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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MICHE BAG, LLC., a Utah limited
liability company,

Plaintiff,

v.

REBECCA COOK, an individual,

Defendant.

Civil Case No. 2:09-cv-00166 TC

**PLAINTIFF MICHE BAG, LLC'S
MEMORANDUM IN OPPOSITION TO
DEFENDANT REBECCA COOK'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION**

HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT JUDGE

Plaintiff Miche Bag, LLC (“Plaintiff”) hereby submits the following memorandum in opposition to defendant Rebecca Cook’s (“Defendant”) “Motion to Dismiss for Lack of Personal Jurisdiction” (the “Motion”).

I. INTRODUCTION

Defendant moves the Court in the above captioned action (the “Action”) to dismiss Plaintiff’s Complaint because Defendant believes she is not subject to this Court’s jurisdiction. The Court should deny the Motion because Defendant is subject to this Court’s jurisdiction as a matter of law.

Plaintiff believes that the allegations of the Complaint and the evidence it has submitted in opposition to the Motion should be sufficient to demonstrate that the Court may properly exercise personal jurisdiction over Defendant. However, should the Court have doubts in this regard, Plaintiff hereby requests the right to conduct expedited discovery to establish additional facts justifying jurisdiction. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (“[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.”); *Toys R Us, Inc. v. Step Two, S.A.*, 318 F.3d 445, 456 (3d Cir. 2003) (quotation omitted) (Courts “are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff’s claim is clearly frivolous,” and “if a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between the party and the forum state, the plaintiff’s right to conduct jurisdictional discovery should be sustained.”).

II. FACTUAL BACKGROUND

Plaintiff is a Utah limited liability company with its principal place of business in Riverton, Utah, and is the manufacturer and distributor of handbags, purses, and related products. (*See* Complaint, ¶¶ 1, 9.) Plaintiff is the owner of United States Trademark Registration No. 3,528,628 for the trademark MICHE for use in connection with purses, handbags, straps for purses and handbags, *and removable decorative covers for purses and handbags*. (*Id.*, ¶ 10, Exh. A.)

Defendant admittedly creates fabric covers that fit Plaintiff's MICHE purse shells and offers the same for sale on the online auction website operated by eBay, Inc. ("eBay"). (*See* Declaration of Rebecca Cook ["Cook Decl.,"], ¶¶ 3, 10, Exh. A; Docket No. 7.) Defendant boasts on eBay that her fabric covers "fit[] Miche [purse] shells." (*Id.*, ¶ 13 , Exhibit D; Declaration of James B. Belshe In Support of Memorandum in Opposition to Motion to Dismiss for Lack of Personal Jurisdiction, filed concurrently herewith ["Belshe Decl.,"], ¶ 3, Exh. A.) Plaintiff accordingly brought this Action for trademark infringement under 15 U.S.C. § 1052 *et seq.* (Complaint, ¶ 5.)

eBay touts its website as "'The World's Online Marketplace,' enabling trade on a local, national, and international basis." (Belshe Decl., ¶ 4, Exh. B.) eBay has "approximately 84 million active users worldwide," and "[i]n 2007, the total value of sold items on eBay's trading platforms was nearly \$60 billion. This means that eBay users worldwide trade more than \$1,900 worth of goods on the site every second." (*Id.*, ¶ 5, Exh. C.)

III. ARGUMENT

"To obtain personal jurisdiction over a nonresident defendant...a plaintiff must show that jurisdiction is legitimate under the laws of the forum state and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999) (*quoting Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995)). Where "there has been no evidentiary hearing, and the motion to dismiss for lack of jurisdiction is decided on the basis of affidavits or other written material, the plaintiff need only make a prima facie showing that jurisdiction exists." *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995) (*citing Doe v. Nat'l Medical Servs.*, 974 F.2d 143, 145 (10th Cir. 1992)); *see also Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063,

1070 (10th Cir. 2008) (same); *OMI Holdings v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998) (same); *Soma Medical*, 196 F.3d at 1295 (same). “If the parties present conflicting affidavits, all factual disputes are resolved in plaintiff’s favor, and the plaintiff’s prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.” *Wenz*, 55 F.3d at 1505 (quotation omitted); *see also Dudnikov*, 514 F.3d at 1070 (same). As set forth below, a prima facie showing of this Court’s specific personal jurisdiction over Defendant has been made.

