No. 06-1458

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN DUDNIKOV and MICHAEL MEADORS,
Plaintiffs-Appellants,

v.

CHALK & VERMILION FINE ARTS, INC., and SEVENARTS, LTD.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado

The Honorable Walker D. Miller, District Judge
No. 05-CV-02505-WDM-MEH

APPELLEES' RESPONSE BRIEF

Respectfully submitted:

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Defendants/Appellees hereby certify that:

(i) Defendant/Appellee Chalk & Vermilion Fine Arts, Inc. has no parent entity, and no publicly held entity owns ten percent or more of Chalk & Vermilion's Fine Arts, Inc.'s stock; and

(ii) Defendant/Appellee SevenArts, Ltd. has no parent entity, and no publicly held entity owns ten percent or more of SevenArts, Ltd.'s stock.

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Defendants concur in the "Statement of Jurisdiction" set forth in Plaintiffs' Opening Brief, except to the extent Plaintiffs argue that this Court has jurisdiction over their claims pursuant to the Digital Millennium Copyright Act (the **"DMCA"**), 17 U.S.C. § 512, because Plaintiffs assert no claims arising under the DMCA.

STATEMENT OF THE ISSUE

Whether the District Court properly concluded that Defendants were not subject to personal jurisdiction in Colorado where the only act on which jurisdiction was claimed was Defendants' submission—from Connecticut—of a notice to a California-based internet service provider, pursuant to that provider's policies for objecting to internet sales of items that infringe on copyrights.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit against Defendants Chalk & Vermilion Fine Arts, Inc. ("**C&V**"), and SevenArts, Ltd. ("**SevenArts**"), seeking a declaratory judgment and injunctive relief, but not damages. Plaintiffs asked the District Court to find that they were not infringing on copyrights owned by SevenArts, a British company represented in the United States by C&V, so that Plaintiffs could market

fabric depicting SevenArts' copyrighted image on eBay, an internet auction site. (Appellants' Appendix (**"Aplt. App."**) at 20, ¶¶ 1-4.)

Defendants moved to dismiss Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(2) and (3) and 28 U.S.C. § 1400(a) because the United States District Court for the District of Colorado lacked personal jurisdiction over Defendants, and because venue was improper in that Court. (Id. at 56-69.) In opposing Defendants' motion to dismiss, Plaintiffs argued that the District Court had specific personal jurisdiction over Defendants. (Id. at 72-76.) In support of this argument, the only conduct identified by Plaintiffs that was purportedly aimed at Colorado was C&V's submission of a notice to eBay in California. (Id. at 72, ¶ 9; 121.)

After reviewing the Magistrate Judge's recommendation, the District Court granted Defendants' motion to dismiss, holding that it had neither general nor specific jurisdiction over Defendants. (Id. at 188-192.) In addressing specific personal jurisdiction, the District Court ruled that C&V's submission of a notice to eBay did not support the exercise of personal jurisdiction over Defendants. (Id. at 191-92.) This appeal followed.

STATEMENT OF THE FACTS

Plaintiffs base their Statement of the Facts almost entirely upon non-jurisdictional allegations in their Complaint, offering virtually no facts relevant to the issue on appeal: whether the District Court properly dismissed Plaintiffs' claims because it concluded that it lacked personal jurisdiction over Defendants. The only facts relevant to this inquiry are jurisdictional facts, which are as follows:

SevenArts holds copyrights in art designs created by an artist named Erte. (Aplt. App. at 66, ¶ 2.) SevenArts is a British corporation with its principal place of business in Essex, England. (Id.) SevenArts does not conduct business in Colorado, nor is it authorized to do so. (Id. at ¶ 3.) It has not appointed an agent for service of process in Colorado, owns no real property in Colorado, maintains no offices, accounts, or telephone listings in Colorado, and directs no advertisements specifically to Colorado residents. (Id. at 67, ¶¶ 4-8.)

C&V is a publisher of contemporary fine art prints. (Id. at 68, ¶ 2.) C&V publishes and distributes Erte's art in the United States. (Id.) C&V is a Delaware corporation with its principal place of business in Greenwich, Connecticut. (Id.) C&V does not conduct business in Colorado, nor is it authorized to do so. (Id. at ¶ 3.) It has appointed no agent for service of process in Colorado, owns no real property in Colorado, maintains no offices, bank accounts, or telephone listings in

Colorado, and directs no advertisements specifically to Colorado residents. (Id. at 68-69, ¶¶ 4-8.)

