

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
Dallas Division**

**M3Girl Designs, LLC  
Plaintiff,**

**v.**

**Purple Mountain Sweaters and  
Carol-Ann Bishop,  
Defendants.**

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**CIVIL ACTION NO. 3:09CV2334-G**

**PLAINTIFF'S RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS FOR INSUFFICIENT  
SERVICE OF PROCESS AND LACK OF PERSONAL JURISDICTION**

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COMES NOW Plaintiff, M3Girl Designs, LLC, by its counsel, to file this Response in Opposition to the Defendants' Motion to Dismiss for Insufficient Service of Process and Lack of Personal Jurisdiction, as well as the other bases set forth in the filed motion, as follows:

**I. INTRODUCTION**

The Plaintiff, M3 Girl Designs, LLC, is a Texas limited liability company formed by two young sisters, Ms. Madeline Bradshaw and Ms. Margot Bradshaw, and their mother, Ms. Diane Bradshaw, for the purpose of marketing and selling interchangeable bottlecap jewelry. The jewelry designs created by M3 Girl Designs include artwork placed within a bottlecap, such as an old-fashioned soft drink bottlecap. A magnet or magnetic attachment is placed on the opposite side of the bottlecap so the wearer can "change out" or interchange the various bottlecap designs with a necklace having a metal ring.

Ms. Madeline Bradshaw initially started her new business a few years ago as part of a fourth-grade school project while attending The Hockaday School in Dallas, Texas. Ms. Madeline Bradshaw continued to work diligently on her business for the succeeding years thereafter with direct assistance of her mother and sister. As part of their business development, the Bradshaws attended hundreds of trade shows and market events from coast-to-coast across the United States. The marketing expenses associated with such efforts were significant, and these expenses were personally incurred by the Bradshaws to promote their new product and build the good-will of their new business.

The extensive time and resources invested by the Bradshaws into M3 Girl Designs produced significantly positive returns. The M3 Girl Designs interchangeable bottlecap jewelry became extremely popular among young ladies, which was the direct result of the personal expenditures incurred by the Bradshaws to create, foster, and mature their new business. Jewelry

produced by M3 Girl Designs is now being sold in several hundred “Learning Express” stores across the country, with their products being offered in over 1200 retail sales locations in forty-six states in the United States, two United States territories, and the Canadian provinces. *Exhibit 7, M3 Girl Designs LLC Website, “Where to Buy” page, “www.m3girldesigns.com/where-to-buy.”* Ms. Madeline Bradshaw and Ms. Margot Bradshaw were recently interviewed by Ms. Barbara Walters on “The View,” a national daytime television show, and the Bradshaws have appeared on numerous other national and regional television shows promoting their product line.

The Bradshaws created an entirely new market “niche” for interchangeable bottlecap jewelry. With success, regrettably, comes imitation. In the present case, the Defendants are just such imitators. As set forth in the Complaint, Defendants have produced over twenty-eight (28) infringing articles that are substantially similar to the identified designs copyrighted by the Plaintiff. Not only have these copyists taken the Plaintiff’s copyrighted materials, but they also infringed trademarks owned by M3 Girl Designs to lure consumers toward their unauthorized products sold on the Defendants’ interactive website.

The Defendants would not have had any awareness of a market for interchangeable bottlecap jewelry but for the extensive presence of M3 Girl Designs in the market. In contrast to M3 Girl Designs, the Defendants did not create a new market for interchangeable bottlecap jewelry. The Defendants did not invest their time, money or effort in promoting this new market. The Defendants did not enter this market as good faith competitors. The Defendants contributed nothing to this new market. Instead, the Defendants have taken the intellectual

property of M3 Girl Designs in an effort to make a “quick buck,” and the Defendants have leveled several unseemly personal attacks against the Bradshaws.<sup>1</sup>

These personal attacks appear to be intended to divert attention away from the Defendants’ infringing conduct. It is interesting to note that the Defendants never indicate why or how they entered this market -- because that explanation would necessarily include an admission that the Defendants entered this market by “riding on the coattails” of two young and successful female entrepreneurs. The Defendants undoubtedly found out about the M3 Girl products, copied the interchangeable bottlecap jewelry products, and started selling their own version of the Plaintiff M3 Girl Designs products on their interactive Internet website. The Defendants even used confusing similar wording as the Plaintiff’s trademarks on their website. All to this conduct is unlawful and unfair competition -- plain and simple.

The Defendants Motion to Dismiss presents this Court with many inconsistencies. Incredibly, the Defendants’ Motion asks for “justice” from this Court by asking that this Court summarily sanction their theft of the Plaintiff’s intellectual property rights. Further, the Defendants contend there is no profitability in the bottlecap jewelry market, but the Defendants have continued to sell their infringing products on their “interactive” website after being sued in this Court. Moreover, the Defendants claim poverty, but they admit to making approximately \$20,000 in revenue from their infringing sales to date.

While imitation is claimed to be the sincerest form of “flattery,” the Defendants in the present case are causing significant damages to the Plaintiff M3 Girl Designs business. The

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<sup>1</sup> The Defendants have cited alleged artwork at Exhibit 5 to their Motion, which they claim has an impact on the Plaintiff’s claims for copyright protection. While the Defendants claim that the Plaintiff’s bottlecap jewelry is shown in their Exhibit 5, no bottlecap jewelry is disclosed anywhere in Exhibit 5. Further, no artwork that was used in bottlecap jewelry prior to the Plaintiff’s copyright registrations is shown in Exhibit 5. In fact, bottlecaps and bottlecap jewelry are not mentioned anywhere in the Defendants’ Exhibit 5.

Defendants are undercutting the M3 Girl Design prices in the market and making sales of interchangeable bottlecap jewelry that would have otherwise been made by M3 Girl Designs. Given an opportunity to correct their behavior and after being warned to stop their unauthorized conduct, the Defendants did nothing to stop their sale of infringing products. The Defendants have continued to make sales of their infringing products.

The Defendants are recalcitrant infringers and willful copyists, and for that reason and the reasons set forth herein, the Defendants' Motion to Dismiss and/or Transfer should be denied. The Defendants should not be allowed to continue their violations of the law and their infringement of the intellectual property rights held by the Plaintiffs.

## **II. FACTUAL BACKGROUND**

On December 8, 2009, the Plaintiff filed the Complaint in the present matter against Purple Mountain Sweater, Inc.<sup>2</sup> and Ms. Carol Ann Bishop alleging copyright infringement, trademark infringement, violations of §43(a) of the Lanham Act, and violations of Texas state misappropriation law.