A. This Court May Exercise Specific Personal Jurisdiction Over Defendant

“There is a three-part inquiry to invoke specific jurisdiction....First, Utah’s long-arm statute must permit the exercise of personal jurisdiction. Second, there must be a ‘nexus’ between Plaintiffs’ claims and Defendants’ acts or contacts. Third, the application of Utah’s long-arm statute must satisfy the requirements of federal due process—i.e., the exercise of personal jurisdiction over Defendants must not offend traditional notions of fair play and substantial justice.” *Time Critical Solutions, LLC v. AComm, Inc.*, No. 2:07-cv-00957-DAK, 2008 U.S. Dist. LEXIS 55337, *8 (D. Utah July 22, 2008).

1. Utah’s Long-Arm Statute Permits the Assertion of Jurisdiction Over Defendant

“Utah’s long-arm statute states that any person submits himself to the jurisdiction of Utah courts as to ‘any claim arising from . . . the transaction of any business within this state; . . . [or] the causing of any injury within this state whether tortious or by breach of warranty.’...The statute broadly defines ‘transaction of business’ to mean ‘activities of a non-resident...in this state which affects persons or business within the State of Utah.’” *Id.* at *8-9; Utah Code Ann. §§ 78-27-24, 78-27-23(2).

Utah's long-arm statute is to be interpreted "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution." Utah Code Ann. §§ 78-27-22. Utah's long-arm statute clearly permits this Court to exercise jurisdiction over Defendant. Therefore, the only remaining issue is whether Defendant has the requisite minimum contacts with Utah specifically related to this Action for this Court to exercise personal jurisdiction over Defendant.

2. Defendant's Activities Create Sufficient Minimum Contacts

"The 'minimum contacts' necessary for specific personal jurisdiction are established if the defendant purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." *Soma Medical*, 196 F.3d at 1298. "Advertising and attempting to sell products through an online store to residents of the forum constitutes purposeful availment." *A.L. Enterprises, Inc. v. Sebron*, No. 2:08-CV-536, 2008 U.S. Dist. LEXIS 70177, *6 (D. Utah Sept. 17, 2008); *see also Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999) ("[P]ersonal jurisdiction is not appropriate when a website is merely [] passive, either as an advertisement or for informational purposes, but is appropriate when an entity is conducting business over the internet."). Significantly, "[t]he jurisdictional question revolves around the *nature and quality* of the commercial activity, as opposed to the *quantity* of sales." *Id.* (emphasis in original); *see also Stomp*, 61 F. Supp. 2d at 1078 (*quoting Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)) ("[T]he constitutionality of exercising jurisdiction [is] 'directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.'"). Personal jurisdiction is therefore "proper for a highly commercial site even where there is only *minimal or no evidence* of actual

sales into the forum.” *Id.* (emphasis added). Indeed, sellers on the Internet “cannot expect to avail themselves of the benefits of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it.” *A.L. Enterprises*, 2008 U.S. Dist. LEXIS 70177, at *6 (quoting *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 820 (E.D. Mich. 2006)).

This Court found specific personal jurisdiction in a counterfeiting and federal trademark infringement matter where a defendant sells its product on interactive websites, provides customers “with a shopping cart feature that allows them to select multiple products for purchase” and allows customers to “purchase items over the website using Google checkout or a number of major credit cards,” and “offers to sell its products into Utah” through the interactive websites. *Id.* at *5. As this Court stated, “[g]iven its efforts to sell into Utah counterfeits of a product produced by a company located in Utah, [the defendant] should have reasonably anticipated being haled into this Court to answer for its activities.” *A.L. Enterprises*, 2008 U.S. Dist. LEXIS 70177, at *7.

Similarly, in the present Action, Defendant offers her infringing fabric covers, that she claims fit Plaintiff’s MICHE purse shells, for sale on the interactive online auction website operated by eBay. (Cook Decl., ¶¶ 3, 10, Exh. A; Belshe Decl., ¶ 3, Exh. A.) eBay permits visitors to place bids for purchase on multiple products, and in some cases permits visitors to purchase products outright at a pre-determined price set by the seller. (Belshe Decl., ¶ 6, Exh. D.) Further, a visitor may purchase Defendant’s infringing fabric covers using eBay’s PayPal checkout system, which provides the visitor with the option of paying with a major credit card. (Belshe Decl., ¶ 7, Exh. E.) And given eBay’s claim of approximately 84 million active users worldwide, and its self-promotion as “The World’s Online Marketplace” that enables “trade on a local, national, and

