

**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' OBJECTIONS TO RECOMMENDATION OF UNITED STATES
MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636(b)(1), Defendants Chalk & Vermilion Fine Arts, Incorporated (“**C&V**”), and SevenArts, Ltd. (“**SevenArts**”), appear specially to file this Objection to the Recommendation [Docket #24] (the “**Recommendation**”) of the United States Magistrate Judge on Defendants’ Motion to Dismiss, and to request that this Court enter an order granting Defendants’ Motion to Dismiss.

INTRODUCTION AND STATEMENT OF OBJECTIONS

SevenArts is a British corporation, C&V is a Connecticut corporation, and neither have a single contact with Colorado. Moreover, in the events leading up to this lawsuit, Defendants initiated no actions that were expressly aimed at Colorado. Consequently, this lawsuit does not and cannot arise out of any contacts Defendants had with Colorado. Instead, this lawsuit arises out of Plaintiffs’ sale of fabric on eBay, an internet auction service located in California.

Defendants informed eBay of copyright issues invoked by this sale and, rather than dealing with eBay, Plaintiffs commenced this lawsuit to determine the validity of their own sale. These facts cannot support an exercise of personal jurisdiction over Defendants.

Accordingly, Defendants object to the Magistrate's Recommendation that the Motion to Dismiss be denied, and the Recommendation's finding that Plaintiffs met their burden of establishing a basis for exercising specific personal jurisdiction over Defendants. More specifically, Defendants object to the following findings in the Recommendation:

1. Using impermissible guesswork and misapplications of governing law, the Recommendation incorrectly found that Plaintiffs met their burden of proving that Defendants purposefully availed themselves of the privilege of conducting business in Colorado;
2. Under well-established law, Plaintiffs' alleged copyright infringement is the underlying action in this declaratory judgment lawsuit, and the Recommendation incorrectly concluded that Defendants' efforts to protect its copyright comprised the underlying action; and
3. Hauling Defendants—foreign corporations with no Colorado contacts—to this forum offends traditional notions of fair play and substantial justice, and the Recommendation's urgings to the contrary are incorrect.

STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1), magistrate judges may not decide dispositive motions like Defendants' Motion to Dismiss, and the disposition of this Motion is left solely to this Court.¹ Hence, this Court "shall make a *de novo* determination" of the Motion to Dismiss. *Id.* § 636(b)(1)(C).² More specifically, this Court "should make an independent determination of the issues" and "is not to give any special weight to the" Recommendation. *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)(citation omitted). In other words, the *de*

¹ Such motions are outside of a magistrate's purview because "[i]n the passage of the Federal Magistrates Act, Congress did not intend an erosion of the underlying responsibilities and policies of the Article III judicial office." *Vekamaf Holland B.V. v. Pipe Benders, Inc.*, 671 F.2d 1185, 1187 (8th Cir. 1982).

² See also Fed.R.Civ.P. 72(b).

novo standard “entails consideration of an issue as if it had not been decided previously.” U.S. v. George, 971 F.2d 1113, 1118 (4th Cir. 1992).³ “Where circumstances indicate the district court did not conduct a *de novo* review, the case must be remanded.” Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996).⁴

FACTS BEFORE THE MAGISTRATE JUDGE

The following facts are alleged in Plaintiffs’ Complaint and/or in affidavits filed by the parties in briefing on the Motion to Dismiss:

- In this lawsuit, Plaintiffs seek a declaratory judgment that they are not infringing on copyrights held by SevenArts, and to restrain Defendants from claiming copyright infringement or interfering with Plaintiffs’ eBay auctions.⁵
- Plaintiffs do not seek damages for any business or other loss, and they have repeatedly affirmed this position on the record.⁶
- SevenArts holds copyrights in art designs created by an artist named Erte. SevenArts is a British corporation with its principal place of business in Essex, England, and conducts no business in Colorado. SevenArts has no agents, property, accounts, or listings located in Colorado, nor does it direct advertisements to Colorado residents.⁷
- C&V is a publisher and dealer of fine art that publishes and distributes Erte art in the United States. C&V is a Delaware corporation with its principal place of business in Greenwich, Connecticut, and conducts no business in Colorado. C&V has no agents, property, accounts, or listings located in Colorado, nor does it direct advertisements to Colorado residents.⁸

³ “The term ‘*de novo* determination’ has ‘an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.’ Therefore, *de novo* review ‘means reconsideration afresh by the district judge in this sense: no presumption of validity applies to the magistrate judge’s findings or recommendations.’” Moore v. Scully, 956 F. Supp. 1139, 1144 (S.D.N.Y. 1997).