As part of its copyright infringement claim, the Plaintiff alleged that:

11. Three United States federal copyright registrations have been obtained covering the interchangeable bottle cap necklaces, their unique artwork, and a magnetic "keeper" board, which include United States Copyright Registration Nos. VA 1-665-063, VA 1-684-413, and VA 1-665-059. The Plaintiff has been assigned all rights to the above-identified Copyright Registrations.
12. Apart from creating a jewelry concept that allows one jewelry design to be interchanged with other jewelry designs, Plaintiff produces unique jewelry on the

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<sup>2</sup> Prior to filing, the Plaintiff's research into the Florida Secretary of State records indicated that one or more corporate entities existed under the name "Purple Mountain," at least one of which was believed to be affiliated with the Defendants. The Plaintiff, however, is willing to accept Ms. Bishop's contention that Purple Mountain Sweaters is her "alter-ego" business entity as long as that position does not prejudice arguments provided herein. The Plaintiff is also willing to file an Amended Complaint that revises the caption to include Ms. Carol Ann Bishop, an individual, and Purple Mountain Sweaters, a sole proprietorship.

interior (inside) of the bottle cap and produces unique artwork that are both covered by one or more of the above-identified U.S. Copyright Registrations, including (but not limited to): “Animal Prints (zebra stripes),” “Animal Prints (cheetah),” “Cheer,” “Love,” “Peace Sign,” “Peace,” “I Love Gymnastics,” “Peace Heart & Cheer,” “Softball,” “Soccer Ball,” “BFF (best friends forever),” “Daddy’s Girl,” “Miss Bossy,” “Go Green” “Recycle Arrows,” “Cupcakes,” “Princess,” “Big Sister,” “Little Sister,” “Chick,” “Girls Rock,” “Pirate’s Skull,” “Hope,” “Butterfly,” “Horses,” “I Love Dance,” “Peace Heart & Dance,” and “Peace Out.”

13. The Defendants have purposefully, willfully and with bad faith intent copied the jewelry designs created by the Plaintiff, including using the unique concept of selling jewelry designs on the interior (inside) of the bottle cap.

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15. The Defendants have purposefully, willfully and with bad faith intent copied the jewelry design created by the Plaintiff, including selling jewelry designs on the interior (inside) of the bottle cap that has the following designs: “Wild One Zebra,” “Cheetah Initials Animal Prints,” “Cheer,” “Love,” “Peace Sign,” “Peace,” “I Love Gymnastics,” “Heart Cheer,” “Softball,” “Soccer Ball,” “BFF (best friends forever),” “Daddy’s Girl,” “Miss Bossy,” “Go Green” “Recycle Arrows,” “Cupcakes,” “Princess,” “Big Sister,” “Little Sis,” “Chicks,” “Girls Rock,” “Pirate’s Skull,” “Hope,” “Butterfly,” “Horses,” “I Love Dance,” “I Heart Dance,” and “Peace Out.”

Complaint, ¶11-13, 15, p. 3-4.

As part of the trademark infringement and violation of §43(a) of the Lanham Act claim, the Plaintiff alleged that:

8. Plaintiff M3Girl Designs, LLC markets and sells the bottle cap necklaces under the trademark “Snap Caps®,” and has obtained United States federal trademark Registration No. 3,626,432 on that trademark.
9. The Defendants have used in commerce, on their interactive Internet website, the words “Snappy Bottle Cap Necklaces.”

Complaint, ¶9-10, p. 3.

The basis for misappropriation and unfair competition claims includes the unfair use, taking and profiting from the Plaintiff’s concept of selling interchangeable bottlecap jewelry, which was created and developed by the Plaintiff, M3 Girl Designs into a unique “niche” product

market. Because this claim is directed to a functional aspect of the jewelry, the misappropriation and unfair competition claims extend beyond the federal copyright and trademark claims, and encompass claims of unfair taking under Texas law that are not commensurate with those federal causes of action.<sup>3</sup>

The Complaint includes personal jurisdiction allegations including an allegation that there is “personal jurisdiction over all of the Defendants because each has established minimum contacts with the State of Texas relating to the controversy at issue,” which includes the claims directed to copyright infringement (Count I), misappropriation (Count II), trademark infringement (Count III), and violations of §43(a) of the Lanham Act (Count IV). *Complaint*, Dec. 8, 2009, Docket Entry No. 1, p. 2. The Plaintiff’s Complaint also includes specific allegations regarding the Defendants’ interactive website, such as allegations at regarding the use of an infringing slogan “on their interactive Internet website.” *Complaint*, ¶10, p. 3, Docket Entry No. 1.

The Defendants, through their interactive website, [www.purplemountainbaby.com](http://www.purplemountainbaby.com) (see Exhibit 1 hereto), displays, offers, sells, and distributes interchangeable bottlecap jewelry that is accused of infringing the Plaintiff’s copyright registrations, and the Defendants have explicitly acknowledged that their interactive website included the “Snappy Bottle Caps” slogan that is accused of infringing the Plaintiff’s trademark, Snap Caps®. *See Exhibit 1, Website print-outs with Plaintiff’s prior correspondence; see also, Defendants’ Mtn. to Dismiss, p. 10 (Defendants used the “phrase ‘Snappy Bottle Cap Necklaces’ on www.purplemountainbaby.com”); Exhibit 2, Ltr. from Defendants’ Counsel, Oct. 14, 2009, p. 1 (applied the “phrase ‘Snappy Bottle Cap*

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<sup>3</sup> See, generally, *United States Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214 (Tex. App. Waco 1993, writ denied); *Sefton v. Jew*, 201 F. Supp. 2d 730, 745 (W. D. Tex. 2001) (separate claims that fall within a general category of unfair competition).

*Necklaces’ to a sub portion of its product website”).* The Defendants’ customers use this interactive website to access images and promotional literature, communicate orders with the Defendants, transfer payments for product purchased on the website, and dictate how product will be shipped to the customer. *See Exhibit 1, Defendants’ Website.*

Ms. Carol Ann Bishop, as a sole proprietorship, is directly and exclusively in control of the interactive website that she operates at the website [www.purplemountainbaby.com](http://www.purplemountainbaby.com). Exhibit 1 provides this Court with a sworn copy of the Defendants’ interactive website that was accessed in the Northern District of Texas on October 6 and 16, 2009, and on January 28, 2010. *Exhibit 1, Defendants’ Website.* In their Motion to Dismiss, the Defendants admit that their interactive website has been accessed in the Northern District of Texas (including the accused infringing trademark slogan), and at least one sale has been made to this District from a “purchase to the Dallas/Ft. Worth region for a small quantity of craft made products from Purple Mountain Sweaters products made over the internet.” *Mtn. to Dismiss, Jan. 7, 2009, Docket Entry No. p. 14.*

### **III. ARGUMENT**

The Defendants’ Motion to Dismiss presents several arguments to the Court, some of which are set forth in the title of the Motion. Namely, the Defendants contend that the Motion to Dismiss should be granted for lack of service of process and lack of personal jurisdiction. While not set forth in the title of the Motion to Dismiss, it appears that the Defendants are also contending that the motion is based on improper venue and a motion to transfer under 28 U.S.C. §1404(a). The Plaintiff will attempt to address all of these arguments in this Response in Opposition to Defendants’ Motion.

