:

At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet. In this situation, personal jurisdiction is proper. At the other end of the spectrum, there are situations where a defendant merely establishes a passive website that does nothing more than advertise on the Internet. With passive websites, personal jurisdiction is not appropriate. In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information with a host computer. In this middle ground, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website.

190 F.3d at 336 (internal quotation marks and citations omitted); *see also* *Zippo Mfg. Co. v. Sippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997) (establishing the spectrum test). In *Mink*, the court held that the defendant's website was passive even though the site contained an e-mail link as an order form which the customer could print, complete, and return through traditional mail. 190 F.3d at 337. Because the site fell on the passive end of the spectrum, personal jurisdiction was not established. *Id.* In this case, United's websites for 3 Sum and Diesel are no more interactive than the website in *Mink*. "Absent a defendant doing business over the Internet or sufficient interactivity with residents of the forum state, we cannot conclude that personal jurisdiction is appropriate." *Id.*

However, the website for U.S. Energy is more interactive. Apparently, users can order U.S. Energy directly through the website. *See* Reply, Exhs. D3, E3; *c.f.* *Mink*, 190 F.3d at 337 (noting that the defendant's "website does not allow consumers to order or purchase products and services online"). But mere interactivity, even when coupled with evidence of actual transactions with forum state residents, is not enough to establish general jurisdiction. *Revell*, 317 F.3d at 469-71.

In *Revell*, a defamation case, the Court of Appeals held that a federal district court in Texas could not exercise general jurisdiction over Columbia University even though Columbia maintained a website whereby customers could "subscribe to the *Columbia Journalism Review*, purchase advertising on the website or in the journal, and submit electronic applications for admission." 317 F.3d at 470. Though there was evidence that at least 17 Texas customers had subscribed to the *Review* through the website, the court found insufficient contacts for general jurisdiction: "Irrespective of the sliding scale, the question of general jurisdiction is not difficult here. Though the maintenance of a website is, in a sense, a continuous presence everywhere in the world, the cited contacts of Columbia with Texas are not in any way substantial." *Id.* at 471 (footnotes and internal quotation marks omitted). The court approvingly cited a Sixth Circuit case in which 4,000 Internet

orders by forum-state residents were held to be insufficient for general jurisdiction. *Id.* (discussing *Bird v. Parsons* , 289 F.3d 865 (6th Cir.2002)).

Even though United offers U.S. Energy for sale through its website, there is no evidence that anyone in Texas has purchased the product. Even if Optimal provided some evidence, *Revell* indicates that sporadic Internet sales to forum-state customers are not enough to create general jurisdiction.

C. Specific Jurisdiction

"For specific jurisdiction we look only to the contact out of which the cause of action arises." *Revell*, 317 F.3d at 472 (footnote omitted). Optimal argues that its trademark claims arise from the marketing and sale of Diesel, that United "expressly aimed" its Diesel website at Texas customers, and that both the website and the October 24 purchase by a Texas customer are contacts out of which this cause of action arises. These arguments are not persuasive.

In *Revell*, the court indicated that *Mink's* sliding scale is more appropriate perhaps when the theory is specific jurisdiction, not general jurisdiction. *Id.* at 471. As stated previously, under the *Mink* scale, the Diesel website is passive and should not serve as a basis for exercising personal jurisdiction. Optimal attempts to characterize the Diesel site as "specifically and actively solicit[ing] Texas customers," (Resp. ¶ 9), because the site contains a copy of a *Dallas Morning News* article about Diesel. (Resp. Exh. C) Optimal does not argue that United caused the article to appear in the *Dallas Morning News* ; it only argues that the article's inclusion in the Diesel website "specifically and actively solicits Texas customers." *Id.*

The source of the *Dallas Morning News* article was Business Wire, a national wire service. The article itself contains no reference to Texas, and the dateline explicitly states that the article was filed in San Diego. *Compare Revell*, 317 F.3d at 476 (emphasizing the geographic focus of the

allegedly defamatory article). The Fifth Circuit has repeatedly held that advertising in nationwide publications alone is insufficient to establish personal jurisdiction. See *Growden v. Ed Bowlin & Assocs.*, 733 F.2d 1149, 1151-52 (5th Cir. 1984) ("The foregoing evidence of Bowlin's advertising in these two national trade publications which circulated in Louisiana is insufficient, without more, to constitute a 'purposeful availment' of the facilities in Louisiana."); *Loumar v. Smith*, 698 F.2d 759, 763-64 (5th Cir. 1983); *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184, 187 (5th Cir. 1978) ("[M]erely advertising in magazines of national circulation that are read in the forum state is not a significant contact for jurisdictional purposes."); *Benjamin v. W. Boat Bldg. Corp.*, 472 F.3d 723, 731 (5th Cir. 1973) (same). When the website is passive on the *Mink* scale, the mere fact that it contains a copy of a nationwide article as published in a Texas newspaper does not establish minimum contacts with Texas.

The same is true for United's nationwide marketing of Diesel through the Beverages & More and Bevnet websites. If Optimal could show that a substantial percentage of the allegedly infringing products were being sold in Texas, and that United was aware of this fact, then that would establish minimum contacts and personal jurisdiction. See *Luv n' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006), *cert. denied*, 126 S. Ct. 2968 (2006) ("[M]ere foreseeability or awareness is a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce.") (internal quotation marks and footnote omitted). However, in this case, there is no evidence that any of United's products had reached Texas "while still in the stream of commerce" as of the date of service. *Id.*

This motion does not hinge on the strength of United's case, or on its status as the alleged victim of trademark infringement. This Court obtains personal jurisdiction over a defendant by service of process. Fed. R. Civ. P. 4(k). In this case, service would only be effective if Optimal was

amenable to service in a Texas court of general jurisdiction. Fed. R. Civ. P. 4(k)(1). Because this Court's jurisdiction has been tied to constitutional limits on state jurisdiction, the

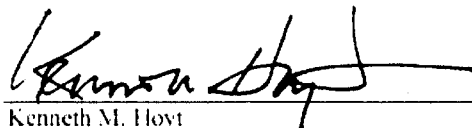
ultimate inquiry is rooted in the limits imposed on states by the Due Process Clause of the Fourteenth Amendment. It is fairness judged by the reasonableness of Texas exercising its power over residents of [other states]. This inquiry into fairness captures the reasonableness of hauling a defendant from his home state before the court of a sister state; in the main a pragmatic account of reasonable expectations-if you are going to pick a fight in Texas, it is reasonable to expect that it be settled there. It is not fairness calibrated by the likelihood of success on the merits or relative fault.

Revell, 317 F.3d at 477. Optimal has not shown that United picked a fight in Texas, nor has it provided any other basis for concluding that United could reasonably have expected to be hauled before a court in Texas.

V. CONCLUSION

Because Optimal has not established a *prima facie* case that this Court has personal jurisdiction over United, United's motion to dismiss is Granted. Optimal's complaint is hereby Dismissed without prejudice.

SIGNED and ENTERED this 27th day of February, 2007.


Kenneth M. Hoyt
United States District Judge