UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

M3Girl Designs, LLC Plaintiff, - against - Purple Mountain Sweaters, Carol Ann Bishop Defendants.	Index No.: 3-09CV2334-G January 6, 2009

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS AND LACK OF PERSONAL JURISDICTION

On or about December 8, 2009, Plaintiff sued Defendant Carol Ann Bishop, an individual, residing at 17716 Bridlewood Court, Parrish, Florida 34219, and Purple Mountain Sweaters, in this alleged copyright infringement action. Insufficient service of process was attempted on or about December 16, 2009 on Carol Ann Bishop but no service of process was attempted on Purple Mountain Sweaters. For the following reasons, this civil action should be dismissed.

Service of process was completely lacking or insufficient and this Court lacks personal jurisdiction over the defendants. No attempt to serve process on Purple Mountain Sweaters has been made. No affidavit of service has been made with this court for either Purple Mountain Sweaters or Carol Ann Bishop. Carol Ann Bishop and Purple Mountain Sweaters contacts with Texas are insufficient to establish *in personam* jurisdiction over the defendants.

If this court does not dismiss this civil action, then this civil action should be transferred

to the Middle District of Florida. The Middle District of Florida is: (1) the location of relevant documents and non-party witnesses; (2) the location where the alleged tort occurred by accused sales from defendant's home in Parrish, Florida, and alleged copying of plaintiff's copyright registered visual artworks, and (3) the location where virtually all of the events giving rise to this litigation occurred. Therefore, in the interests of justice and judicial economy, transfer to the Middle District of Florida is warranted.

THE PARTIES

Plaintiff, M3Girl Designs, LLC is a Texas limited liability company organized and existing under the laws of the State of Texas, with its principal place of business located at 14456 Midway Road, Farmers Branch, Texas 75244.

Defendant, Carol Ann Bishop, is a private individual domiciled within the State of Florida and residing at 17716 Bridlewood Court, Parrish, Florida 34219 at all times relevant to this case.

Purple Mountain Sweaters has never been served process and is not yet a party to this civil action.

STATEMENT OF FACTS

Purple Mountain Sweaters sells quality crafts and handwares to retailers and vendors, primarily in the Northeastern and East Coast of the United States. [*See* Bishop's Declaration,

attached as Exhibit A]. Purple Mountain Sweaters has no control over the distribution of her crafts and handwares once the sale is made to a vendor or retailer from her home in Parrish, Florida. [Bishop's Affidavit.]

No server's affidavit has been filed with this court as of this date, as to service of process on Carol Ann Bishop or Purple Mountain Sweaters. Purple Mountain Sweaters has never been served process.

Neither of the defendants is located in the State of Texas or doing business within Texas. Neither of the defendants was served process within the State of Texas. Neither of the defendants reside in the State of Texas, own property in the state of Texas or are engaged in any recurring activities within the State of Texas that would subject the defendants to Texas' long-arm statute.

Defendants have not had any systematic and continuous contact with the State of Texas, nor have they established or maintained sufficient "minimum contacts" in Texas such that the exercise of personal jurisdiction would comport with the traditional notions of fair play and substantial justice.

Instead, Carol Ann Bishop is a private individual, residing and domiciled in the State of Florida with no contacts to Texas. Purple Mountain Sweaters is not registered to do business in Texas.

Carol Ann Bishop is an individual, without sufficient resources to defend against this cause of action in the Northern District of Texas.

All transactions and resulting facts and occurrences occurred in the State of Florida, and non-party witnesses and documents are located in the State of Florida. Charles J. Prescott, a non-party witness, has personal knowledge of previous uses of bottlecap art and necklaces,

Robert Ellis Bishop, a non-party witness, has personal knowledge of business practices and licensing of artwork, and Beverly Jones, a non-party witness, has personal knowledge of financial information and documents prepared for Purple Mountain Sweaters.