⁴ See also Hudson v. Gammon, 46 F.3d 785, 786 (8th Cir. 1995)(“The failure to perform *de novo* review when required is reversible error.”).

⁵ See Complaint, at 13.

⁶ See id. See also Proposed Scheduling Order, attached as **Exhibit A**, at 2; Plaintiffs’ Initial Disclosures, attached as **Exhibit B**, at 3.

⁷ See Complaint, ¶ 2; Affidavit of George Raymond Perman (filed in support of Motion to Dismiss), attached as **Exhibit C**, at ¶¶ 3-8.

⁸ See Complaint, ¶ 3; Affidavit of Eric Danneman (filed in support of Motion to Dismiss), attached as **Exhibit D**, at ¶¶ 3-9.

- Plaintiffs listed fabric for sale on eBay, an internet auction website. This fabric contained images of Betty Boop, a cartoon character, wearing a gown.⁹
- Defendants sent a Notice of Claimed Infringement (“NOCI”) to eBay expressing, under penalty of perjury, a good faith belief that the image being sold by Plaintiffs on eBay violated the Erte copyright. Pursuant to its Verified Rights Owner (“VeRO”) program, eBay removed Plaintiffs’ auction of the Betty Boop fabric from its website.¹⁰
- eBay’s “takedown,” as noted in the Recommendation, is the action from which “[t]he instant controversy arose.” As Plaintiffs allege, they commenced this and other lawsuits “[b]ecause eBay has adopted a head-in-the-sand attitude” to NOCIs.¹¹
- After eBay’s takedown, *Plaintiffs* initiated contact with Defendants, who declined to recant the NOCI.¹²

FACTS NOT BEFORE THE MAGISTRATE JUDGE

The following facts were not alleged by Plaintiffs, nor were they otherwise properly before the Magistrate Judge. Yet, these facts comprise the basis for the Recommendation:

- Nowhere have Plaintiffs or anyone else alleged that either SevenArts or C&V ever viewed Plaintiffs’ website. Quite the contrary, the only website at issue is the auction website maintained by eBay. Plaintiffs do not allege the Defendants visited eBay’s website, only that they contacted eBay to terminate an auction on this website.
- Plaintiffs have not alleged that their website is accessible from the eBay website. If this is in fact true, this fact would have been derived from the Magistrate Judge’s admitted independent research on eBay.
- Nowhere have Plaintiffs or anyone else alleged that a “black mark” or any other type of penalty or repercussion was actually entered by eBay due to Defendants’ NOCI.
- Plaintiffs do not allege that they are “power sellers” on eBay, and this fact apparently derives from the Magistrate Judge’s independent research on eBay.

⁹ See Complaint, ¶ 18.

¹⁰ See *id.*, ¶¶ 14, 22.

¹¹ Recommendation at 3; Complaint, ¶ 15.

¹² Complaint ¶ 30.

- In any event, Plaintiffs have not alleged that Defendants actually knew of the purported volume of Plaintiffs' sales on eBay. Rather, Plaintiffs allege that Defendants sent a NOCI to eBay relating to a single transaction.
- Nor have Plaintiffs alleged that Defendants actually knew that Plaintiffs are in Colorado. Rather, Plaintiffs allege that Defendants sent a NOCI to eBay outside of Colorado.
- Plaintiffs have not alleged that Defendants actually knew of any repercussions that may result from the NOCI, other than the takedown of a single fabric sale.
- Nor have Plaintiffs alleged that Defendants actually knew that eBay supposedly maintains some kind of record of infringers, or that repeat infringers could be suspended from eBay.