In October 2005, Plaintiffs attempted to sell fabric imprinted with SevenArts' copyrighted Erte image on eBay, a California-based internet service provider. (Id. at 9, ¶ 7; 12, ¶ 18; 22-23; 121.) In offering the fabric for sale on eBay, Plaintiffs chose to market the fabric to purchasers throughout the entire world. (Id. at 9, ¶¶ 7-8; 12 ¶ 18.)[1]

Acting from Connecticut, C&V submitted a Notice of Claimed Infringement ("**NOCI**") to eBay in California, notifying eBay of SevenArts' copyrights in the fabric marketed by Plaintiffs. (Aplt. App. at 22; 138, ¶ 4.) C&V submitted the NOCI pursuant to *eBay's* Verified Rights Owner (**"VeRO"**) program, **not** the DMCA, and eBay makes no reference to the DMCA in its statement of the VeRO program. (Id. at 12, ¶ 22; 91.) Rather, the VeRO program was developed by eBay to "facilitate cooperation," rather than lawsuits, in protecting intellectual property rights invoked by eBay auctions. (Id. at 91.) By submitting a NOCI, copyright owners throughout the world can protect their intellectual property rights from infringement by anyone, in any state or country, who posts items for sale on eBay. (Id.) Before they submitted the NOCI, Defendants had never viewed any website

[1] eBay is a popular internet auction site accessible throughout the world at www.ebay.com. (Aplt. App. at 9, ¶8.)

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maintained by Plaintiffs, and no one from SevenArts or C&V knew that Plaintiffs conducted their world-wide internet sales from Colorado. (Id. at 137-40.)

SUMMARY OF THE ARGUMENT

In this case, the District Court refused to exercise jurisdiction over British and Delaware companies that have never directly or indirectly touched Colorado and this Court should affirm that refusal. The sole act offered by Plaintiffs in support of jurisdiction is C&V's submission of a NOCI from Connecticut to eBay in California. For a myriad of reasons, Due Process does not permit the exercise of jurisdiction over Defendants based on the NOCI.

First, this Court has unequivocally held that district courts cannot exercise the specific personal jurisdiction urged by Plaintiffs without a showing that Defendants purposefully availed themselves of the privilege of conducting activities in Colorado, thus invoking the benefits and protections of its laws. See Trujillo v. Williams, 465 F.3d 1210, 1219 (10th Cir. 2006). Sending a NOCI from Connecticut to California in order to assert copyrights invoked by an internet auction simply does not fit this bill. In fact, Plaintiffs can point to no action whatsoever in which Defendants directly or indirectly availed themselves of the privilege of conducting activities in Colorado, let alone invoking the benefits or protections of its laws.

Instead, Plaintiffs offer their own unilateral conduct, purported foreseeability of effects in Colorado, and tenuous factual leaps. This Court has rejected each of these tactics as a basis for jurisdiction. Plaintiffs also inject a wrongfulness requirement into the District Court's order—a requirement that the District Court did not impose. Rather, the District Court correctly rejected *Plaintiffs'* claim that submitting the NOCI was somehow wrongful and correctly found that Defendants' NOCI submission is an improper basis for jurisdiction. A NOCI submission is a standard non-localized electronic eBay transaction that Defendants undertook with no knowledge that Plaintiffs are located in Colorado, and with the intent to assert copyrights in an *internet* auction, not a Colorado sale. This act cannot support jurisdiction in Colorado.

Second, Plaintiffs cannot refute the fact that exercising jurisdiction over Defendants in Colorado would violate "traditional notions of fair play and substantial justice." Pro Axess, Inc. v. Orlux Distribution, Inc., 428 F.3d 1270, 1280 (10th Cir. 2005). Defendants have no relationship with Colorado and operate from Connecticut and England—meaning litigating in Colorado would involve long travels and subject SevenArts to foreign laws, even though Defendants never directly or indirectly came in contact with Colorado. Plaintiffs, on the other hand, have no real interest in proceeding in Colorado. This lawsuit concerns a small

amount of fabric that Plaintiffs chose to market throughout the world in accordance with eBay's VeRO policy, and Plaintiffs have already stated that they no longer intend to sell the fabric. Likewise, Colorado has no has no interest resolving this dispute, which involves a single internet auction, not a localized Colorado transaction. In fact, Plaintiffs have filed at least 14 lawsuits in Colorado in the past four years—including a previously-rejected NOCI-based claim—and Colorado's interest lies in keeping its courts unclogged by such unwarranted litigation.

Under these circumstances, subjecting Defendants to jurisdiction in Colorado would violate Due Process and this Court should thus affirm the District Court's dismissal of Plaintiffs' lawsuit.

ARGUMENT

The District Court correctly declined to exercise personal jurisdiction over Defendants because C&V's submission of a NOCI to eBay does not warrant hauling these British and Delaware companies to Colorado, where they have absolutely no contacts. "When the court's jurisdiction is contested, the plaintiff has the burden of proving jurisdiction exists." Benton v. Cameco Corp., 375 F.3d 1070, 1074 (10th Cir. 2004). Specifically, Plaintiffs must show that exercising personal jurisdiction over Defendants does not contravene the U.S. Constitution's Due Process Clause. See Behagen v. Amateur Basketball Assoc., 744 F.2d 731,

733 (10th Cir. 1984). The Due Process Clause requires that the court "exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). To meet their burden of showing minimum contacts under the principle of specific jurisdiction,[2] Plaintiffs were required to show: (1) that Defendants purposefully directed their activities at Colorado, and (2) that this lawsuit results from those activities. See Benton v. Cameco Corp., 375 F.3d 1070, 1075 (10th Cir. 2004). Also, Plaintiffs must show that exercising personal jurisdiction "does not offend traditional notions of fair play and substantial justice." World-Wide Volkswagen, 444 U.S. at 291. Plaintiffs failed to meet this burden and the District Court correctly ruled that it lacked specific jurisdiction over Defendants.