Upon information and belief, this civil action is one of a series of vexatious and frivolous causes of action being planned and asserted by M3Girl Designs, LLC against a list of defendants known to Carol Ann Bishop, and Carol Ann Bishop should not be burdened with the costs and expense of litigating this civil action in the Northern District of Texas, when no contacts with the Northern District of Texas exist. Thirty-two of plaintiff's advertised designs have been found in online clip-art libraries pre-dating the use of the designs by plaintiff. Plaintiff's complaint fails to allege any specific tort that occurred in whole or in part in Texas, fails to identify the works covered by the copyright registrations and fails to identify the alleged infringing works.

Only two sales have been made of bottlecap necklaces within Texas by Purple Mountain Sweaters, amounting to less than six hundred dollars in revenue. Total revenue generated by sales of bottlecap necklaces and necklaces without bottlecaps by Purple Mountain Sweaters is less than twenty-two thousand dollars.

None of the bottlecap necklaces sold within Texas have been identified as containing any artwork of plaintiff's that is protected under copyright laws of the United States and registered with the copyright office. Plaintiff has failed to attach any copyright registration and has failed to provide any images of plaintiff's allegedly copyrighted artworks. Therefore, defendant cannot determine if any allegedly infringing sales were made to Texas. However, plaintiff has failed to identify any allegedly infringing products of the defendants, failing to provide plaintiff sufficient notice of the alleged infringement to allow plaintiff to answer plaintiff's complaint.

LAW AND ARGUMENT

This case should be dismissed for lack of personal jurisdiction, insufficient service of process and lack of subject matter jurisdiction, or alternatively, transferred to the United States District Court for the Middle District of Florida, which is the proper venue for this case.

This Court lacks personal jurisdiction over the defendants. Neither of the defendants is located in the State of Texas or doing business within Texas. Neither of the defendants was served process within the State of Texas. Neither of the defendants reside in the State of Texas, own property in the state of Texas or are engaged in any recurring activities within the State of Texas that would subject the defendants to Texas' long-arm statute.

Purple Mountain Sweaters was never served process; therefore, this action should be dismissed as to Purple Mountain Sweaters. Only Carol Ann Bishop was served process, but service of process on Carol Ann Bishop was insufficient.

Defendants have not had any systematic and continuous contact with the State of Texas, nor have they established or maintained sufficient "minimum contacts" in Texas such that the exercise of personal jurisdiction would comport with the traditional notions of fair play and substantial justice. Instead, Carol Ann Bishop is a private individual, residing and domiciled in the State of Florida with no contacts to Texas.

The United States District Court for the Northern District of Texas is the improper venue for this lawsuit. Specifically, Carol Ann Bishop is an individual, without sufficient resources to defend against this cause of action in the Northern District of Texas.

Furthermore, all transactions and resulting facts and occurrences occurred in the State of Florida, and necessary parties and witnesses and documentation are located in Florida, including

nonparty witnesses. Charles J. Prescott, a non-party witness, has personal knowledge of previous uses of bottlecap art and necklaces, Robert Ellis Bishop, a non-party witness, has personal knowledge of business practices and licensing of artwork, and Beverly Jones, a non-party witness, has personal knowledge of financial information and documents prepared for Purple Mountain Sweaters.

In addition, upon information and belief, this civil action is one of a series of vexatious and frivolous causes of action being asserted by M3Girl Designs, LLC against a list of defendants known to Carol Ann Bishop, and Carol Ann Bishop should not be burdened with the costs and expense of litigating this civil action in the Northern District of Texas, when no contacts with the Northern District of Texas exist. The facts and circumstances of this case are exactly those that the U.S. Supreme Court warns against. Subjecting an individual to the costs and inconvenience of civil litigation in a distant jurisdiction without any reason for the selection of the jurisdiction, except tenuous allegations of tortuous contacts within Texas, is improper. And if not dismissed, then this civil action should be transferred to the Middle District of Florida.

The Middle District of Florida is where documents and nonparty witnesses are present, including witnesses with first person evidence of alleged sales that took place in the Middle District of Florida. The State of Florida is: (1) the location of relevant documents; (2) the location where the alleged tort occurred by accused sales from defendant's home in Parrish, Florida, and alleged copying of plaintiff's copyright registered visual artworks, and (3) the location where virtually all of the events giving rise to this litigation occurred. The Plaintiff and Defendant each are subject to the personal jurisdiction of the Florida courts. 28 U.S.C. §§1391 (a) and 1400(b), because M3Girl Designs, LLC has systematic and recurring contacts with the State of Florida, including sales of the allegedly infringed artwork of M3Girl Designs, LLC.