ADDITIONAL FACTS

Under the *de novo* standard, "a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate." George, 971 F.2d at 1118. "The statute and the rule both confirm, further, that the district judge is completely free to supplement the record developed by the magistrate judge with further evidence" 12 Wright & Miller, Federal Practice and Procedure § 3070.2 at 378 (1997). Hence, Defendants offer the following additional facts:

- Prior to the submission of the NOCI, no one from SevenArts or C&V had viewed tabberone.com, or any other internet website maintained by the Plaintiffs.¹³
- Prior to the submission of the NOCI, no one from SevenArts or C&V knew that Plaintiffs operated out of Colorado, nor did any SevenArts or C&V representative know of the volume of business Plaintiffs conducted on eBay.¹⁴
- The NOCI was submitted to protect copyrights in the Erte design, and was not submitted with the knowledge or intent that eBay would impose any penalty upon Plaintiffs beyond the sale of the fabric specifically referenced in the NOCI.¹⁵

¹³ See Second Affidavit of George Raymond Perman ("2d Perman Aff."), filed herewith, at ¶ 2; Second Affidavit of Eric Danneman ("2d Danneman Aff."), filed herewith, at ¶ 2.

¹⁴ See 2d Perman Aff., ¶ 3; 2d Danneman Aff., ¶ 3.

¹⁵ See 2d Perman Aff., ¶ 4; 2d Danneman Aff., ¶ 4.

- eBay “is located at 2415 Hamilton Ave., San Jose CA, 95125” and has an international office in Switzerland. All dealings with eBay are governed by California law.¹⁶

ARGUMENT

The Recommendation incorrectly found that Plaintiffs established the minimum contacts necessary to exercise personal jurisdiction over Defendants. Due process mandates that this 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 (U.S. 1980).¹⁷ The “minimum contacts” standard yields: (1) general jurisdiction, meaning the defendant’s contacts with a forum are “continuous and systematic”; and (2) specific jurisdiction, meaning “the defendant has ‘purposefully directed’ his activities” to this forum. Benton v. Cameco Corp., 375 F.3d 1070, 1075 (10th Cir. 2004). Plaintiffs “bear the burden of establishing personal jurisdiction” with prima facie evidence. OMI Holdings, Inc. v. Royal Ins. Co., 149 F.3d 1086, 1091 (10th Cir. 1998). Courts accept a plaintiff’s jurisdictional allegations “to the extent they are uncontroverted by defendant’s affidavits [and] only the well pled facts of plaintiff’s complaint, as distinguished from mere conclusory allegations, must be accepted as true.” Ten Mile Indus. Park v. Western Plains Serv. Corp., 810 F.2d 1518, 1524 (10th Cir. 1987). The Recommendation ignored this last mandate.

In this case, Defendants have no contacts with Colorado, and Plaintiffs’ attempted to show contacts with only C&V’s alleged response to false internet inquiries made by Plaintiffs’ friend in Wisconsin. Accordingly, as the Recommendation found, Plaintiffs failed to establish

¹⁶ See <http://pages.ebay.com/help/policies/user-agreement.html>

¹⁷ Personal jurisdiction must also comport with Colorado’s long-arm statute, which has been interpreted to apply to the full extent of due process, and “this interpretation obviates the need for statutory analysis separate from the due process inquiry.” Keefe v. Kirshenbaum, 40 P.3d 1267, 1270 (Colo. 2002).

general jurisdiction. Likewise, Plaintiffs failed to establish that Defendants purposefully availed themselves of the privilege of conducting business in Colorado, or that Plaintiffs' lawsuit arose from anything other than their own sale of infringing fabric on eBay. Despite these failures, the Recommendation found that Plaintiffs established specific jurisdiction over Defendants.

The exercise of specific personal jurisdiction required that Plaintiffs establish: (1) Defendants purposefully directed their activities at Colorado; and (2) this lawsuit arose out of those activities. See SEC v. Knowles, 87 F.3d 413, 418 (10th Cir. 1996). If these elements are shown, Plaintiffs must also establish that exercising jurisdiction comports with "traditional notions of fair play and substantial justice." U.S. v. Botefuhr, 309 F.3d 1263, 1272 (10th Cir. 2002). Contrary to the Recommendation's deductions, Plaintiffs met none of these burdens.