I. STANDARD OF REVIEW

This Court reviews a district court's dismissal for lack of personal jurisdiction *de novo*. See Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1229 (10th Cir. 2006).

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[2] Minimum contacts may also be shown under the principle of general jurisdiction, which requires a showing that Defendants have continuous and systematic contacts with Colorado. See Benton v. Cameco Corp., 375 F.3d 1070, 1075 (10th Cir. 2004). Plaintiffs do not even attempt to challenge the District Court's ruling that it cannot exercise general jurisdiction over Defendants.

II. DEFENDANTS DID NOT PURPOSEFULLY DIRECT THEIR ACTIVITIES AT COLORADO

The District Court correctly found that Defendants did not purposefully direct conduct at Colorado. As this Court recently confirmed:

> Although the . . . the "fair warning requirement [of specific personal jurisdiction] is satisfied if the defendant has purposefully directed his activities at residents of the forum," this oft-quoted statement does not stand for the proposition that *any* contact with a resident of a forum is sufficient to establish minimum contacts with that forum. Instead, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities *within the forum State,* thus invoking the benefits and protections of its laws."

Trujillo v. Williams, 465 F.3d 1210, 1219 (10th Cir. 2006)(citation omitted).[3]

In this case, C&V sent a NOCI, from Connecticut, to eBay in California. When the NOCI was sent, Defendants had no knowledge that Plaintiffs operated from Colorado. Defendants did nothing to actually reach into Colorado and they certainly did not purposefully avail themselves of the privilege of conducting activities in Colorado, nor did they invoke the benefits and protections of its laws. Yet Plaintiffs base their entire jurisdiction claim on C&V's submission of the NOCI to eBay. This attempt to twist conduct that occurred entirely outside of

[3] See also Bell Helicopter Textron, Inc. v. Heliqwest Intern., Ltd., 385 F.3d 1291, 1296 (10th Cir. 2004)("To support specific jurisdiction, there must be 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'")(citation omitted).

Colorado into a basis for jurisdiction in Colorado is belied by well-established law and undeniable facts.

A. Plaintiffs' Unilateral Conduct Does Not Subject Defendants To Jurisdiction In Colorado

The only basis Plaintiffs offer for showing purposeful availment is Plaintiffs' own conduct—a tactic that Due Process and this Court do not permit. "[T]he unilateral activity of another party 'is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.'" Doe v. National Medical Services, 974 F.2d 143, 146 (10th Cir. 1992)(quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

The factual backdrop offered by Plaintiffs to support a finding of specific jurisdiction is as follows:

- *Plaintiffs* attempted to sell fabric that contained copyrighted images;
- *Plaintiffs* chose not to limit their sale of this fabric to Colorado;
- Instead, *Plaintiffs* chose to market the fabric to the entire world using the internet;
- *Plaintiffs* also chose to market the fabric through eBay, and *Plaintiffs* assented to eBay's VeRO program;[4]

[4] In fact, Plaintiffs bill themselves as VeRO experts, offering advice on the program and "Tabberone's VeRO Commdandments" on their internet site. See Aplt. App. At 9, ¶ 7; http://www.tabberone.com/Trademarks/VeroCommandments.html.

- *Plaintiffs* included references to Colorado on their internet site—references that Defendants never saw.

These facts comprise Plaintiffs' entire factual basis for their effort to bootstrap a notice sent electronically from Connecticut to California into jurisdiction in Colorado. These facts are all, however, unilateral acts by *Plaintiffs* which cannot support a finding that Defendants purposefully directed their conduct to Colorado. Plaintiffs are thus left with no facts to meet their burden, meaning the District Court correctly ruled that Colorado has no jurisdiction over Defendants.

B. The Mere Foreseeability That Submitting A NOCI Will Have An Effect In Colorado Does Not Subject Defendants To Jurisdiction In Colorado, And Plaintiffs Cannot Show "Something More"

Personal jurisdiction cannot be based on "the mere foreseeability of causing injury in another state." Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1534 (10th Cir. 1996)(citing Calder v. Jones, 465 U.S. 783, 789 (1984)). "Something more" is required to show that a defendant's actions were purposefully directed at a forum. U.S. v. Swiss Am. Bank, Ltd., 274 F.3d 610, 623 (1st Cir. 2001). See also Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1158 (9th Cir. 2006)("'something more' is needed in addition to a mere foreseeable effect").