In this Response, the Plaintiff will show this Court that: (1) service of process was properly effected on Ms. Bishop and her “alter-ego” business entity, Purple Mountain Sweaters, (2) this Court has specific personal jurisdiction over the Defendants, (3) venue was properly invoked in this matter, and (4) the motion to transfer should be denied under 28 U.S.C. §1404(a). For these reasons, the Defendants’ Motion to Dismiss and/or Transfer should be denied.

**A. Service of Process Was Properly Made On Ms. Bishop And Her Business, Purple Mountain Sweaters**

Service of process was made by hand-delivery from an authorized process server on Ms. Carol Ann Bishop and Purple Mountain Sweaters at her home and business address, 17716 Bridlewood Court, Parrish, Florida, 34219. *Exhibit 2, Proof of Service Affidavit (Ms. Bishop), Docket Entry No. 8, Jan. 7, 2010, Exhibit 3, Proof of Service Affidavit (Purple Mountain Sweaters), Docket Entry No. 9, Jan. 7, 2010.* The process server was Warren J. Cutter, CPS No. 0287, and he specifically noted the service time for both Defendants as 5:53 p.m. on December 16, 2009. Both Proof of Service Affidavits were signed and notarized, and both Proof of Service Affidavits were filed with this Court.

According to Federal Rule 4(e), the Federal Rules of Civil Procedure state that

Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
  - (A) delivering a copy of the summons and of the complaint to the individual personally;
  - (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
  - (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

*Fed. R. Civ. P. 4(e)*. Under Texas Rules of Civil Procedure 108, where a defendant is a nonresident of the State, Rule 108 states that the form of notice of institution of a suit "shall be the same as prescribed for citation to a resident defendant ...". *T.R.C.P. Rule 108*. Because Ms. Carol Ann Bishop was personally and properly served with process by hand delivery at her home/business address, her Motion to Dismiss the Complaint with respect to her service of process should be denied.

Under Fed. R. Civ. P. Rule 4(h), the Federal Rules of Civil Procedure state:

Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

- (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
- (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant;

*Fed. R. Civ. P. 4(e)*. Under Texas Rules of Civil Procedure 28, "[a]ny partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted." *T.R.C.P. Rule 28*.

According to filings by Defendant Ms. Carol Ann Bishop, the Defendant Purple Mountain Sweaters is not a corporate entity, which is what the Plaintiff's research had preliminarily indicated. Accepting Mr. Bishop's representation that the entity Purple Mountain Sweaters is an "alter-ego" sole proprietorship owned and operated by her, the service of process on "Purple Mountain Sweaters" still placed that sole proprietorship on notice of this lawsuit, even though it may have identified Purple Mountain Sweaters as a corporate entity.

There can be no doubt that all the Defendants received service of process when Ms. Bishop was served with process at 5:53 pm on December 16, 2009 with both Summons and two sets of Complaints. Ms. Bishop is recorded to have received all these documents at the very same moment, and the Summons that identified "Purple Mountain Sweaters" clearly instructed Ms. Bishop that her business entity, regardless of its exact corporate structure, was being as a named party to this matter. In fact, on the Purple Mountain Sweaters Summons form, the named party is only identified as "Purple Mountain Sweaters," which actually should have apprised the Defendant that an unincorporated entity was receiving a Summons form for the attached Complaint. *Exhibit 3, Proof of Service Affidavit (Purple Mountain Sweaters), Docket Entry No. 8, Jan. 7, 2010.*

To place the pleadings in conformance with the evidence presented by the Defendants on their business structures, the Plaintiff is willing to file an Amended Complaint that revises the caption to include Ms. Carol Ann Bishop, "an individual," and Purple Mountain Sweaters, "a sole proprietorship." But, regardless of this amendment, service of process was sufficiently provided to Purple Mountain Sweaters by the service of process on its owner, Ms. Carol Ann Bishop, on December 16, 2009.

The Defendant Bishop attempts to use a technical error in the caption as a basis for throwing out the entire Complaint and the adequate service on Purple Mountain Sweaters. The Defendant Bishop, however, fails to identify any prejudice or burden arising from that technical error. As set forth in *La Acorn Fair Housing v. Quarter House*, 952 F. Supp. 352, 355 (E. D. La. 1997), [w]hen an alleged defect in service is due to a minor, technical error, only actual prejudice to the defendant or evidence of a flagrant disregard of the requirements of the rules justifies dismissal." *Id. at \*7 (citing Libertad v. Welch*, 53 F.3d 428, 440(1st Cir. 1995); 4A C. Wright

and A. Miller, *Federal Practice & Procedure*, Civ.2d § 1088; *Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 897, 900 (11th Cir. 1990); and, *Crane v. Battelle*, 127 F.R.D. 174, 177(S.D.Ca. 1989) (erroneously naming defendant "Leonard Colin" rather than "Colin Lennard" in the summons and complaint is a mere technical error that does not prejudice defendant's rights when there is actual notice)).

The Eastern District of Louisiana denied a similar request from a Defendant in the *La Acorn Housing* case, finding that the Defendants "have offered no evidence in their memoranda that Quarter House Owners' Association did not receive notice or has suffered any prejudice from plaintiff's technical error." The *La Acorn Fair Housing* court also found that any technical error in identifying defendant as "Homeowners" as opposed to "Owners" did not warrant dismissal under Rule 12(b)(4). *Id.*; see also, *Vax-D Med. Techs., LLC v. Tex. Spine Med. Ctr.*, 485 F.3d 593 (11<sup>th</sup> Cir. 2007) (reversing trial court dismissal because proper service upon the individual or its d/b/a business entity constitutes proper service of process on both Defendants under Texas procedural law).

There is no doubt that the Defendant Purple Mountain Sweaters received service of process in this matter. As Judge Lindsay found in a similar case, *Veracity Research Co. v. Bateman*, 2008 U.S. Dist. LEXIS 58403 (N.D. Tex. Aug. 1, 2008), the Plaintiff received the summons and complaint as evidenced by the filing of his motion to dismiss. Because the Defendants in the present case were not prejudiced and the Defendants received notice of the Complaint filing against Purple Mountain Sweaters, the Court should deny the Defendants'

Motion to Dismiss based on the alleged improper service of process on Purple Mountain Sweaters.<sup>4</sup>

## **B. This Court Has Specific Personal Jurisdiction Over The Defendants**

The Plaintiff will attempt to focus the personal jurisdiction inquiry on specific personal jurisdiction, and the Plaintiff will use Judge Fish's decision in *Drive Fin. Servs., LP v. Ginsburg*, 2007 U.S. Dist. LEXIS 52557, \*5-6 (N.D. Tex. July 19, 2007) as a template for the present legal analysis regarding minimum contacts, purposeful availment, and due process analysis of this Motion. As the Court knows, the *Drive Financial* decision addressed the issue of the minimum standards for asserting specific personal jurisdiction based on the contacts established by an interactive website.<sup>5</sup> Further, the Plaintiff will briefly address the "stream of commerce" theory for establishing personal jurisdiction in this forum. Based on the following legal analysis, this Court should deny the motion to dismiss because this Court has personal jurisdiction over the Defendants in this matter.