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

Defendants engaged in no conduct that could amount to a finding of specific jurisdiction, and the Recommendation supports its urgings to the contrary with impermissibly attenuated suppositions. "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.'" Bell Helicopter Textron, Inc. v. Heliquest Intern., Ltd., 385 F.3d 1291, 1296 (10th Cir 2004)(quoting Hanson v. Denckla, 357 U.S. 235, 253 (1953)). In other words, the focus should be on *Defendants'* conduct, not speculation drawn from Plaintiffs' conduct. See id.

Defendants' conduct in this case amounts to sending a NOCI to eBay in California to protect its Erte copyright, which was being infringed by a single transaction posted by Plaintiffs

on eBay. As set forth in their sworn and uncontested Affidavits, Defendants did not view tabberone.com, or any other website maintained by Plaintiffs, nor were Defendants aware of Plaintiffs' location in Colorado, or the volume of business conducted by Plaintiffs on eBay. Defendants' intent in sending the NOCI to eBay was to protect the Erte copyright, not to impose any black marks or penalties beyond the single cloth item listed by Plaintiffs on eBay. The record in this case is void of a single act undertaken by Defendants in which they purposefully availed themselves of the privilege of conducting activities in Colorado, and Defendants have never invoked the benefits and protections of Colorado's laws. In other words, Defendants are not subject to specific personal jurisdiction in Colorado.

The Recommendation ignores these undisputed facts and instead dwells on conduct undertaken by *Plaintiffs* to pin non-existent knowledge upon the Defendants. The Recommendation notes the volume of *Plaintiffs'* sales on eBay, indications from *Plaintiffs'* website (not eBay) that they are located in Colorado, indications that *Plaintiffs'* products (not Plaintiffs) are located in Colorado, and Plaintiffs' contentions that they "potentially" could receive "black marks" from eBay. Based on these allegations,¹⁸ the Recommendation theorizes that Defendants knowingly aimed conduct at Colorado. Adopting this conjecture is an invitation to error for at least five reasons.

¹⁸ The Recommendation notes that it accords a high level of deference to Plaintiffs' allegations because Plaintiffs are *pro se*, ignoring the mandate that "[p]ro se status 'does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based' and 'conclusory allegations without supporting factual averments are insufficient to'" meet this standard. Fogle v. Pierson, 435 F.3d 1252, 1264 n.7 (10th Cir. 2006). More importantly, while *pro se* pleadings need not be barred for failure to cite proper legal authority, the Tenth Circuit has firmly avowed that "we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant." Hall v. Bellmon, 935 F.2d 1106, 1110 (10 Cir. 1991).

First, “the 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)).

Second, the “requirement of ‘purposeful availment’ for purposes of specific jurisdiction precludes personal jurisdiction as the result of ‘random, fortuitous, or attenuated contacts.’” Id. (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. The attenuated nature of the Recommendation’s finding is further demonstrated by the remote and speculative nature of the “harm” on which the finding is based. Nothing in the record supports the notion that eBay considers a NOCI takedown to be a “black mark,” other than Plaintiffs’ bald allegation that NOCI takedown “could” result in a black mark. More importantly, the record is entirely void of evidence supporting the notion that the NOCI at issue actually resulted in any type of black mark. What the record does show is that Plaintiffs seek no damages in this lawsuit. Under these circumstances, any finding of Defendants’ purposeful availment is, at best, attenuated.

Third, “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). The Recommendation pays lip service to this mandate, and then supports its entire purposeful availment finding with mere foreseeability. The Recommendation trumpets Plaintiffs’ internet statements about their operations but nowhere in these statements do Plaintiffs

actually state that they are in Colorado. The Recommendation insists that harm in Colorado was foreseeable from statements that products were shipped from Colorado or that sales tax was due in Colorado, but this foreseeability is simply not enough.

Fourth, courts dealing with eBay transactions, like the transaction at issue in this case, reject the Recommendation's rationale. "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).¹⁹ 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. Every allegation in this case surrounds well-documented traditional eBay procedures, including eBay's VeRO program, and Defendants' compliance with these procedures is insufficient to confer specific jurisdiction over Defendants.