First, the facts supported by the accompanying Affidavits show that Carol Ann Bishop and Purple Mountain Sweaters are not doing business in Texas and do not have sufficient contacts with Texas to warrant subjecting the defendants to the jurisdiction of this court. And second, virtually all of the operative facts leading up to and surrounding this civil action, if they occurred at all, transpired in the State of Florida. All of the artwork used by Carol Ann Bishop in making crafts and handwares are licensed and used in Parrish, Florida. All sales are made from her home in Parrish, Florida. Once sales are made, the defendant has no further control over the crafts and handwares.

Neither of the defendants is located in the State of Texas or doing business within Texas. Neither of the defendants was served process within the State of Texas. Neither of the defendants reside in the State of Texas, own property in the state of Texas or are engaged in any recurring activities within the State of Texas that would subject the defendants to Texas' long-arm statute.

A. Standard

In considering a motion to dismiss under Fed. R. Civ. P. 12(b), "a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard v. Beerman,* 18 F.3d 147, 150 (2nd Cir.), *cert. denied,* 130 L.Ed. 2d 28, 115 S.Ct. 73(1994). As a matter of law, the burden of establishing personal jurisdiction over a nonresident defendant is on the plaintiff. *Gould, Inc. v. Mitsui Mining and Smelting Co., et al.,* No. C85-3199, 1990 WL 103155 at *3 (N.D. Ohio, June 29, 1990) (citing *Welsh v. Gibbs,* 631 F.2d 436, 438 (6th Cir. 1980)) *see also Hoover Co. v. Robeson Indus. Corp.,* 904 F. Supp. 671, 673 (N.D. Ohio 1995)

(denying joiner of party in patent case for lack of personal jurisdiction). When the parties have provided materials such as pleadings and affidavits, the plaintiff's burden "is relatively slight and the district court 'must consider the pleadings and affidavits in the light most favorable to the plaintiff.'" *Id.* (citation omitted). The Court must determine if the plaintiff has made a *prima facie* showing of jurisdiction, giving due regard to the foreign defendant's domicile. *Id.* at 3. Here, there is no dispute that plaintiff has failed to allege any specific facts sufficient to show that Texas courts have personal jurisdiction over Carol Ann Bishop.

B. Personal Jurisdiction

1. Choice of Law

A federal district court sitting in a diversity action must apply the law of the forum state, subject to due process limitations, to decide if it may exercise personal jurisdiction over a nonresident defendant. *Kinetic Instruments, Inc. v. Lares,* 802 F.Supp. 976, 981 (S.D.N.Y. 1992). In doing so, federal courts generally engage in a two step analysis. *Id.; see also Hoover,* 904 F. Supp. at 672-73. First the court must determine whether state law confers personal jurisdiction over the defendant. *Id.* at 673 (citing Fed. R. Civ. P. 4(k)(1)(A)). Second, the court must determine whether such jurisdiction comports with the requirements of due process. *Id. (citing International Shoe v. Washington,* 326 U.S. 310, 316 (1945)). This standard is only satisfied, and thus personal jurisdiction only exists, if "the defendant purposely avails itself of the privilege of conducting activities within the forum State," *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., Ltd.,* 91 F.3d 790, 793 (6th Cir. 1996), *quoting Hanson v. Denckla,* 357 U.S. 235, 253 (1958), such that it "should reasonably anticipate being hailed into court there." *Id. (quoting World Wide Volkswagen Corp. v. Woodsen,* 444 U.S. 286, 297 (1980)). In the present case, the defendant has clearly not availed herself of the privilege of conducting activities in Texas. The type and

quality of contacts between Texas and Carol Ann Bishop do not give rise to *in personam* jurisdiction in Texas.