Yet Plaintiffs offer mere foreseeability—and nothing more—to support jurisdiction in Colorado. Plaintiffs insist that Defendants could have divined that sending the NOCI to eBay would impact Colorado because *Plaintiffs'* internet

statements listed Colorado as the location of the goods and referenced Colorado sales tax. These passive references comprise Plaintiffs' entire basis for exercising specific jurisdiction, despite Defendants' uncontroverted affirmation that they never reviewed these statements before sending the NOCI.[5] Under these circumstances, Plaintiffs' arguments necessarily amount to a claim that, at best, Defendants could *foresee* that sending the NOCI would have some impact in Colorado, and nothing more. This mere foreseeability cannot comprise a basis for exercising jurisdiction over Defendants.

1. Wrongful Conduct—Which Is One Example Of "Something More"—Is What Plaintiffs Claimed And What The District Court Properly Rejected

Contrary to Plaintiffs' claims, the District Court did not rule that purposeful direction always requires a showing of wrongfulness—*Plaintiffs* urged wrongfulness as the "something more" needed for specific jurisdiction and the District Court properly rejected Plaintiffs' position. As noted above, Calder and its progeny requires "something more" than foreseeable effects in a forum to exercise personal jurisdiction. See Calder, 465 U.S. at 789; Trierweiler, 90 F.3d at 1534; Swiss Am. Bank, Ltd., 274 F.3d at 623; Pebble Beach, 453 F.3d at 1158. The Ninth Circuit has concluded "that 'something more' is what the Supreme Court

[5] In proceedings before the District Court, Plaintiffs never claimed that Defendants actually viewed their internet references to Colorado.

described as 'express aiming' at the forum state," and "that 'express aiming' encompasses wrongful conduct individually targeting a known forum resident." Bancroft & Masters v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000).

Seizing on this, Plaintiffs repeatedly attempted to support their jurisdictional arguments with claims that Defendants engaged in wrongful conduct targeting Plaintiffs.[6] Plaintiffs insisted that "Defendants took direct and specific tort-based action against the Plaintiffs when they sent the NOCI to eBay," and that this was a wrongful act deliberately designed to injure Plaintiffs. (Aplt. App. at 168, ¶ 10; 85, ¶ 52.) Defendants also attempted to factually analogize this case to Calder, which involved a defendant who aimed wrongful conduct at a plaintiff in the forum state.[7] (Id. at 75-76, ¶¶ 17-19) The Magistrate Judge accepted Plaintiffs' urgings, with specific reference to Bancroft & Masters, the case that articulated the wrongfulness aspect of "something more."[8] (Id. at 116-17.) In reviewing the Magistrate Judge's

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[6] Plaintiffs do not, however, include such claims in their Complaint because the Complaint arose from Plaintiffs' attempt to sell fabric, not Defendants' conduct.

[7] The Calder the defendant wrote a libelous article about a well-known celebrity residing in California and circulated the article in California, where the defendants knew the plaintiff resided and where defendant had its largest circulation. See 465 U.S. at 784-86.

[8] Plaintiffs both malign Bancroft's application of "wrongfulness" and rely on Bancroft. This reliance, however, is misplaced. Bancroft involved a declaratory judgment action brought by a California plaintiff to determine the validity of a copyright in an internet domain name. See 223 F.3d at 1084. Unlike this case, Bancroft's entire focus was the defendant's efforts directed at *plaintiff's* website in the forum state, not an auction

recommendation, the District Court correctly articulated the "express aiming" definition of the "something more" requirement, and correctly rejected Plaintiffs' wrongful conduct argument. (Id. at 191.) The District Court did not, as Plaintiffs bemoan, impose a *requirement* of an independent showing of wrongfulness. The District Court merely rejected the wrongful conduct arguments advanced by Plaintiffs, concluding that, because Plaintiffs' arguments showed only the mere foreseeability of effects in Colorado, "Calder is not a basis for specific jurisdiction" in this case.[9] (Id.)

On appeal, Plaintiffs abandon their prior claims and misstate the District Court's ruling as imposing a bright-line requirement of an independent showing of wrongfulness. Asking the District Court to determine the propriety of Defendants' conduct, then distorting that finding into a non-existent requirement, does not

website maintained by a third party outside of the forum. See id. Also, the Bancroft defendant "sent a letter to [the plaintiff] in California demanding that [the plaintiff] cease and desist its use of" its own website. Id. Under these circumstances, the knowledge of the plaintiff's location and intent to cause an effect in this forum were indisputable. See id. at 1087. These circumstances, however, simply do not exist in this case, which concerns eBay, not Plaintiffs' website, and in which Defendants initiated no communications with Plaintiffs.