Finally, and most importantly, Defendants have filed sworn statements that directly counter any the Recommendation's attenuated theories. Defendants have affirmed that they did not view Plaintiffs' website, know of Plaintiffs' location in Colorado or the volume of their business on eBay, and Defendants submitted the NOCI solely to protect the Erte copyright.

The Recommendation attempts to salvage its imputation of knowledge by citing the inapposite case of Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082 (9th Cir. 2000). Bancroft involved a declaratory judgment action brought by a California plaintiff to determine the validity of a copyright in an internet domain name. See id. at 1084. Unlike this case, Bancroft's entire focus was the defendant's efforts directed at *plaintiff's* website in the forum

¹⁹ A copy of the Action Tapes case is attached as **Exhibit E**.

state, not an auction 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 correspondence to Plaintiffs. Accordingly, Bancroft provides no basis for imputing knowledge upon Defendants, as the Recommendation seeks to do.²⁰

Defendants simply did not purposefully avail themselves of the privilege of conducting activities within Colorado, or invoke the benefits and protections of its laws. The Recommendation’s reliance on attenuated speculation, mere foreseeability, and legal misapplications do not alter this fact. Hence, this Court should grant the Motion to Dismiss.

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

Plaintiffs have not established specific jurisdiction because they failed to show that their lawsuit is related to Defendants’ activities. The exercise of specific jurisdiction requires 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). The

²⁰ The Recommendation also improperly relies on Calder v. Jones, 465 U.S. 783 (1984). The keystone of the Calder holding is that the defendant “knowingly” caused injury in the forum state. Id. at 790. The Calder defendant wrote a libelous article about a California resident and circulated the article in California. Id. at 784. The Calder defendants knew that the article would be seen in California (where the publication had its largest circulation), and intended that it harm the plaintiff in California. See id. In stark contrast, Plaintiffs in this case have alleged no facts supporting a finding that SevenArts or C&V expressly aimed any acts at Colorado and Calder thus does not support an assertion of jurisdiction in this case. See U.S. v. Swiss Am. Bank, Ltd., 274 F.3d 610, 623 (1st Cir. 2001)(“Calder cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.”).

application of this requirement in cases like this—*i.e.*, a declaratory judgment action to determine if plaintiff’s actions infringed a copyright—is a well-trodden issue. “The *dispute* in this case results from the alleged tortious conduct of the plaintiff” in infringing on the copyright. Wise v. Lindamood, 89 F. Supp.2d 1187, 1191 (D.Colo.1999)(emphasis added). To find otherwise, as the Recommendation did, “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).

This lawsuit arises solely from Plaintiffs’ attempt to auction fabric that infringes on SevenArts’ copyright. Plaintiffs do not claim SevenArts or C&V committed a tort or any unlawful act, nor are Plaintiffs seeking to redress any injury. Rather, Plaintiffs seek only a declaratory judgment blessing their own actions. In other words, this case arises from Plaintiffs’ sale of allegedly infringing material, not from any action by Defendants, meaning Defendants are not subject to specific personal jurisdiction here.

The Recommendation attempts to skirt this principle based on an inapposite distinction between cease and desist letters and NOCIs. Putting aside the Recommendation’s complete lack of legal authority to support this distinction, the Recommendation ignores the fact that both actions arise from a claimed infringement. In this case, as in the vast majority of cases like it, the claimed infringement is the only tortious or actionable conduct at issue, and is the first act in the events leading to the lawsuit. The overwhelming case law addressing the issue does not distinguish between cease and desist letters, NOCI, or other media for protecting copyrights, instead citing the need for “sufficient latitude to inform others” of its copyrights “without

subjecting itself to jurisdiction in a foreign forum.” Red Wing Shoe Co., 148 F.3d at 1360-61. NOCIs are provided for in the federal Digital Millennium Act and, in passing this Act, Congress certainly did not intend to create a new means of invoking personal jurisdiction.²¹ Finally, the Recommendation incorrectly deduces that this action arose from harm to Plaintiffs—ignoring the fact that Plaintiffs are not seeking damages in this case, only a declaration that they are not infringing upon SevenArts’ copyright.