2. Texas Long Arm Statutes

Under the Texas long-arm statute, the plaintiff has the initial burden to plead sufficient allegations to confer jurisdiction. *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002). The defendant seeking to avoid being sued in Texas then has the burden to negate all potential bases for jurisdiction pled by the plaintiff. *Id.*

In this case, the plaintiff alleges Carol Ann Bishop is subject to personal jurisdiction merely because she "has established minimum contacts with the State of Texas" and has "purposefully availed [herself] of the rights and privileges of the State of Texas ... and committed a tort in whole or in part in the State of Texas, which *may* include copyright infringement, misappropriation and unfair competition in the State of Texas." [*See* Complaint at para. no. 5., *italics* added for emphasis.] The plaintiff has not even identified any actual instance of infringement but qualifies the assertion with the verb "may." This is insufficient.

The copyright laws of the United States do not protect functional designs such as the use of bottlecap concept to interchange bottlecap artwork on a magnetic keeper board. Instead, the copyright laws only protect certain "works of authorship" and only allow a plaintiff access to the courts when such "works of authorship" are first registered with the U.S. Copyright Office. The plaintiff refers only to three copyright registration numbers. VA means that the copyright registrations are for the visual arts forms. VA 1-665-063, VA 1-684-413 and VA 1-665-059 are not identified with any particular artwork in plaintiff's Complaint, but are merely listed at para. no. 11. The three cited registrations are not attached to the complaint as exhibits, nor are a copy of the specific "works of authorship" registered using the visual arts form attached

to the complaint or compared to any products sold by the defendant within the State of Texas. Thus, the Complaint fails to plead sufficient allegations to confer personal jurisdiction under copyright law or even to put the defendant on notice. *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002).

The Complaint fails to allege any act of misappropriation to have occurred within the State of Texas. [*See* Complaint, Count II.] Indeed, there are no specific allegations of misappropriation anywhere. Instead, the Complaint appears to claim a right for the plaintiff in its concept that is protectable under neither copyright or misappropriation laws. In essence, plaintiff is seeking to prevent the use of a concept by others that can only be provided under the protection of U.S. patent laws, without asserting any rights in a granted U.S. patent. Thus, the Complaint fails to plead sufficient allegations to confer personal jurisdiction under this tort in the State of Texas, as well. *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002). Specifically, there is no wrongful act. Any person can take publicly available information and use it, absent some contract or wrongful act in obtaining the information. Nothing is pleaded by plaintiff that explains its assertion of misappropriation.

The plaintiff alleges that the Defendant's admitted to using the Plaintiff's registered trademark for "Snap Caps," in para. no. 21 of the Complaint, which is both inaccurate and misleading to this Court. From Exhibit B, a letter from the law offices of Charles J. Prescott, P.A. to plaintiff, it is clear that no admission of any use of "Snap Caps" as a trademark was made. Indeed, the letter is clear that any inadvertent use of a descriptive phrase "Snappy Bottle Cap Necklaces" on a portion of the purplemountainbaby.com website was immediately removed upon receipt of plaintiff's initial cease and desist letter. Furthermore, no allegation is made anywhere in its Complaint that the use of "Snappy Bottle Cap Necklaces" on the

purplemountainbaby.com website resulted in any act of infringement by Carol Ann Bishop of any registered trademark of the plaintiff within the State of Texas. [See Complaint, Count III and Count IV.] Thus, Counts III and IV of the Complaint fail to plead sufficient allegations to confer personal jurisdiction under this tort within the State of Texas, as well. *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002). **Considering all of the allegations on their face, nothing in the complaint alleges any specific tort being committed within the State of Texas in order to establish personal jurisdiction over Carol Ann Bishop or Purple Mountain Sweaters.**

Personal jurisdiction is a question of law. *Id.* "Texas courts may assert *in personam* jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). Thus, this court may dismiss this civil action if it finds that the complaint lacks a sufficient basis for establishing personal jurisdiction over the defendants or if hailing the defendants into court in Texas offends traditional notions of fair play and substantial justice.