### **1. Burdens of Proof**

When a nonresident defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident. *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994); *Gardemal v.*

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<sup>4</sup> While the Plaintiff believes that service was adequately effected, any conclusion that service was not properly effected does not mandate the dismissal of the plaintiff's suit. *See Froland v. Yamaha Motor Co., Ltd.*, 296 F. Supp. 2d 1004, 1006 (D. Minn. 2003)("dismissal is not always required when service has been deemed improper."). Rather, the better practice is to quash insufficient service of process unless it is clear that the plaintiff cannot effect proper service. *Id.* at 1008.

<sup>5</sup> Because much of the following legal standards are taken directly from the Court's *Drive Financial* opinion, the Plaintiff's counsel wish to make an appropriate and proper attribution to this Court's analysis. As this Court has already set forth the proper template for this analysis, the Plaintiff believes that this analysis and citation to authority is appropriate for this matter. *Id.* at \*5-12.

*Westin Hotel Company*, 186 F.3d 588, 592 (5th Cir. 1999). If the district court chooses to decide the matter without an evidentiary hearing, the plaintiff may meet his burden by presenting a *prima facie* case for personal jurisdiction. *Wilson*, 20 F.3d at 648; *Gardemal*, 186 F.3d at 592.

The court will take the allegations of the complaint as true, except where they are controverted by opposing affidavits, and all conflicts in the facts are resolved in favor of the plaintiff. *Wilson*, 20 F.3d at 648; *Gardemal*, 186 F.3d at 592. In making its determination, the court may consider affidavits, interrogatories, depositions, oral testimony, or any combination of recognized discovery methods. *Allred v. Moore & Peterson*, 117 F.3d 278, 281 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998); *Thompson v. Chrysler Motors Corporation*, 755 F.2d 1162, 1165 (5th Cir. 1985).

## **2. Long Arm Standards**

With respect to personal jurisdiction analysis, a federal district court may exercise personal jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state permits the exercise of personal jurisdiction over the defendant; and (2) the exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution. *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002). A defendant is amenable to the personal jurisdiction of a federal court sitting in diversity to the same extent that he would be amenable to the jurisdiction of a state court in the same forum. *Pedelahore v. Astropark, Inc.*, 745 F.2d 346, 347 (5th Cir. 1984).

Applying state law, this court must first determine whether Texas, the forum state, could assert long-arm jurisdiction. *Id.* Because the Texas long-arm statute confers jurisdiction to the limits of the federal constitution, *Access Telecom, Inc. v. MCI Telecommunications Corporation*, 197 F.3d 694, 716 (5th Cir. 1999), *cert. denied*, 531 U.S. 917 (2000); *Hall v. Helicopteros*

*Nacionales de Colombia, S.A.*, 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), the court need only concern itself with the federal due process inquiry. *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999); *Wilson*, 20 F.3d at 647 n.1; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 17.041 *et seq.* (Vernon 1997) (Texas long-arm statute).

### 3. Due Process Requirements

Due process requires the satisfaction of two elements to exercise personal jurisdiction over a non-resident defendant: (1) the nonresident must have some minimum contact with the forum that results from an affirmative act on his part such that the nonresident defendant could anticipate being haled into the courts of the forum state; and (2) it must be fair or reasonable to require the nonresident to defend the suit in the forum state. *Burger King Corporation v. Ruzewicz*, 471 U.S. 462, 474-78 (1985); *Gulf Consolidated Services, Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1073 (5th Cir.), *cert. denied*, 498 U.S. 900 (1990). The Due Process Clause ensures that persons have a "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

To establish minimum contacts with the forum, a nonresident defendant must do some act by which he "purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). However, the unilateral activity of one asserting a relationship with the nonresident defendant does not satisfy this requirement. *Burger King*, 471 U.S. at 474 (quoting *Hanson*, 357 U.S. at 253); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (citing *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Hanson*, 357 U.S. at 253). In determining whether the exercise of jurisdiction is

appropriate, the Supreme Court has focused less on presence in the forum state as a means to establish jurisdiction and looked increasingly to whether a defendant's contacts with the forum state make it reasonable to require the defendant to defend the particular suit in that forum. *Quill Corporation v. North Dakota*, 504 U.S. 298, 307 (1992).

While two types of *in personam* jurisdiction may be exercised over a nonresident defendant: specific jurisdiction and general jurisdiction, the Plaintiff is only asserting specific personal jurisdiction in this matter. Specific jurisdiction exists if the cause of action is related to, or arises out of, the defendant's contacts with the forum state and those contacts meet the due process standard. *J.R. Stripling v. Jordan Production Company, LLC*, 234 F.3d 863, 871 (5th Cir. 2000) (quotations and citations omitted). "When a court exercises personal jurisdiction over a defendant based on contacts with the forum related to the particular controversy, the court is exercising 'specific jurisdiction.'" *Holt Oil & Gas Corporation v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) (citations omitted), *cert. denied*, 481 U.S. 1015 (1987).

Under either a specific or general jurisdiction analysis, however, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum [s]tate." *Burger King*, 471 U.S. at 474 (quoting *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945)). The "purposeful availment" requirement of the minimum contacts inquiry "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity of another party or a third person.'" *Id.* at 475 (citations omitted). A plaintiff must establish a substantial connection between the nonresident defendant and the forum state. *Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1068 n.9 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992); *Beary v. Beech Aircraft Corporation*, 818 F.2d 370, 374 (5th Cir. 1987) (citing *Burger*

*King*, 471 U.S. at 475 n.18; *McGee v. International Life Insurance Company*, 355 U.S. 220, 223, (1957)).

A court must consider all factors when making the purposeful availment inquiry -- "no single factor, particularly the number of contacts, is determinative." *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). "[W]hether the minimum contacts are sufficient to justify subjection of the non-resident to suit in the forum is determined not on a mechanical and quantitative test, but rather under the particular facts upon the quality and nature of the activity with relation to the forum state." *Mississippi Interstate Express, Inc. v. Transport, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982); see also *Coats v. Penrod Drilling Corporation*, 5 F.3d 877, 884 (5th Cir. 1993), *cert. denied*, 510 U.S. 1195 (1994).

When the underlying cause of action is based on an intentional tort, a single act by the defendant can be sufficient to establish personal jurisdiction if that act gives rise to the claim being asserted. *Lewis v. Fresne*, 252 F.3d 352, 358-59 (5th Cir. 2001); see also *FCA Investments Company v. Baycorp Holdings, Ltd.*, 48 Fed. App'x 480 (5th Cir. 2002) (finding that in a claim for the intentional tort of fraud, a single phone call into the forum state is sufficient to establish personal jurisdiction where the content of that phone call was the subject matter of the fraud claim).