[9] Contrary to Plaintiffs' claims, this conclusion is entirely correct. The Calder defendant: (1) knew that the plaintiff resided in California; (2) published a magazine that had its greatest circulation in California; and (3) intentionally circulated a libelous article about the plaintiff in California. See 465 U.S. at 784. This lead to the obvious holding that the defendant "knowingly" caused injury in the forum state. Id. at 790. Defendants, in stark contrast: (1) had no idea that Plaintiffs resided in Colorado; (2) have no operations whatsoever in Colorado; and (3) sent a NOCI to California. The Calder facts bear no similarity to the facts in this case and the District Court correctly ruled that Calder provides no basis for specific jurisdiction in this case.

refute the correctness of the District Court's ruling. Nor does this tactic overcome Plaintiffs' inability to point to **any** conduct, wrongful or not, in which Defendants purposefully availed themselves of the benefits of Colorado's laws—as this Court requires them to do. See Bell Helicopter Textron, Inc. v. Heliqwest Intern., Ltd., 385 F.3d 1291, 1296 (10th Cir. 2004). Plaintiffs dwell on Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006), which urged an examination of "all of a defendant's contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant." Id. at 1207-08. Yet Plaintiffs offer only one action—submitting a NOCI—which did not occur in Colorado and which Plaintiffs incorrectly painted as wrongful. Under these circumstances, the District Court correctly ruled that jurisdiction was lacking.

C. Plaintiffs Offer Only Tenuous Actions Which Cannot Support Jurisdiction

The District Court correctly rejected Plaintiffs' invitation to make attenuated factual leaps to support jurisdiction. The "requirement of 'purposeful availment' for purposes of specific jurisdiction precludes personal jurisdiction as the result of 'random, fortuitous, or attenuated contacts.'" Doe v. National Medical Services, 974 F.2d 143, 146 (10th Cir. 1992)(quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985)). Imputing Defendants' knowledge from actions undertaken solely by *Plaintiffs*—without direct evidence that Defendants ever glanced at

websites documenting Plaintiffs' actions—is, by definition, attenuated.[10] Yet this is exercise is precisely what Plaintiffs demand from this Court, and what the District Court correctly refused to undertake.

D. The Typical Online Auction Process At Issue In This Case Cannot Confer Jurisdiction Over Defendants

This case involves internet auction procedures administered by a California company for transactions occurring throughout the world, not a direct entry into Colorado. "Courts faced with the question of personal jurisdiction involving eBay transactions have consistently held that the typical online auction process is insufficient to confer specific jurisdiction over the defendant." Action Tapes, Inc. v. Ebert, 2006 WL 305769, *4 (N.D. Tex. 2006). Consequently, jurisdiction cannot be established through dealings with eBay without a showing that "the traditional eBay auction procedure was altered or circumvented in any manner." Id. at *5. This precept is grounded in common sense—eBay transactions, including VeRO transactions, are non-localized and often undertaken (as in this case) without reference to the situs of the transaction participants.

Every allegation in this case surrounds well-documented traditional eBay

[10] Equally attenuated is Plaintiffs' claim that Defendants' purported prior participation in eBay's VeRO program supports the exercise of jurisdiction. This purported prior participation obviously would not have clued Defendants in to Plaintiffs' situs in Colorado, meaning this conduct gets Defendants no closer to that forum.

procedures, including eBay's VeRO program. Plaintiffs do not allege that eBay's procedures were altered or circumvented and, in fact, these procedures were undisputedly followed. Thus, C&V's submission of a NOCI is not a proper basis for exercising jurisdiction over Defendants.

In sum, Plaintiffs failed to meet their burden of showing that Defendants purposefully availed themselves of the privilege of conducting activities in Colorado, thus invoking the benefits and protections of its laws.[11] Hence, the District Court correctly declined to exercise jurisdiction over Defendants.

III. THIS LAWSUIT ARISES FROM PLAINTIFFS' SALE OF INFRINGING FABRIC, NOT DEFENDANTS' CONDUCT

The District Court correctly ruled that this lawsuit did not arise out of Defendants' activities because the propriety of *Plaintiffs'* fabric sales, not Defendants' submission of a NOCI, was the basis for this lawsuit. "[I]n an action for a declaratory judgment regarding whether plaintiffs' actions infringed a copyright," steps taken by the copyright holder to protect itself do not subject the copyright holder to personal jurisdiction. Wise v. Lindamood, 89 F. Supp.2d 1187, 1189 (D. Colo. 1999)(citation omitted). In Wise, as in this case, the plaintiff attempted to use material that allegedly infringed on the defendant's copyrights.

[11] In attempting to meet this burden, Plaintiffs devote considerable argument to issues of reasonableness. (See Opening Brief at 15.) This tactic conflates two requirements and puts the reasonableness cart before the minimum contacts horse.

See id. at 1188-89. The defendant, like Defendants in this case, sent communications—two cease and desist letters sent to the plaintiff in Colorado—designed to prevent the plaintiff from engaging in infringing conduct. See id. The plaintiff, like Plaintiffs in this case, commenced a declaratory judgment action seeking to determine the propriety of her conduct. See id. The court granted the defendant's motion to dismiss for lack of jurisdiction, ruling that the "*dispute* in this case results from the alleged tortious conduct of the plaintiff," not from the defendant's cease and desist letters. Id. at 1191.[12] In other words, Plaintiffs' claims arose from their sale of allegedly infringing fabric, not Defendants' submission of a NOCI to eBay to protect their copyrights.