(1) The Long Arm Statute

The Texas long-arm statute's broad doing-business language "allows the statute to reach as far as the federal constitutional requirements of due process will allow." *Id.* at 575 (citations omitted); *accord Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005). Therefore, Texas courts analyze whether a defendant's acts would bring the defendant within Texas' jurisdiction consistent with constitutional due process requirements. *See Moki Mac*, 221 S.W.3d at 575 (citations omitted); *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).

(2) Due Process Constraints

Under constitutional due-process analysis, personal jurisdiction is achieved when (1) the non-resident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice." *Moki Mac*, 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). We focus on the defendant's activities and expectations when deciding whether it is proper to call the defendant before a Texas court. *Int'l Shoe Co.*, 326 U.S. at 316.

(A) Minimum Contacts

A defendant establishes minimum contacts with a state when it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe Co.*, 326 U.S. at 319). "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Am. Type Culture Collection*, 83 S.W.3d at 806 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). A nonresident's contacts can give rise to either specific or general jurisdiction. *Am. Type Culture Collection*, 83 S.W.3d at 806. General jurisdiction arises when the defendant's contacts with the forum are continuous and systematic. *Id.* at 807. Specific jurisdiction, which is alleged here, arises when (1) the defendant purposefully avails itself of conducting activities in the forum state, and (2) the **cause of action arises from or is related to those contacts or activities**. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995). In a specific jurisdiction analysis, "we focus . . . on the 'relationship among the

defendant, the forum [,] and the litigation.'" *Moki Mac*, 221 S.W.3d at 575–76 (citing *Guardian Royal*, 815 S.W.2d at 228).

1. Purposeful Availment

We consider three issues in determining whether a defendant purposefully availed itself of the privilege of conducting activities in Texas:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Moki Mac, 221 S.W.3d at 575 (internal citations and quotations omitted). Additionally, the minimum-contacts analysis is focused on the quality and nature of the defendant's contacts, rather than their number. *Am. Type Culture Collection*, 83 S.W.3d at 806.

In this case, none of the actions of Carol Ann Bishop asserted in the Complaint giving rise to this litigation occurred in Texas, not copying, non misappropriation and not trademark infringement. General sales of products by Purple Mountain Sweaters, which general sales are not identified within the complaint as specifically infringing any of the three asserted copyright registered designs of the plaintiff, did not give rise to any tort within the State of Texas. No specific sales within the state of Texas are identified in the complaint. Bishop's Affidavit shows that the sales in Texas are attenuated and sporadic and not systematic and continuous. Purple Mountain Sweaters does the vast majority of its business in the Northeast and East Coast. Thus, Carol Ann Bishop's alleged contacts with the State of Texas, amounting to a total of two, nonrecurring sales by Purple Mountain Sweaters within the state, for less than $600 of total revenue, much or all of which is not related to any alleged infringing sales, were not purposeful.

Instead, the sales of products within the State of Texas have been random, fortuitous, and attenuated, occurring only recently and not reoccurring. Furthermore, plaintiff has not alleged any facts showing that any of the sales are infringing any of the three copyright registrations relied upon in the plaintiff's complaint. The only sales made to the Northern District of Texas were for $42 and was shipped shortly before the onset of this dispute. Sales to the plaintiff are not considered in determining personal jurisdiction in Texas.

In *Michiana,* it was held that "in some circumstances a single *contract* may meet the purposeful-availment standard, but not when it involves a single *contact* taking place outside the forum state." *Id.* at 787. (emphasis in original) (holding that an Indiana RV dealer did not have minimum contacts with Texas where the dealer's only contact with Texas was the Texas resident's decision to place an order from Texas). Carol Ann Bishop never entered the state to meet with vendors within the state or to target sales within the state. The Complaint fails to assert any specific sales to the Northern District of Texas, but the records of Purple Mountain Sweaters record only a single purchase to the Dallas/Ft. Worth region for a small quantity of craft made products from Purple Mountain Sweaters made over the internet from Purple Mountain Sweaters' Florida location. *Michiana* found it "hard to imagine what possible benefits and protection Michiana enjoyed from Texas law" under circumstances involving much more significant contact with the forum state. *Id.* at 787, 794. In this case, the destination of the small order placed from the Dallas/Ft. Worth area was merely fortuitous, as in *Michiana.* Furthermore, Carol Ann Bishop's contacts with Texas are the result of the unilateral actions of a third party. Here, Carol Ann Bishop's contacts with Texas are even more attenuated, as a proprietor of a small craft and handware business, she merely accepted an order over the internet and shipped the goods to Texas by ordinary common carrier.