#### **4. The Zippo Sliding Scale As It Relates to Interactive Websites**

As discussed in *Drive Financial at \*12-15*, this Circuit has adopted the approach of *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), in determining whether the defendant's operation of an Internet website provides the requisite minimum contacts for personal jurisdiction. See *Revell*, 317 F.3d at 470; *Mink v. AAAA Development LLC*, 190 F.3d 333, 336 (5th Cir. 1999).

The *Zippo* decision established a sliding-scale test to evaluate the "nature and quality of commercial activity that an entity conducts over the Internet." *Zippo*, 952 F. Supp. at 1124. District courts in Texas have employed the *Zippo* analysis in specific jurisdiction cases. See *Mothers Against Drunk Driving v. DAMMADD, Inc.*, No. 3:02-CV-1712-G, 2003 U.S. Dist. LEXIS 1800, 2003 WL 292162, at \*5 (N.D. Tex. Feb. 7, 2003) (Fish, Chief J.); *Carrot Bunch Co., Inc. v. Computer Friends, Inc.*, 218 F. Supp. 2d 820, 824-26 (N.D. Tex. 2002); *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F. Supp. 2d 895, 900 n. 10 (N.D. Tex. 2000).

The *Zippo* sliding-scale analysis categorizes Internet use into a three point spectrum. At one end of the spectrum, a defendant "merely establishes a passive website that does nothing more than advertise on the Internet." *Mink*, 190 F.3d at 336. Personal jurisdiction based on a "passive website" is inappropriate. See *id.*; *Carrot Bunch*, 218 F. Supp. 2d at 825. At the other end of the spectrum, "a defendant clearly does business over the Internet by entering into contracts with residents of other states which 'involve the knowing and repeated transmission of computer files over the Internet. . . .'" *Mink*, 190 F.3d at 336 (quoting *Zippo*, 952 F. Supp. at 1124). In this situation, personal jurisdiction over the nonresident defendant is proper. See *id.*; *Carrot Bunch*, 218 F. Supp. 2d at 825.

Between these two extremes are cases where a defendant's website allows a visitor to exchange information with a host computer. *Mink*, 190 F.3d at 336. "In this middle ground, 'the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the [w]ebsite.'" *Mink*, 190 F.3d at 336 (quoting *Zippo*, 952 F. Supp. at 1124); *American Eyewear*, 106 F. Supp. 2d at 901. The critical inquiry, however, as with any personal jurisdiction case, is whether the contacts suggest that the nonresident

defendant purposefully directed his activities toward the forum state or purposefully availed himself of the privilege of conducting activities within the forum state. See *Origin Instruments Corporation v. Adaptive Computer Systems, Inc.*, 1999 U.S. Dist. LEXIS 1451, 1999 WL 76794 at \*2 (N.D. Tex. 1999); see also *Hanson*, 357 U.S. at 253; *World-Wide Volkswagen*, 444 U.S. at 298-99.

#### **5. Minimum Contacts and Purposeful Availment Analysis In The Present Case**

Applying the *Zippo* sliding scale to the facts of this case, the Defendants' interactive website clearly falls within the category of an interactive transactional sales website because the Defendants do "business over the Internet by entering into contracts with residents of other states which 'involve the knowing and repeated transmission of computer files over the Internet. . . .'" *Mink*, 190 F.3d at 336 (quoting *Zippo*, 952 F. Supp. at 1124). The Plaintiff has attached copies of the Defendants' websites at Exhibit 1, and copies of these websites were attached to correspondence sent to the Defendants on October 6 and 16, 2009. See *Exhibit 1, 5 and 6, attached hereto*. While these website attachments were not provided to the Court in the Defendants' Motion to Dismiss, the "interactivity and commercial nature of the exchange of information that occurs" on the Defendants website clearly support an assertion of personal jurisdiction over the Defendants.

The Defendants are nonresident defendants, but their actions in directing activities to the forum through their commercial website establish sufficient minimum contacts to support this Court's exercise of personal jurisdiction. The Defendants' website is not a "passive" website without interactive content, and the Defendants' website does not approach the "middle ground" for website activity. On the contrary, the Defendants' website located at [www.purplemountainbaby.com](http://www.purplemountainbaby.com) is an interactive website that allows customers to: (1) view

images (including accused infringing works and slogans involved in this matter), (2) communicate to the Defendants at the Contact Us webpage feature or the phone number or email address listed on the webpage, (3) order product using the “Shopping Cart” feature, (4) select the manner of shipping, and (5) and transmit payment for product that is purchased using the website. *Exhibit 1, Affidavit of Mr. Hemingway, ¶2, p. 1, see also exhibit 1A, 1B, and 1C attached thereto.*

The attached webpages are accessible to the public, including persons residing in the State of Texas and the Northern District of Texas. *Id.* The Defendants offer for sale, display and sell product accused of copyright infringement on this interactive website, and the Defendants promoted and marketed infringing product using a slogan accused to be infringing a U.S. Registered Trademark on this interactive website. Specifically, the Defendants, through their interactive website, [www.purplemountainbaby.com](http://www.purplemountainbaby.com) (see Exhibit 1 hereto), displays, offers, sells and distributes interchangeable bottlecap jewelry that is accused of infringing the Plaintiff’s copyright registrations, and the Defendants have explicitly acknowledged that their interactive website included the “Snappy Bottle Caps” slogan that is accused of infringing the Plaintiff’s trademark, Snap Caps®. *See Exhibit 1, Website print-outs with Plaintiff’s prior correspondence; see also, Defendants’ Mtn. to Dismiss, p. 10 (Defendants used the “phrase ‘Snappy Bottle Cap Necklaces’ on www.purplemountainbaby.com”); Exhibit 2, Ltr. from Defendants’ Counsel, Oct. 14, 2009, p. 1 (applied the “phrase ‘Snappy Bottle Cap Necklaces’ to a sub portion of its product website”).* After engaging in this commercial sales conduct over their website and directly infringing the Plaintiff’s intellectual property through this website, the Defendants can hardly be surprised about being sued in the Northern District of Texas.