Attempting to refute this conclusion, Plaintiffs go to great lengths to distinguish NOCI submissions from cease and desist letters. Plaintiffs ignore the fact that, despite any differences between the two types of copyright protection efforts, the "*dispute* in this case results from the alleged tortious conduct of the plaintiff," *i.e.* alleged copyright infringement, not the method of dealing with this alleged conduct. Id. In any event, the cease and desist letters sent by the Wise defendant are directly parallel to the NOCI sent by C&V to eBay: both are actions

[12] See also Ham v. La Cienega Music Co., 4 F.3d 413, 416 (5th Cir. 1993)(an action for a declaratory judgment regarding whether plaintiff's actions infringed a copyright "does not arise" from the defendant's efforts to protect their copyrights).

to address copyright infringement sent to avoid the need for filing an infringement lawsuit. The primary controversy here remains Plaintiffs' infringement of Defendants' copyright, not the harm allegedly caused by Defendants, on which Plaintiffs have not based their claims[13] and for which Plaintiffs notably do not seek damages.[14]

Plaintiffs asked the District Court for a determination that their own actions in Colorado were lawful, not a determination concerning the lawfulness of Defendants' actions. Thus, Plaintiffs' claims are not based on Defendants' actions, and no specific jurisdiction over Defendants exists in Colorado. To find otherwise

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[13] Plaintiffs cannot argue, as they do on page 22 of their Opening Brief, that Defendants' conduct "may" give rise to other, unasserted causes of action. This Court's review is limited to the record on appeal, and the record contains no claims against Defendants other than claims seeking to bless Plaintiffs' sale of fabric. See United Steelworkers of Am. v. Oregon Steel Mills, Inc., 322 F.3d 1222, 1228 (10th Cir. 2003).

[14] Plaintiffs' melodramatic analogy that personal jurisdiction is appropriate here just as it would be if Defendants "had physically broken into plaintiffs' home in Colorado and stolen the allegedly infringing goods" is nothing short of absurd. (Opening Brief at 25.) Had someone broken into Plaintiffs' home and stolen goods, Plaintiffs would sue for damages, not for declaratory judgment, because that case would be based on the defendant's conduct – not on Plaintiffs' sale of fabric. Likewise, the inapposite cases cited by Plaintiffs do not salvage jurisdiction over Defendants. For example, in Metropolitan Life Ins. Co. v. Neaves, 912 F.2d 1062 (9th Cir. 1990), the court held that an Alabama defendant was subject to personal jurisdiction in California because she was "purposefully defrauding" the plaintiff there. Id. at 1065. Defendants committed no such wrongful act in Colorado or anywhere else. They simply employed a procedure provided by eBay to protect SevenArts' copyright. Additionally, unlike eBay's VeRO policy at issue in this case, Bancroft & Masters v. Augusta Nat'l Inc., 223 F.3d 1082 (9th Cir. 2000), involved an internet service policy that required the instigation of a declaratory judgment action.

"ignores the essential fact that in a declaratory judgment action, the [copyright holder] is, after all, the defendant." Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1360 (Fed. Cir. 1998). "The vast majority of courts to address this issue have reached the same conclusion." Wise, 89 F. Supp.2d at 1192 (citing cases).

IV. FORCING DEFENDANTS TO LITIGATE IN COLORADO WOULD OFFEND NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

In addition to showing that Defendants purposefully directed activities at Colorado, and that this lawsuit arises from those activities, Plaintiffs must show that that the exercise of personal jurisdiction over Defendants comports with "traditional notions of fair play and substantial justice." Pro Axess, Inc. v. Orlux Distribution, Inc., 428 F.3d 1270, 1280 (10th Cir. 2005). Courts balance the following factors in this analysis:

> (1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving 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 social policies.

Id. Importantly:

> the analyses of minimum contacts and reasonableness are complementary, such that the reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an

> especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts].

Id. Both the two-prong minimum contacts test and the multi-factor reasonableness analysis show that Defendants are not subject to personal jurisdiction in Colorado, and that the District Court properly dismissed Plaintiffs' claims.[15]

First, "'the burden on the defendant of litigating the case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction . . . . When the defendant is from another country, this concern is heightened and 'great care and reserve should be exercised' before personal jurisdiction is exercised over the defendant.'" Benton v. Cameco Corp., 375 F.3d 1070, 1079 (10th Cir. 2004)(citations omitted). Also, great care should be taken when the defendant "has no office or property in Colorado, is not licensed to do business in Colorado, and has no employees in Colorado." Id. Neither SevenArts nor C&V have offices or property in Colorado, nor are they licensed to do business here. Moreover, SevenArts is a British company that would have to travel to a foreign country and subject itself to foreign laws to defend itself in this lawsuit. Under these circumstances, the burden factor weighs against the exercise of personal

[15] Plaintiffs misstate Defendants' burden in challenging the reasonableness of litigation in Colorado. Defendants have shown that their contacts with Colorado are non-existent, that they did not direct activities toward Colorado, and that the claims in this case are not based on Defendants' activities. As this Court has held, "the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction." Pro Axess, , 428 F.3d at 1280.

jurisdiction over Defendants. See Benton, 375 F.3d at 1079.