Lastly, the Complaint fails to allege any specific instance where Carol Ann Bishop has sought a "benefit, advantage or profit" in Texas. Thus, the Complaint fails to establish any basis for *in personam* jurisdiction. *Id.* at 785.

Under Texas law, "a nonresident may purposefully avoid a particular jurisdiction by structuring its transactions so as to neither profit from the forum's laws nor be subject to its jurisdiction." *Michiana*, 168 S.W.3d at 785. Certainly this is true in some transactions, such as the purchase of personal property or out-of-state services. *See, e.g.*, *BMC Software Belgium*, 83 S.W.3d at 793 (finding no personal jurisdiction where details of a personal services contract were discussed in Texas); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 763 (Tex. 1977) (finding no personal jurisdiction over Oklahoma defendant where the contract for installation of highway advertisement signs by Texas company was signed and performed in Oklahoma). In this case, the sale of products via purplemountainbaby.com to an address in Dallas/Ft. Worth does not rise to the level of purposefully availing Carol Ann Bishop of the privilege of conducting activities in Texas. *See Michiana*, 168 S.W.3d at 784–85. Nor does the other sale in Texas, which amounts to the only other sale in the state. Therefore, no personal jurisdiction has been established by the plaintiff.

2. Arise From or Related to

Even if purposeful availment is found, "purposeful availment alone will not support an exercise of specific jurisdiction . . . unless the defendant's liability arises from or relates to the forum contacts." *Moki Mac*, 221 S.W.3d at 579. Nothing is asserted in the complaint that any of the contacts of Carol Ann Bishop with Texas were the contacts from which Carol Ann Bishop's liability arises. There must be a "substantial connection between [the defendant's forum] contacts and the operative facts of the litigation." *Id.* at 585. Thus, the

Complaint must establish operative facts within the State of Texas that give rise to the claims involved in the litigation. The Complaint of M3Girls Designs, LLC fails to establish any such operative facts. *See* TEX. CIV. PRAC. & REM. CODE §17.042 ("a nonresident does business in this state if the nonresident . . . commits a tort in whole or in part in this state"). No specific assertions are made in the Complaint that ties any specific instances of sales, copying, misappropriation or use of registered trademarks to Texas. Therefore, the complaint fails to establish personal jurisdiction over the defendants.

(B) Traditional Notions of Fair Play and Substantial Justice

An assertion of jurisdiction over a defendant must comport with "traditional notions of fair play and substantial justice." *Guardian Royal*, 815 S.W.2d at 228. "Only in rare cases, however, will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *Id.* at 231 (citing *Burger King*, 471 U.S. at 477). Nonetheless, this court must still consider: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies. *Guardian Royal*, 815 S.W.2d at 228, 231 (citing *Burger King*, 471 U.S. at 477–78). These factors weigh heavily in Carol Ann Bishop's favor. The total amount at stake is much less than $75,000, notwithstanding the general assertion made in the Complaint. The burden on the defendant, Carol Ann Bishop, is severe. As an individual, she does not have the resources or the time to adequately represent herself within the Northern District of Texas. She would be forced to hire

an attorney in Texas or to travel to Texas to represent herself, pro se, within the state, at great expense and inconvenience.

In this case, Texas has no interest in resolving these controversies, except for possible infringing sales within the State of Texas. The Complaint fails to assert or allege that any sales within the State of Texas are infringing any valid intellectual property rights of the plaintiff. Moreover, Florida has a much greater interest in the litigation, because any allegations of copying or misappropriation would likely have occurred in Florida, if at all, based on the defendant's residence within the State of Florida.