Ms. Carol Ann Bishop, as a sole proprietorship, is directly and exclusively in control of the interactive website that she operates at the website [www.purplemountainbaby.com](http://www.purplemountainbaby.com). The Defendants' customers use their interactive website to access images and promotional literature, communicate orders to the Defendants, transfer payment for product purchased on the website, and dictate how product will be shipped to the customer. *See Exhibit 1, Defendants' Website*. In their Motion to Dismiss, the Defendants admit that their interactive website has been accessed in the Northern District of Texas (including the accused infringing trademark slogan) to sell product, and at least one sale has been made to this region from a "purchase to the Dallas/Ft. Worth region for a small quantity of craft made products from Purple Mountain Sweaters products made over the internet." *Mtn. to Dismiss, Jan. 7, 2009, Docket Entry No. p. 14.*<sup>6</sup>

In addition to the sale of products in this District using their commercial website, the infringement of the Plaintiff's trademark on this interactive, commercial website constitutes trademark infringement in this District. In this situation, personal jurisdiction over the nonresident defendant is proper. *See id.; Carrot Bunch*, 218 F. Supp. 2d at 825. The Defendants have purposely availed themselves of the benefits and privileges of this forum by conducting infringing activities in this forum. *Id.; see also, See also, Biggs v. Bass Pro Outdoor World, L.L.C.*, 2003 U.S. Dist. LEXIS 11888 (N.D. Tex. July 10, 2003)(J. McBryde) (use of copyrighted material on interactive sales website makes Defendant amenable to claims of personal jurisdiction); *Veracity Research Co. v. Bateman*, 2008 U.S. Dist. LEXIS 58403 (N.D.

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<sup>6</sup> It is unclear whether the Defendants are indirectly accusing the Plaintiff of ordering product from their website to create a false connection with the forum. The Plaintiff's counsel is not aware of any such activities conducted by or on behalf of the Plaintiff. Accordingly, it is unclear why the Defendants would accuse the Plaintiff of that conduct by its statement, "[s]ales to the plaintiff are not considered in determining personal jurisdiction in Texas." *Mtn. to Dismiss, p. 14.*

Tex. August 1, 2008)(J. Lindsay) (personal jurisdiction exercised over Defendant who directed his activities to the forum by creating the "vrcinvestigations.net" website).

## 6. Due Process Analysis In The Present Case

The due process inquiry limits a court's jurisdiction over a nonresident if the exercise of that jurisdiction would not comport with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. In evaluating fairness and substantial justice, the Fifth Circuit considers "(1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interests of the several states in furthering fundamental social policies." *Luv n' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 473 (5th Cir.), *cert. denied*, --- U.S. ---, 126 S. Ct. 2968, 165 L. Ed. 2d 951 (2006). The burden rests on the defendant to prove that litigating in this court would be "so gravely difficult and inconvenient" that he would be at a "severe disadvantage" relative to the plaintiff. *Burger King*, 471 U.S. at 478.

The State of Texas and the Northern District of Texas has an interest in protecting the Plaintiff, which is headquartered in Farmer's Branch, Texas, from infringement activities and unfair competition of others. All the Plaintiff's witnesses and business documents are located in the Northern District of Texas, all the officers and directors of the Plaintiff (the Bradshaws) reside in Dallas, Texas, other employee witnesses for the Plaintiff reside in the Dallas area, and there are claims directed to Texas state law that are best addressed by a Texas court. Moreover, the Northern District of Texas is the "ground-zero" court for two other matters that relate to similar claims made against two other unrelated groups of infringers, *M3 Girl Designs v. Lucky 11 and Kristen Almond*, 3:09cv02335-B (N.D. Tex.)(J. Boyle) and *M3Girl Designs v. Blue*

*Brownies*, 3:09cv02390-F (N.D. Tex.)(J. Furgeson). Conservation of judicial resources may dictate the consolidation of one or more of these actions, which could promote consistency of judicial rulings in this matter regarding the nature and scope of the Plaintiff's rights and the egregiousness of the Defendants' conduct.

The Plaintiff has a vested interest in protecting its copyrights and trademarks, especially from recalcitrant infringers that wish to benefit monetarily from the extensive market efforts conducted by M3 Girl Designs in establishing this "niche" jewelry market. The Defendants are causing significant damages to the Plaintiff M3 Girl Designs business by undercutting the M3 Girl Design prices in the market and making sales of interchangeable bottlecap jewelry that would have otherwise been made by M3 Girl Designs. The Defendants were given an opportunity to correct their behavior. After being warned to stop their unauthorized conduct, the Defendants did nothing to stop selling their product, and they continue to make sales of infringing products to this date.

While the Defendants make a claim to poverty and lack of resources, these claims are highly suspect. The Defendants compilation of law in their briefing is hardly the effort of a novice or lay person, and the Defendants have sufficient resources to hire counsel as shown by the attorney correspondence attached at Exhibit 4 hereto. *Exhibit 4, Correspondence from Defendants' counsel, October 14, 2009*. Further, the Defendants blatantly admit to making approximately \$20,000 from the sale of bottlecap necklaces. *Mtn. to Dismiss, p. 4 and attached Bishop declaration, ¶9 ("Total gross sales of bottlecap necklaces" is less than \$22,000, presumably in the \$21,000 range).*<sup>7</sup> These sales have a significant impact on the Plaintiff's

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<sup>7</sup> As an alternative ground for extending personal jurisdiction, the Defendants admit that they have sold over \$20,000 of infringing product, with some of that product being directed to the Northern District of Texas. The Supreme Court has stated that a defendant's placing of its

pricing structure, which has to be reduced to account for the presence of each infringer in the market created by M3 Girl Designs. Overall, the Defendants claims to poverty ring hollow in light of their attorney correspondence, prepared and transmitted on October 14, 2009 and the significant sums of money the Defendants have made selling bottlecap jewelry.

Despite being sued, claiming poverty, and claiming that there is no money in this business, the Defendants continue to offer their infringing products on their interactive website to this date without cessation or abatement. If the Defendants were truly poverty-stricken and if their business activities were actually “unprofitable” as they claim, why would they continue on with their efforts to sell infringing products in the face of a federal lawsuit? *See Exhibit 1C, Website as of Jan. 28, 2009.* If the prospects for profitability on this product were as dim as the Defendants claim, why would a Defendant continue to engage in unprofitable conduct that is the subject of a federal lawsuit? The Defendants’ conduct does not match their statements to this Court, and there is no reasonable justification for granting leniency to this willful infringer.

In a very similar case, this Court found the exercise of personal jurisdiction over a non-resident defendant comported with due process concerns, *Veracity Research Co. v. Bateman*, 2008 U.S. Dist. LEXIS 58403, \*14-16 (N.D. Tex. Aug. 1, 2008)(J. Lindsay), as follows:

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product into the stream of commerce with the knowledge that the product will be used in the forum state is enough to constitute minimum contacts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980). The Fifth Circuit is among the circuits that have interpreted *World-Wide Volkswagen* to hold that "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111, 107 S. Ct. 1026, 1031, 94 L. Ed. 2d 92 (1987) (citing *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir.1984).) Under this “stream of commerce” theory, the bottlecap necklace products sold by the Defendants were directed to this forum, and it is reasonable to foresee that other products sold by the Defendants would also make their way into this forum. Accordingly, the Plaintiff believes that the “stream of commerce” theory also justifies the exercise of personal jurisdiction in this matter.