Plaintiffs respond to these facts with a red herring argument that the DMCA somehow erases the need to consider the burden on Defendants. In submitting the NOCI, Defendants utilized eBay's VeRO program, which makes no reference to the DMCA. (Aplt. App. at 91.) Plaintiffs have judiciously avoided asserting actual claims under the DMCA, and that statute provides no basis for hauling Defendants to court in Colorado. Contrary to Plaintiffs' arguments, the DMCA requires the *target* to agree to jurisdiction in its own home state, and to accept service of process from the copyright owner; it does **not** require those filing notices of claimed infringement, like Defendants, to submit to jurisdiction in the *target's* home state. See 17 U.S.C. § 512(g)(3)(D). Plaintiffs opine that Congress intended copyright owners like Defendants to refrain from submitting NOCIs for auctions in states where the owner does not want to litigate, as if Congress would impose a Hobson's choice upon copyright owners of either allowing infringement to go unchecked or litigating in a forum where they are not subject to jurisdiction. Nothing expressed or implied in the DMCA imposes such a result.[16]

[16] Equally misplaced is Plaintiffs' reliance on Pro Axess, Inc. v. Orlux Distrib., 428 F.3d 1270 (10th Cir. 2005), in support of their claims regarding the burden of litigating in this forum. In Pro Axess, the defendant bore a much higher burden of proving unreasonableness, because the plaintiff made a much stronger showing of minimum contacts. See id. at 1280. First, in Pro Axess, the foreign defendant "solicited [plaintiff's] assistance" in procuring certain products. Id. at 1277. The court held that

Second, Colorado has no interest in resolving this dispute and, in fact, has an interest in preventing the unwarranted exercise of jurisdiction in claims like those asserted by Plaintiffs. This case concerns electronic internet commerce conducted by Plaintiffs throughout the world. Notably, Plaintiffs chose to market their goods using a California-based internet service provider, and chose to market copyrighted material. Over the past four years, Plaintiffs have filed no fewer than 14 lawsuits in Colorado.[17] (Aplt. App. at 57 n.1.) Permitting the exercise of personal jurisdiction based on inferences from Plaintiffs' website and dealings over eBay will open a floodgate of litigation against unwitting defendants from around the world, such that defendants from China, Australia, and elsewhere will be haled into court in Colorado simply for submitting a NOCI in an internet auction initiated by

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"[t]his solicitation itself is some evidence suggesting purposeful availment." Id. Moreover, the court found: "it is clear that there is a nexus between [defendant's] activities with Utah and [plaintiff's] injuries." Id. at 1278. In a case such as Pro Axess, where the defendant has purposefully directed its activities at a forum but seeks to defeat jurisdiction, it must present "compelling" evidence of unreasonableness. Id. at 1280. Such circumstances do not exist here because there is no showing that Defendants directed activities toward Colorado or that Plaintiffs' claims are based on those activities. Thus, Pro Axess is not instructive in this regard.

[17] Plaintiffs have parlayed this experience into a page on their website, www.tabberone.com, in which Plaintiffs advise other infringers on issues such as "what is a copyright", "what is a trademark", responding to cease and desist letters, and the meaning and application of the Lanham Act. See Aplt. App. at 9, ¶ 7 and http://www.tabberone.com/Trademarks/trademarks.html. This advice arguably amounts to the unauthorized practice of law in Colorado and elsewhere.

someone in Colorado. Plaintiffs have shown a voracious appetite for this kind of litigation, which will accomplish nothing more than clogging Colorado's courts.[18]

Third, Plaintiffs' interest in relief in this forum is minimal, at best. The only real interest Plaintiffs have in this case is an auction for a small amount of fabric that infringes on the Erte copyright, which they have already agreed not to sell. (See Aplt. App. at 41: "we volunteered in return for having the black mark removed we would not relist the fabric . . . [i]t is not our intention to relist the fabric."). This interest hardly weighs in favor of hauling Defendants to Colorado to litigate Plaintiffs' claims.

Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of this controversy weighs in favor of dismissal. Defendants' witnesses are located either in England or in Connecticut; federal copyright law, not

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[18] Despite the fact that it has no place in this appeal, Plaintiffs argue the merits of their claims. See Opening Brief at 21, n.4. Defendants, of course, disagree with any assertion that Plaintiffs' sale of the fabric amounted to anything other than a copyright infringement. More importantly, however, is the fact that, in another case, Plaintiffs previously asserted claims based on the submission of a NOCI under eBay's VeRO program, and those claims were flatly rejected and dismissed. See Dudnikov v. MGA Entertainment, Inc., 410 F. Supp.2d 1010 (D. Colo. 2005). Plaintiffs' continued willingness to bring these types of claims is consistent with Plaintiffs' advice to other infringers: "Even if it turns out you were infringing, never admit to doing anything wrong. The only way the 'rights owner' can get damages from you is to show a court you were a 'willing infringer.'" See Aplt. App. at 9, ¶ 7; http://www.tabberone.com/Trademarks/VeroCommandments.html. Plaintiffs' conduct evidences an intent to vex Colorado's courts with litigation, even if it turns out Plaintiffs were infringing on other parties' copyrights. Colorado has no interest in such litigation.

Colorado law, governs Plaintiffs' claims; and jurisdiction in Colorado is not necessary to avoid piecemeal litigation.[19] Plaintiffs' speculation that the issues in this case are largely a question of law is just that – speculation – and should not guide this Court's analysis of the relevant factors.

Fifth, the shared interest of the several states in furthering fundamental social policies weighs in Defendants' favor. This Court's "analysis of this factor focuses on whether the exercise of personal jurisdiction by [Colorado] affects the substantive social policy interests of other states or foreign nations" and "the extent to which jurisdiction in the forum state interferes with the foreign nation's sovereignty." OMI Holdings, 149 F.3d at 1097-98. "Facts courts have relied on to determine whether the exercise of jurisdiction interferes with sovereignty include whether one of the parties is a citizen of the foreign nation, whether the foreign nation's law governs the dispute, and whether the foreign nation's citizen chose to conduct business with a forum resident." Id.

Here, exercising personal jurisdiction in Colorado would affect England's policy interest in protecting the intellectual property rights of its citizens. SevenArts is a British company, and it did not choose to conduct business with

[19] See Trujillo v. Williams, 465 F.3d 1210, 1221-22 (10th Cir. 2006)("[W]e see no particular reason to believe that due process requires Mr. Trujillo to be able to file his suit in a single forum in order to receive convenient and effective relief.").

Colorado residents. Rather, Colorado residents tried to sell SevenArts' copyrighted material unlawfully.

Finally, "[p]rinciples of fair play and substantial justice afford [an owner of intellectual property] sufficient latitude to inform others of its . . . rights without subjecting itself to jurisdiction in a foreign forum." Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1360-61 (Fed. Cir. 1998). Defendants have done nothing more than inform a California internet auction service of their copyrights. Punishing Defendants for protecting their rights by forcing them to litigate in a foreign forum would be unfair and unjust.

CONCLUSION

Defendants have directed no activity toward Colorado. Their activities do not form the basis for this lawsuit. Forcing them to litigate in Colorado would be unjust and unreasonable. Hence, this Court should affirm the District Court.

STATEMENT CONCERNING ORAL ARGUMENT

Like Plaintiffs, Defendants request oral argument. This case raises the issue of personal jurisdiction in the emerging context of the internet as it concerns intellectual property, and it appears the Court would benefit from oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

As required by Fed. R. Aplt. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 7,278 words.

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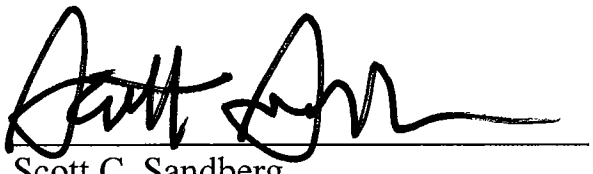
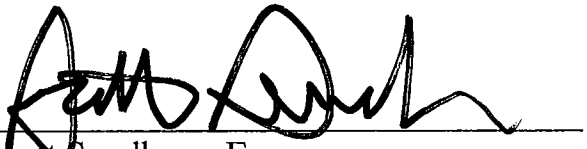


Scott C. Sandberg

Respectfully submitted,

SNELL & WILMER, L.L.P.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2007, a true and correct copy of the above and foregoing **APPELLEES' RESPONSE BRIEF** was deposited in the United States mail, postage prepaid, addressed to the following:

Gregory A. Beck
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009

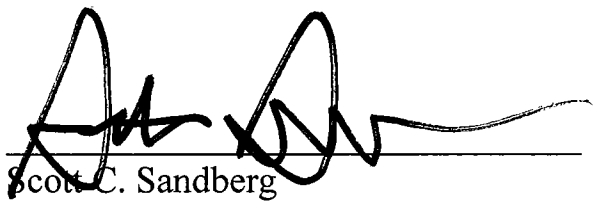
An identical electronic copy was filed with the Clerk on the same date and provided to Mr. Beck via email.

CERTIFICATION OF DIGITAL SUBMISSIONS

Counsel hereby certifies that:

(1) No privacy redactions were required, and every document submitted in digital format or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(2) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Antivirus, Version 9.0.1.1100, February 4, 2007), and according to the program, are free of viruses.



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