The plaintiff has an interest in resolving this controversy in Texas because that is where the plaintiff filed the litigation, but this is granted little weight in an analysis for purposes of personal jurisdiction over a nonresident defendant. The plaintiff has filed a large number of similar litigations against defendants located across the country and is allegedly making large profits by asserting vexatious litigation against any and all competitors to improperly establish monopoly power within the United States for any and all sales of any jewelry similar to its bottle cap necklaces. The primary purpose for choosing the Northern District of Texas is for the convenience of plaintiff's litigation counsel and minimizing plaintiff's costs, while increasing the inconvenience and cost to others of the many litigations being brought by plaintiff without good faith and for reasons of maintaining plaintiff's market power improperly.

The interstate judicial system's interest in obtaining the most efficient resolution of controversies might favor the Northern District of Texas, if this litigation were being joined to other ongoing litigations within the Northern District of Texas. However, Carol Ann Bishop's infringement or noninfringement of any intellectual property rights owned by M3Girl Designs, LLC does not arise from a common set of operative facts as any other unrelated third party's

infringement. While it is hypothetically possible that the defendants' might share a defense of invalidity, antitrust, misuse or fraud against M3Girl Designs, LLC, each act of copyright infringement, trademark infringement or misappropriation arises from entirely separate facts and circumstances relating to the alleged access to certain designs of M3Girl Designs, LLC, the similarity of Carol Ann Bishop's designs to those of M3Girl Designs, LLC, any likelihood of confusion between trademarks used by the defendant and plaintiff, and other facts that are entirely separate from any acts of infringement by any unrelated third party. Therefore, consolidation of the causes of action brought by M3Girl Designs, LLC is unlikely to yield any significant efficiencies. Therefore, this factor is neutral.

The shared interest of the several States in furthering fundamental substantive social policies weighs heavily in favor of the defendant, Carol Ann Bishop. The several States all share an interest in reducing vexatious and frivolous litigation, the purpose of which is not to put forward a legitimate cause of action against another but instead to exact an unacceptable cost, forcing smaller vendors from the marketplace. An individual should not be forced to defend herself in a foreign jurisdiction, when a plaintiff is clearly participating in a scheme of vexatious litigation to discourage legitimate competition within a nationwide marketplace for goods. The total gross sales to date by Carol Ann Bishop for any and all bottlecap necklaces is less than $15,000, nationwide, primarily within the Northeast region of the United States. *See* Bishop's Affidavit. The costs to Carol Ann Bishop of litigating in Texas have already greatly exceeded the total sales of bottlecap necklaces within Texas. Less than $600 of bottlecap necklaces were ordered and shipped to Texas in only two, unrelated and non-recurring sales to the state.

From this total, the proportion of sales that are asserted to be infringing of any legitimate copyright registration is impossible to determine from the Complaint. Images of any

original artwork registered under the asserted copyright registrations, VA 1-665-063, VA 1-684-413, and VA 1-665-059, are not attached to the complaint. It is the plaintiff's burden to show that allegedly infringed artwork is subject to a proper copyright registration, which requires Plaintiff to compare the allegedly infringing artwork with artwork properly registered with the U.S. Copyright Office. Plaintiff has failed to meet this initial burden by merely listing three copyright registration numbers, without more. Indeed, Plaintiff's Complaint fails to assert that any particular designs sold within Texas incorporate any artwork alleged to be infringing one of the three copyright registrations asserted.

Carol Ann Bishop has already identified 32 examples of the plaintiff's artwork for sale on plaintiff's website that infringe Microsoft's ClipArt library (and are not original to plaintiff). *See* Bishop's Affidavit. A side-by-side comparison of the Microsoft ClipArt library and 32 of the plaintiff's advertised designs are attached as Exhibit 5 to Bishop's Affidavit and show that the 32 infringing designs are identical to the corresponding images obtained from a variety of clip-art libraries. Plaintiff alleges to be the author of its designs, but this raises serious doubts about the originality of plaintiff's "original" works of authorship.

In contrast, Carol Ann Bishop can show that all of the artwork sold by Purple Mountain Sweaters is properly licensed artwork from third party artists and designers. *See* Bishop's Affidavit. Therefore, Carol Ann Bishop did not copy any of M3Girls Designs, LLC designs, and Carol Ann Bishop can show that her designs are licensed.