international basis,” it is clear that Defendant purposefully sells its products on eBay to reach a large number of potential buyers, including those in Utah, and clearly benefits from such widespread exposure. (Belshe Decl., ¶¶ 4, 5, Exhs. B, C.) Given Defendant’s efforts to sell into Utah a product that infringes a trademark associated with products produced by a company located in Utah, Defendant should have reasonably anticipated being haled into this Court to answer for her infringing activities. *See A.L. Enterprises*, 2008 U.S. Dist. LEXIS 70177, at *7; *Stomp*, 61 F. Supp. 2d at 1078 (“By advertising and offering its products for sale via the Internet, NeatO has placed its products into the stream of commerce intending that they would be purchased by consumers with access to the Web, including California citizens. By engaging in Internet commerce with California citizens, NeatO has established the minimum contacts that are prerequisite to the exercise of jurisdiction over it.”). Indeed, Defendant “is not being haled into court in some unexpected location where the Internet is not commonly available,” but into a court in Utah, where Internet users presumably reside. *See, e.g., Stomp*, 61 F. Supp. 2d at 1079.

Defendant claims that she has not shipped any infringing fabric covers to Utah, has not transacted business relating to fabric covers in Utah, and has not contracted to supply services or goods relating to purse shell covers in Utah. (Cook Decl., ¶¶ 6-8.) However this Court has held that it is “not...sales alone that provide[s] the basis for jurisdiction,” but is instead the “highly commercial nature” of the website on which the infringing products are sold that renders jurisdiction proper. *See A.L. Enterprises*, 2008 U.S. Dist. LEXIS 70177, at *6. Indeed, even where the only evidence of actual sales in Utah were sales made to a private investigator working for the plaintiffs, this Court has held specific personal jurisdiction to be proper. *Id.* Plaintiff in this Action may also have a private investigator purchase Defendant’s infringing fabric covers on eBay, but

this would be a moot exercise, given the highly commercial nature of eBay, the website on which the infringing fabric covers are sold, and this Court's holding that personal jurisdiction is "proper for a highly commercial site even where there is only *minimal or no evidence* of actual sales into the forum." *Id.* (emphasis added).

Contrary to authority issued from this Court, Defendant asserts that her "decision to hold an eBay auction" for her infringing products "does not by itself compel the conclusion that I purposefully availed myself of the protection of the laws" of the State of Utah, and relies upon the decision in *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, a case that issued almost eight months before this Court's above-cited decision in *A.L. Enterprises*, for support. (Motion, p. 4.) However, Plaintiff's reliance on the *Dudnikov* decision is misplaced. Because the plaintiffs in *Dudnikov* "fixed their focus on a single precedential analogy" as controlling the outcome of the purposeful direction or purposeful avilment requirement, the Tenth Circuit limited its analysis to the context of the singular authority cited by plaintiffs in support of their position—the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984). *Dudnikov*, 514 F.3d at 1071 ("While we do not imagine that *Calder* necessarily describes the only way to satisfy the purposeful direction test, because plaintiffs assert it provides the key to unlocking the courthouse door for them, we are able to limit our attention in this case to *Calder's* demands."). Defendant is not relying on the decision in *Calder* to demonstrate that Plaintiff has purposefully availed herself of this Court's jurisdiction, and the Tenth Circuit analysis of the minimum contacts requirement in *Dudnikov* is not analogous to the analysis that should be applied in this Action.

Because it is also evident that this Action results from injuries that arise out of or relate to Defendant's infringing activities (i.e., this Action revolves around a dispute over the MICHE

trademark, which Defendant uses to market its infringing products sold over the Internet), the minimum contacts necessary for specific personal jurisdiction have been established.

3. The Exercise of Personal Jurisdiction Over Defendant Will Not Offend Traditional Notions of Fair Play and Substantial Justice

“Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). In this context, the Court may evaluate: (1) the burden on the defendant, (2) the forum state’s interest in adjudicating the dispute, (3) the plaintiff’s interest in obtaining convenient and effective relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1102 (10th Cir. 2009) (citing *Burger King*, 471 U.S. at 476).

