

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 05-CV-02505-WDM-MEH

KAREN DUDNIKOV and MICHAEL MEADORS,

Plaintiffs,

v.

CHALK & VERMILION FINE ARTS, INC. and
SEVENARTS, LTD.,

Defendants.

**DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO OBJECTIONS TO
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Defendants Chalk & Vermilion Fine Arts, Incorporated (“**C&V**”), and SevenArts, Ltd. (“**SevenArts**”), appear specially to file this Reply to Plaintiffs’ Response [Docket #26] to Defendants’ Objection [Docket #25] to the Recommendation [Docket #24] of the United States Magistrate Judge on Defendants’ Motion to Dismiss [Docket #7], and to request that this Court enter an order granting Defendants’ Motion to Dismiss.

INTRODUCTION

Neither SevenArts nor C&V purposefully availed themselves of the benefits of Colorado’s laws, and hauling them to this forum—to which they have no connection—would be unfair and unjust. Plaintiffs failed to meet their burden of refuting this conclusion before the Magistrate or in response to Defendants’ Objection to the Magistrate’s Recommendation. Hyperbole aside, Plaintiffs have shown nothing more than conduct occurring outside of Colorado. Consequently, this Court should grant Defendants’ Motion to Dismiss.

REPLY TO PLAINTIFFS' DEPTICTION OF FACTS

Contrary to Plaintiffs' claims, SevenArts is in fact a British corporation, and is registered in the United Kingdom under registration number 522818, and all copyright registrations are in the name of this British company. While SevenArts maintains a nominal affiliate in New York, it has no operations there. Also, while it is completely inconsequential to any issues in this case, Plaintiffs misrepresent the domicile of SevenArts' President, Mr. George Raymond Perman. Mr. Perman is a British citizen. He owns a vacation home in Florida, but is domiciled in England.

ARGUMENT

I. BECAUSE DEFENDANTS DID NOT PURPOSEFULLY AVAIL THEMSELVES OF THE PRIVILEGE OF CONDUCTING BUSINESS IN COLORADO, DEFENDANTS' ACTION WAS NOT EXPRESSLY AIMED AT COLORADO

Plaintiffs have failed to meet their burden of establishing specific jurisdiction because they have not and cannot show "some act by which [either Defendant] purposefully avails itself of the privilege of conducting activities within [Colorado], thus invoking the benefits and protections of its laws." Bell Helicopter Textron, Inc. v. Heliquest Intern., Ltd., 385 F.3d 1291, 1296 (10th Cir. 2004)(citation omitted). In arriving at this conclusion:

- "[T]he unilateral activity of another party is not an appropriate consideration," Doe v. National Medical Services, 974 F.2d 143, 146 (10th Cir. 1992)(citation omitted);
- The "requirement of 'purposeful availment' for purposes of specific jurisdiction precludes personal jurisdiction as the result of 'random, fortuitous, or attenuated contacts.'" Id. (citation omitted);
- The "mere foreseeability of causing injury in another state" does not establish specific jurisdiction. Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1534 (10th Cir. 1996); and
- "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).

Defendants did nothing more than send a NOCI to eBay in California to protect the Erte copyright, which was being infringed by a single transaction posted by Plaintiffs *on eBay*— Defendants never availed themselves of the benefits or protections of Colorado’s laws. Any claim to the contrary hinges on attenuated suppositions drawn from *Plaintiffs’* web site and conduct. These suppositions are directly refuted by sworn affidavits.

In their Response, Plaintiffs claim that SevenArts and C&V terminated other auctions in 2003, took direct actions to terminate the eBay auction at issue in this case, and that this termination resulted in a black mark. Putting aside their lack of support, these claims do not move SevenArts and C&V any closer to Colorado: any other terminations would have occurred outside of Colorado; and Defendants’ communications, and the resulting auction termination, were made by and through eBay outside of Colorado.

Plaintiffs insist that the consequences of an eBay NOCI are so routine that this Court should infer that a black mark was entered due to the NOCI, yet Plaintiffs claim that NOCIs are somehow not part of the typical online auction process. Plaintiffs also insist that Defendants incorrectly cited case law. For purposes of brevity and in accordance with common practice, Defendants’ Objection includes abbreviated case law quotations. However, contrary to Plaintiffs’ antagonistic urgings, Defendants have faithfully and accurately stated the holding and context of each case they have cited, including the Bell Helicopter, Trierweiler, and Action Tapes cases. At best, Plaintiffs’ arguments support the notion that Defendants acted, in Plaintiffs’ words, “not caring where Plaintiffs were.”¹ This simply does not amount to purposeful availment, as is required to exercise personal jurisdiction.

¹ See Response at pg. 9, lines 15-17.