As to trademark infringement, as soon as Carol Ann Bishop was notified of M3Girls Designs, LLC's trademark, Carol Ann Bishop removed all references to anything "snappy" and no longer uses "snappy" on any advertising materials, websites, mailings, product information or anywhere. The term "snappy" was displayed for a brief time on one sub-window

of purplemountainbaby.com as a descriptive term, prior to any receipt of notice, and the brief use of the term snappy in its descriptive sense by a small craft and handwares website in Florida could not have caused plaintiff any harm in Texas. Counsel for plaintiff has already been told this by defendant's local intellectual property counsel in a writing attached to Bishop's Affidavit as Exhibit 1, in response to plaintiff's cease and desist letters, attached as Exhibits 2 and 3.

Exhibit 4, an extract from a website, www.craftster.org, shows that bottlecap magnet crafts are not new and not proprietary to plaintiff. Since at least November 2003, if not early, crafts were being made using bottlecaps, artwork and magnets, and the necklaces for attaching the magnets are even referred to in a January 2004 posting to the website.

The many persons who are being threatened with litigation and being sued by plaintiff, the nature of the artwork that plaintiff is asserting as copyright protected, and the large number of verified, identical copies in online clip-art libraries all suggest that the plaintiff is merely attempting to steam roll small craft companies by improperly using the courts to obtain a dominant market position for bottlecap necklaces. This type of vexatious and meritless litigation is an abuse of the federal courts.

It is not justice to allow a bully to force small craft and handwares suppliers out of the marketplace, merely because they are not capable of defending themselves in a distant jurisdiction against vexatious and meritless lawsuits. This court should dismiss this civil action for lack of personal jurisdiction, because to do otherwise offends traditional notions of fairplay and substantial justice.

C. Venue

In the alternative, this Court should transfer venue to United States District Court for the

Middle District of Florida.

1. 28 U.S.C. §1391 Venue Generally

In a civil action in which jurisdiction is not based solely on diversity of citizenship, venue will only be deemed proper in:

(1) A judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C.A. § 1391(b).

Carol Ann Bishop is not a resident of Texas within the Northern District of Texas. No part of the events or omissions giving rise to the Complaint occurred in the Northern District of Texas, and the subject of this action does not involve property located in Texas. Nor does Carol Ann Bishop own or operate property or facilities in the State of Texas, nor has she contracted to do so. [Bishop's Affidavit.]

2. 28 U.S.C. § 1400 Venue Copyright

While any civil action for copyright infringement may be brought in the judicial district where the defendant has committed acts of copyright infringement, it is the Plaintiff's burden to allege the specific acts of infringement upon which plaintiff is relying for establishing personal jurisdiction. In this case, plaintiff has failed to allege any specific acts of copyright infringement in Texas and has failed to provide notice of the acts of infringement in a way that would put defendants on notice of what copyrighted artwork is being asserted. Although plaintiff lists three copyright registrations, the complaint fails to identify the artworks registered in those copyrights or any of defendant's products that are alleged to be infringing the registered

copyrights.

Under Federal Rule of Civil Procedure 12(b), a claim for relief based on lack of service of process and insufficient service of process may be asserted by motion. In this case, service of process is insufficient. Under Federal Rule of Civil Procedure 4(l)(1), "[u]nless service of process is waived, proof of service must be made to the court ... by the server's affidavit." No server's affidavit has been filed with this court, as to service of process on Carol Ann Bishop or Purple Mountain Sweaters. Indeed, Purple Mountain Sweaters has never been served process.

Conclusion

Therefore, this civil action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b), for insufficient process, lack of personal jurisdiction over defendants, Carol Ann Bishop and Purple Mountain Sweaters under Texas law and its long arm statute and the Constitution of the United States.

Alternatively, because the Northern District of Texas is the improper venue, Defendants ask this Court to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(3) and transfer venue to the United States District Court for the Middle District of Florida, pursuant to 28 U.S.C.A. § 1406.

DATED:

By: /s/Carol Ann Bishop

Carol Ann Bishop