First, any burden on Bateman to litigate in Texas is slight. Most discovery can be conducted from Michigan. As Defendant has shown, any dispositive and nondispositive motions can be drafted and filed from Michigan. If a trial of this case is required, Defendant need only travel to Texas for a brief period of time. Most trial preparation may also be conducted in Michigan. Second, Texas has a substantial interest in protecting its citizens from trademark infringement, unfair competition, and libel. Third, Plaintiff's interest in convenient and effective relief is furthered by litigating this action in Texas. VRC is a corporation with its principal place of business in Texas. Fourth, for the efficient resolution of the conflict, this case should be litigated in Texas. There are numerous acts that Plaintiff alleges violate Texas law, and Texas would be best suited to resolve these disputes. According to Plaintiff, all of the possible witnesses are located in Texas. Finally, the state's shared interest in furthering social policies favors Texas as the appropriate forum. As stated above, Texas has an interest in resolving disputes that injure Texas citizens or corporations. Also, Texas law applies to some of VRC's claims. No other forum, including Michigan, has as much of an interest in resolving this dispute as does Texas. No other residents of other forums have been injured by Defendant's actions. Only Texas law and federal law will apply to this claim. Therefore, Texas has the greatest interest in adjudicating this dispute. After considering these factors, the court concludes that the exercise of jurisdiction over Defendant does not offend traditional notions of fair play and substantial justice.

*Id. at \*14-16.* For almost identical reasons in the present case, the exercise of personal jurisdiction over the Defendants in the present matter is justified and reasonable, and the exercise of personal jurisdiction over these Defendants does not offend the traditional notions of fair play and substantial justice. The Defendants' Motion to Dismiss should be denied.

### **C. Venue Is Properly Invoked In The Northern District of Texas**

The Defendants incorrectly contend that the "United States Court for the Northern District of Texas is the improper venue for this lawsuit." *Mtn. to Dismiss, p. 5.* The Defendants contention, however, is incorrect.

Because subject matter jurisdiction in this case is based upon a federal question, the court looks to the general venue statute, 28 U.S.C. § 1391(b) (2002), to determine whether venue is proper in the Northern District of Texas. According to 28 U.S.C. § 1391(b):

a civil action may be brought only 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 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. §1391(b). Because a copyright claim is raised in the Complaint, the Plaintiff also alleges that venue is proper under 28 U.S.C. §1400(a), which indicates that this action may be instituted in the district in which the defendant "may be found." 28 U.S.C. §1400(a).

This Court, in *Veracity Research Co. v. Bateman*, 2008 U.S. Dist. LEXIS 58403, \*17-19 (N.D. Tex. Aug. 1, 2008)(J. Lindsay), found the Northern District of Texas was the proper venue for a similar intellectual property dispute as follows:

Defendant alleges that venue is improper because the substantial part of the events that gave rise to the claim occurred outside of Texas. Defendant states that the work he performed was in Michigan, he is a resident of Michigan, and any alleged statements or website operation would have been done in Michigan. Plaintiff argues that in determining where a "substantial" part of the events giving rise to the claim occurred, the court may look to the entire sequence of events leading to the cause of action, rather than solely to the event or events that triggered the lawsuit.

Venue is proper in the Northern District of Texas, if "a substantial part of the events or omissions giving rise to a plaintiff's claim occurred" in this district. 28 U.S.C. § 1391(b)(2). To determine if a substantial part of the events occurred in this district, the court may look to whether the allegedly infringed upon trademark is accessible via the internet and whether the infringement causes a plaintiff injury. *International Truck & Engine*, 259 F. Supp. 2d at 558. Plaintiff argues that the entire sequence of events leading to Defendant's violations of federal law, state law, and common law occurred in this district. Plaintiff alleges that Defendant signed an employment contract in Texas and was trained in Texas. Plaintiff also alleges that Defendant violated his employment contract and has refused to pay money he owes based on a provision of that contract. Plaintiff further alleges that after Defendant was terminated, he created "vrcinvestigations.net" in violation of VRC's trademark rights. Plaintiff also alleges that this website is accessible to and has been accessed by residents of the Northern District of Texas. Furthermore, Plaintiff does business in the Northern District of Texas and alleges that "vrcinvestigations.net" has caused Plaintiff injury in this district. Defendant fails to demonstrate that a substantial part of the events or omissions giving rise to Plaintiff's claim did not occur in the Northern District of Texas. Therefore, Defendant has not met its burden of demonstrating affirmatively that the Northern District of Texas is an improper venue for Plaintiff's causes of action.

*Veracity Research Co. v. Bateman*, 2008 U.S. Dist. LEXIS 58403, \*17-19 (N.D. Tex. Aug. 1, 2008)(J. Lindsay).

For almost identical reasons, the actions of the Defendants giving rise to the Plaintiff's claims occurred in the Northern District of Texas because, as a trademark dispute, the Court should "look to whether the allegedly infringed upon trademark is accessible via the internet and whether the infringement causes a plaintiff injury." The infringing trademark slogan was accessible via the Internet in the Northern District of Texas, and the Plaintiff sustained injury in the Northern District of Texas. *See Exhibit 1 and 1A, Website Affidavit.*

Moreover, as a copyright dispute, venue is proper in the Northern District of Texas because the Defendant "may be found" in this District by the presence of its interactive Internet website, which is accessible in the Northern District of Texas, and which promotes, displays, offers and sells infringing works that have been accused of copyright infringement. *See Exhibit 1, 1B and 1C, Website Affidavit.* For these reasons and for the same reasons set forth by this Court in *Veracity Research*, venue is proper in the Northern District of Texas.

**D. The Motion to Transfer Should Be Denied Under 28 U.S.C. §1404(a)**

The basic principles governing transfer of venue under the law of the Fifth Circuit are well settled. Pursuant to § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to another district court or division where it might have been brought." 28 U.S.C. § 1404(a). A motion to transfer venue should be granted upon a showing that the transferee venue "is clearly more convenient" than the venue chosen by the plaintiff. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc). In assessing whether a defendant has met its burden of demonstrating the need to transfer, the Fifth Circuit applies the "public" and "private" factors for determining *forum non conveniens*. *Volkswagen*, 545 F.3d at 314 n.9.

The private interest factors include “(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make a trial easy, expeditious and inexpensive.” 551 F.3d at 1319 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). The public interest factors include “(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of laws [or in] the application of foreign law.” *Volkswagen*, 545 F.3d at 315.

### **1. Convenience of the Parties and the Witnesses**

As the most important factor in the transfer analysis, the Court should address the convenience for and cost of attendance of witnesses. See generally *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 329 (E.D.N.Y. 2006) (“The convenience of the witnesses is probably the single most important factor in transfer analysis”). In *Volkswagen*, the Fifth Circuit noted that “[a]dditional distance [from home] means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.” 545 F.3d at 317 (quotation marks omitted).