II. PLAINTIFFS' ATTEMPT TO SELL INFRINGING FABRIC—NOT THE NOCI—IS THE UNDERLYING ACTION OF THIS LAWSUIT

Plaintiffs also failed to establish the jurisdictional showing that “the litigation results from alleged injuries that ‘arise out of or relate to’” Defendants’ actions directed to the forum. Benton v. Cameco Corp., 375 F.3d 1070, 1075 (10th Cir. 2004). As detailed above, Defendants did not direct any conduct at Colorado, and this lawsuit arises from communications with eBay outside of Colorado. Numerous analogous cases support the absence of a relationship between the NOCI Defendants sent to eBay and this action, and Plaintiffs’ efforts to escape these cases ignores the law governing specific jurisdiction in cases like this case.

First, in Wise v. Lindamood, 89 F. Supp.2d 1187 (D.Colo.1999), a Colorado plaintiff filed a declaratory judgment action like this action, *i.e.*, an action to determine whether the plaintiff was violating a non-resident defendant’s copyrights. Like SevenArts, the defendant had previously sent written communications² identifying the plaintiff and the infringement, and demanding that the infringing conduct cease. Like Plaintiffs in this case, the Wise plaintiff claimed that these communications supported the exercise of specific personal jurisdiction over the defendant, to which Judge Babcock answered, “I disagree.” Id. at 1191. More specifically, Judge Babcock ruled that “[t]he *dispute* in this case results from the alleged tortious conduct of the plaintiff” in infringing on the copyright, not the communications made by the defendant to halt the infringing conduct. Correspondingly, the dispute in this case arises from Plaintiffs’ alleged infringement in their eBay auction, not Defendants’ NOCI.³

² The Wise plaintiff sent cease and desist letters, but the nature and objective for such letters—demanding that infringing conduct cease—is analogous to that of the NOCI at issue here.

³ Judge Babcock did, as Plaintiffs emphasize, find *general* jurisdiction was appropriate, but the Recommendation rejected general jurisdiction and Plaintiffs have abandoned their claim to such jurisdiction.

Second, in Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355 (Fed.Cir.1998), the Federal Circuit affirmed the dismissal, for lack of personal jurisdiction, of a declaratory judgment action brought to determine whether the plaintiff was infringing on the defendant's patent. Once again, the plaintiff contended that letters sent by the defendant to halt the alleged infringement established the relationship necessary to exercise specific jurisdiction. Like Plaintiffs' claims regarding the NOCI, the Red Wing plaintiff insisted that "[w]ithout the assertion of infringement in these letters," the plaintiff "would have no cause to seek declaratory judgment." Id. at 1359. Once again, the court rejected this argument and ruled that letters providing notice of claimed infringement do not provide a basis for exercising personal jurisdiction. See id. at 1359-60. Plaintiffs ignore this holding and instead hone on dicta noting that a declaratory judgment might be the only recourse for a party alleged to infringe on patent rights. The language highlighted by Plaintiffs does not, however, refute the Red Wing court's holding that communications like the NOCI cannot support specific personal jurisdiction.

III. EXERCISING JURISDICTION OVER DEFENDANTS WOULD CONFLICT WITH NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

Plaintiffs' Response ignores or misapplies the "burden on the defendant", "forum state's interest" and "plaintiff's interest" factors of fair play and substantial justice. See Pro Axess, Inc. v. Orlux Distribution, Inc., 428 F.3d 1270, 1297-80 (10th Cir. 2005). First, as noted above, SevenArts is a British corporation and the fact that it has a nominal American affiliate does not refute the fact that litigating here would require SevenArts to travel here from England. Nor does Plaintiffs' tactic of prying into the personal vacation home of SevenArts' President alter the fact that "[w]hen 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).

Second, the only forum state interests identified by Plaintiffs are federal interests that are not unique to Colorado, and a purported interest in protecting Colorado businesses—despite the fact that the transaction at issue was an internet transaction that could have occurred anywhere in the world. Third, Plaintiffs have provided no valid reason why it is in their interest to litigate this lawsuit here than in a jurisdiction in which Defendants are subject to jurisdiction. Ultimately, forcing Defendants to litigate in Colorado when they have no contacts here and did not avail themselves of the benefits of Colorado's laws, would violate principles of fair play and substantial justice, and this Court should thus dismiss this lawsuit for lack of jurisdiction.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court enter an order granting Defendants' Motion to Dismiss.

DATED this 23rd day of June, 2006.

SNELL & WILMER, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2006, a true and correct copy of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO OBJECTIONS TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** was served via U.S. Mail on the following:

Karen Dudnikov
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Hartsel, CO 80449

s/ Stephannie Harris _____

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