Defendants have directed no conduct at this forum and this lawsuit arises from and seeks to sanctify *Plaintiffs’* conduct. Therefore, this Court should not exercise specific jurisdiction over Defendants and should grant Defendants’ Motion to Dismiss.

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

In addition to a lack of minimum contacts, exercising personal jurisdiction over Defendants is improper because it would pose an undue and severe burden on Defendants with no corresponding public interest. “In analyzing whether a court’s exercise of personal jurisdiction offends ‘traditional notions of fair play and substantial justice,’” courts consider

(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.

Pro Axxess, Inc. v. Orlux Distribution, Inc., 428 F.3d 1270, 1297-80 (10th Cir. 2005). In this case, these factors favor dismissal for lack of personal jurisdiction.

²¹ The Recommendation attempts to distinguish NOCIs from cease and desist letters by claiming that NOCIs do not provide settlement incentives, ignoring the fact that NOCIs do not involve court proceedings, and can be removed with a counter notice—which Plaintiffs chose not to submit.

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 if this Court exercises personal jurisdiction. Under these circumstances, the burden factor weighs against the exercise of personal jurisdiction over Defendants. See id.

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. Contrary to the Recommendation’s findings, this case concerns electronic internet commerce conducted by Plaintiffs throughout the globe. Colorado has no unique interest in the transaction at issue in this case. Colorado does have an interest, however, in efficient resolution of controversies. Over the past four years, Plaintiffs have filed no fewer than 14 lawsuits in Colorado.²² Permitting the exercise of personal jurisdiction based on inferences from *Plaintiffs’*

²² These lawsuits include: Dudnikov, et al. v. Allied Domeq N Amer, Case No. 04-cv-00161-WYD-PAC; Dudnikov, et al v. Sanrio, Inc., Case No. 04-cv-00264-WYD-PAC; Dudnikov, et al v. Fleurville Inc., Case No. 04-cv-00348-WYD-PAC; Dudnikov, et al. v. Weight Watchers Intl, Case No. 04-cv-00349-WYD-PAC; Dudnikov, et al v. Debbie Mumm Inc., Case No. 04-cv-00563-WYD-PAC; Dudnikov, et al v. Major League Baseball Props., Case No. 03-cv-00571-WDM-PAC; Dudnikov, et al. v. Mars, Inc., et al; Case No. 02-cv-01481-LTB; Dudnikov, et al v. Shabby Chic, Inc., Case No. 03-cv-02128-WYD-PAC; Dudnikov, et al v. United Media, Case No. 03-cv-02298-WYD-PAC; Dudnikov, et al v. Vittoria America,

website and dealings over eBay—which is precisely what the Recommendation urges—will open a floodgate of litigation against unwitting defendants from around the world.

Third, Plaintiffs' interest in relief in this forum is minimal, at best. As the Recommendation notes, eBay's VeRO program provided Plaintiffs with an immediate remedy in the form of a counter notice to the NOCI, which would have permitted the auction to proceed. It is undisputed, however, that Plaintiffs chose to forego this remedy and instead file this lawsuit. Both Plaintiffs and the Recommendation carefully dodge any claim that Defendants' NOCI actually resulted in a "black mark" (whatever that means) or suspension from eBay. The only real interest Plaintiffs have in this case is an auction for a small amount of fabric that arguably infringes on the Erte copyright. This interest hardly weighs in favor of hauling Defendants to Colorado to litigate Plaintiffs' claims.

Finally, "[p]rinciples of fair play and substantial justice afford a patentee sufficient latitude to inform others of its patent 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.

The Recommendation attempts to refute these principles using the same imputed knowledge as it uses to support minimum contacts, *i.e.* knowledge derived solely from vague

LLC, Case No. 03-cv-02299-WYD-PAC; Dudnikov, et al v. E! Entertainment Television, Case No. 03-cv-02334-WYD-PAC; Dudnikov, et al v. Wiggles Tour Pty Ltd., Case No. 03-cv-02335-WYD-PAC; Tabbers Temptations, et al v. Disney Enterprises, Inc., Case No. 02-cv-02402-WDM-PAC; Dudnikov, et al v. MGA Entertainment, Inc., Case No. 03-cv-02512-WYP-PAC.

references from *Plaintiffs'* statements, none of which actually state that Plaintiffs themselves are located in Colorado. Once again, premising jurisdiction on this tactic is legally impermissible, factually unsupported, unfair, and unjust.