With respect to the Plaintiff, witnesses for the Plaintiff’s case will undoubtedly include Madeline, Margot and Diane Bradshaw, who are all principals in the Plaintiff’s business. All of these witnesses reside in Dallas, Texas, and Ms. Madeline Bradshaw and Ms. Margot Bradshaw attend grade school in Dallas, Texas. Depending on the length of the trial and the timing of the trial, it may be a significant hardship for Ms. Madeline Bradshaw and Ms. Margot Bradshaw to

travel to Florida and attend all aspects of the trial, and it would be a significant hardship for Ms. Diane Bradshaw to be separated from her daughters for an extended period of time attending a trial in Florida.

Apart from these witnesses, the Plaintiff will likely call several employees and representatives that are aware of the impact confusingly similar infringing sales have on the Plaintiff's business. One such witness, Jennifer Cagle, is an office administrator for M3 Girl Designs, and her testimony will likely address the negative impact infringing activities has on the Plaintiff's business, and the numerous complaints received by authorized retailers regarding the infringing activities conducted by the Defendant or similarly situated defendants. Other office employees located in Farmer's Branch, Texas may also be called to testify about these issues. All of these office employees, such as Ms. Jennifer Cagle, reside in Dallas, Texas, and work at the Plaintiff's business location in Farmer's Branch.

The Defendants reside in Parrish, Florida, which is indicated on the Internet maps as being located more than 40 miles away from the nearest federal court in Tampa, Florida. It is respectfully submitted that the Defendants' home federal court in Tampa, Florida, approaches the half-way mark for a "100 mile" analysis, which does not support the Defendants' claims for convenience.

The Defendants have identified four witnesses in the Declaration of Ms. Carol-Ann Bishop that may have relevant information. *Decl. of Ms. Carol-Ann Bishop*, ¶23-24, p. 3. Three of the Defendants' witnesses reside in Florida, but one relevant witnesses identified by the Defendants has a business address in Denton, Texas and resides in North Texas. Among these witnesses, Ms. Bishop identifies Mr. Robert Ellis Bishop, who appears to be her husband, Ms. Beverly Jones, her book-keeper CPA, and Mr. Charles J. Prescott, her attorney that was retained

to represent her interests in this matter. With respect to her attorney, it is uncertain how the Defendants' attorney will be a witness at trial. Ms. Bishop's husband will likely travel wherever a trial is conducted, and deposition testimony can be acquired from Ms. Bishop's book-keeper to present at trial to lessen any travel burdens.

As to the final witness identified by the Defendants, Ms. Kristen Almond operates a business in Denton, Texas, and Ms. Bishop identifies her as a witness that may have relevant information in this matter. There are issues that may arise with respect to compelling an appearance of Ms. Almond if the case is moved to Florida, which are not problems that will be encountered if the Motion to Transfer is denied. Ms. Almond is believed to reside in Southlake, Texas, and as such, it is believed that granting the Defendants' Motion to Transfer will actually create some serious issues about obtaining trial testimony from Ms. Almond. In fact, the Defendant may be eliminating the possibility of presenting such testimony by their motion to transfer. In light of the proximity of both the Plaintiff's and the Defendants' witnesses to the Dallas Division of the Northern District of Texas, the most important factor appears to weigh in favor of denying transfer.

## **2. Other Private Interest Factors**

While the location of documents is considered in the transfer analysis, the volume of documents in this matter is not anticipated to be extensive. All the Plaintiff's business documents are located in Farmer's Branch, Texas, and any employee witnesses for the Plaintiff would reside in and around Dallas, Texas. Gaining ready access to the Plaintiff's documents will depend on what is requested to be produced, but there will be a need for the documents to be located in close proximity to any 30(b)(6) deposition or trial.

Any documents that are located and produced by the Defendant could be provided on a CD disk or by paper copies. Overall, the notion that the physical location of some relevant documents should play a substantial role in the venue analysis is somewhat antiquated in the era of electronic storage and transmission of information. All the “private factors” appear to favor the Plaintiff in this matter, and maintaining the case in the Northern District of Texas would be far less expensive and most convenient for all the parties and witnesses involved. The Defendants’ Motion to Dismiss should be denied.

### **3. Public Interest Factors**

To the extent that court congestion is relevant, the speed with which a case can come to trial and be resolved may be a factor. See *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984) (“[T]he real issue is not whether [transfer] will reduce a court’s congestion but whether a trial may be speedier in another court because of its less crowded docket.”). This factor appears to be the most speculative, see *Collins v. Am. Auto. Ins. Co.*, 230 F.2d 416, 419 (2d Cir. 1956), and case-disposition statistics may not always tell the whole story.

More important to this matter, however, is why this matter should be transferred to a Florida court while the Northern District of Texas continues to process two pending actions involving similar claims against other defendants. There are two other matters pending in the Northern District of Texas that cover similar claims made against two other unrelated groups of infringers, *M3 Girl Designs v. Lucky 11 and Kristen Almond*, 3:09cv02335-B (N.D. Tex.)(J. Boyle) and *M3Girl Designs v. Blue Brownies*, 3:09cv02390-F (N.D. Tex.)(J. Furgeson). Conservation of judicial resources may dictate the consolidation of one or more of these actions, which could promote consistency of judicial rulings in this matter regarding the nature and scope of the Plaintiff’s rights and the egregiousness of the Defendants’ conduct.

All the public factors appear to favor denial of the Motion to Transfer. The Supreme Court has long held that § 1404(a) requires “individualized, case-by-case consideration of convenience and fairness.” *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964); see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). In the present matter, it would be clearly less convenient for all the parties and witnesses involved to transfer this action to a Florida district court.

#### **IV. THE DEFENDANTS’ CLAIM TO IGNORANCE ABOUT THE INFRINGED WORKS**

The Defendants state that they “cannot determine if any allegedly infringing sales were made to Texas,” the Plaintiff “fails to identify the works covered by the copyright registrations and fails to identify the alleged infringing works,” “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.” *Mtn. to Dismiss*, p. 4.

After claiming not to have any knowledge as to what is covered by the Plaintiff’s copyright registrations, the Defendants state that “[n]one 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.” This statement was made on the same page of the Defendants’ Motion to Dismiss, and this statement necessarily relies upon knowledge as to what is covered by the Plaintiff’s copyright registration. Essentially, these latter statements could not be made by the Defendants if they legitimately had no knowledge about what is covered by the Plaintiff’s copyright registrations. The Defendants cannot have it both ways. The Defendants must have some understanding as to what is covered by the Plaintiff’s copyright registrations in making the latter statements, which directly contradict the Defendants’ feigned ignorance about the Plaintiff’s allegations in the Complaint.

**IV. CONCLUSION**

For the foregoing reasons, the Plaintiff respectfully requests that the Defendants' Motion to Dismiss and/or Transfer be denied.

Date: January 28, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that the foregoing was sent directly to the Defendants at the following address via the ECF-Pacer system this day of January 28, 2010. I have also sent a separate copy to the Defendants' email address.

/s/ D. Scott Hemingway  
D. Scott Hemingway