Where the Court finds that there have been minimum contacts, as demonstrated above, “the burden is on the defendant to ‘present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.’” *Rusakiewicz*, 556 F.3d at 1102 (citing *Burger King*, 471 U.S. at 477). As the Tenth Circuit has noted, “[s]uch cases are rare.” *Id.* An assessment of these factors shows that the exercise of jurisdiction in this Action is not constitutionally unreasonable.

A. The Exercise of Personal Jurisdiction Will Place a Minimal Burden on Defendant

“[M]odern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” *TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.*, 488 F.3d 1282, 1293 (10th Cir. 2007) (quoting *Burger King*, 471 U.S. at 474). While Defendant “will have to engage in litigation in another state, traveling a mere five to six hours from [Virginia to Utah], where the same federal substantive and procedural law applies, where the same language is spoken, and where there will be no need to pass through customs, the inconvenience created by exercising jurisdiction falls short of being unconstitutional.” *Stomp*, 61 F. Supp. 2d at 1080. Accordingly, the minimal burden placed on Defendant in litigating in Utah does not render the exercise of jurisdiction in this Action unreasonable.

B. The State of Utah Has a Significant Interest in Adjudicating this Action

“States have an important interest in providing a forum in which their residents can seek redress for injuries caused by out-of-state actors.” *Dudnikov*, 514 F.3d at 1081 (quoting *OMI Holdings*, 149 F.3d at 1096). Plaintiff is a small Utah limited liability company with its principal place of business in Riverton, Utah, and Plaintiff has been injured by the out-of-state Defendant’s infringing sales activities. (Complaint, ¶ 1.) The State of Utah therefore has a significant interest in providing a forum in which Plaintiff may seek redress for Defendant’s infringement of Plaintiff’s intellectual property rights.

C. The Plaintiff's Interest in Obtaining Convenient and Effective Relief is Neutral for Purposes of the Jurisdictional Analysis

This factor requires an analysis of “whether the plaintiff may receive convenient and effective relief in another forum.” *TH Agriculture*, 488 F.3d at 1294 (citing *OMI Holdings*, 149 F.3d at 1097). While it is clearly more convenient for Plaintiff, a Utah limited liability company with its principal place of business in Riverton, Utah, to litigate this Action in the State of Utah, Plaintiff's claims for relief arise out of federal trademark law, and therefore Plaintiff does not believe that its chances of recovery will be greatly diminished by forcing it to litigate in another forum because of that forum's laws. *See, e.g., id* (citing *OMI Holdings*, 149 F.3d at 1097). Therefore, this factor is neutral.

D. The Interests of Interstate Judicial System Weigh in Favor of Personal Jurisdiction

“Key to this inquiry are the location of witnesses, where the wrong underlying the lawsuit occurred, what forum's substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation.” *TH Agriculture*, 488 F.3d at 1296 (quoting *OMI Holdings*, 149 F.3d at 1096). While Defendant is located in Virginia, all other witnesses, including employees of Plaintiff and the attorneys involved in the prosecution of Plaintiff's trademark application, are all located in the State of Utah. (Belshe Decl., ¶ 8.) Additionally, the wrong underlying this Action, specifically, Defendant's infringing sales over the Internet (as those sales relate to Plaintiff's MICHE trademark) occurred in Utah. Personal jurisdiction in Utah is favored by the interstate judicial system.

E. The Shared Interest of the Several States is Neutral for Purposes of the Jurisdictional Analysis

“The fifth factor of the reasonableness inquiry ‘focuses on whether the exercise of personal jurisdiction by [the forum state] affects the substantive social policy interests of other states or foreign nations.’” *TH Agriculture*, 488 F.3d at 1297 (quoting *OMI Holdings*, 149 F.3d at 1097). It does not appear that any substantive social policy interests of the State of Virginia will be implicated by the exercise of personal jurisdiction by Utah, and this factor therefore appears to be neutral.

On balance, the exercise of jurisdiction in this Action is not constitutionally unreasonable.

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully asks the Court to deny Defendant’s Motion.

Dated: April 10, 2009

Respectfully submitted,

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By: /s/ James B. Belshe
Attorneys for Plaintiff MICHE BAG, LLC

PROOF OF SERVICE

I hereby certify that on April 10, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and sent notification of such filing to the following via certified U.S. First Class Mail:

Rebecca Cook
10911 Cattail Court
Manassas, Virginia 20109

DATED this 10th day of April, 2009.

WORKMAN NYDEGGER

By: /s/ James B. Belshe
James B. Belshe