CONCLUSION

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

DATED this 25th day of May, 2006.

SNELL & WILMER, L.L.P.

By: /s/ Scott C. Sandberg

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2006, a true and correct copy of the foregoing **DEFENDANTS' OBJECTIONS TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** was served via U.S. Mail on the following:

Karen Dudnikov
Michael Meadors
P.O. Box 87
3463 Maskoke Trail
Hartsel, CO 80449

/s/ Stephanie Harris

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

Civil Action No. 05-CV-02505-RPM-OES

KAREN DUDNIKOV and MICHAEL MEADORS,

Plaintiffs,

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

Defendants.

SECOND AFFIDAVIT OF GEORGE RAYMOND PERMAN

STATE OF FLORIDA)
 : ss.
COUNTY OF NAPLES)

George Raymond Perman, being first duly sworn, avers that he is over 21 years of age, that he has personal knowledge of the following facts, or has verified them from reliable sources, and that if called to testify he would aver to their truth:

1. I am the President of SevenArts, Limited (“SevenArts”).
2. Prior to the submission of the Notice of Claimed Infringement (“NOCI”) at issue in the above-captioned lawsuit in December 2005, no one from SevenArts had viewed tabberone.com, or any other internet website maintained by the Plaintiffs.
3. Prior to the submission of the NOCI, to my knowledge no one from SevenArts knew that Plaintiffs operated out of Colorado, nor did any SevenArts representative know of the volume of business Plaintiffs conducted on eBay.

4. The NOCI was submitted to protect copyrights in the Erte design, and was not submitted with the knowledge or intent that eBay would impose any penalty upon Plaintiffs beyond the sale of the fabric specifically referenced in the NOCI.

DATED this 24th day of May, 2006.

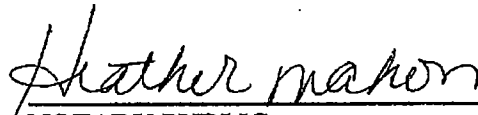


GEORGE RAYMOND PERMAN

SUBSCRIBED AND SWORN before me this 24th day of May, 2006.



Heather Mahon
Commission #DD407771
Expires: Apr 09, 2009
Bonded Thru
Atlantic Bonding Co., Inc.



NOTARY PUBLIC

My commission expires: _____

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

Civil Action No. 05-CV-02505-RPM-OES

KAREN DUDNIKOV and MICHAEL MEADORS,

Plaintiffs,

v.

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

Defendants.

SECOND AFFIDAVIT OF ERIC DANNEMAN


STATE OF CONNECTICUT)
 : ss.
COUNTY OF FAIRFIELD)

Eric Dannemann, being first duly sworn, avers that he is over 21 years of age, that he has personal knowledge of the following facts, or has verified them from reliable sources, and that if called to testify he would aver to their truth:


1. I am the President of Chalk & Vermilion Fine Arts Incorporated (“C&V”).
2. Prior to the submission of the Notice of Claimed Infringement (“NOCI”) at issue in the above-captioned lawsuit in December 2005, no one from C&V had viewed tabberone.com, or any other internet website maintained by the Plaintiffs.
3. Prior to the submission of the NOCI, to my knowledge no one from C&V knew that Plaintiffs operated out of Colorado, nor did any SevenArts representative know of the volume of business Plaintiffs conducted on eBay.

4. The NOCI was submitted to protect copyrights in the Erte design, and was not submitted with the knowledge or intent that eBay would impose any penalty upon Plaintiffs beyond the sale of the fabric specifically referenced in the NOCI.

DATED this 24th day of May, 2006.


ERIC DANNEMANN

SUBSCRIBED AND SWORN before me this 24th day of May, 2006.


NOTARY PUBLIC
My commission expires: 4/30/06

111786.1

CONNIE BARBONE
Notary Public, State of New York
No. 4639314
Qualified in Westchester County
Commission Expires November 30, 20 06