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d/b/a ElectronicShowPlace.com*

**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, NORTHERN DIVISION**

DENIS REAH, an individual; and DENMEL HOLDINGS, LLC, a Utah limited liability company;

Plaintiffs,

vs.

RE.SOURCE, INC., a Rhode Island corporation; *et al.*

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS OF
DEFENDANT
ELECTRONICSHOWPLACE.COM**

Civil No.: 2:09-cv-00601-SA

Magistrate Judge Samuel Alba

I. PRELIMINARY STATEMENT

In patent infringement cases, personal jurisdiction does not exist over an out-of-state defendant who has never sold any of the allegedly infringing items in the forum state, who does not conduct business in the forum state, who has never visited the forum state, and who has never advertised or had contacts with the forum state.

Plaintiffs seem to believe personal jurisdiction exists merely because items Plaintiffs allege infringe the asserted patent can be viewed on Defendant's website. Under Plaintiffs' logic, all retailers in the world would automatically become subject to personal jurisdiction in every U.S. jurisdiction the moment they establish a presence on the Internet.

Defendant DDJ Enterprises, LLC d/b/a ElectronicShowPlace.com ("Defendant" or "ESP") is a Kentucky limited liability company operated by husband and wife out of a home office with no assets or employees in Utah, which has never transacted any business in Utah or had any contacts with the State of Utah, let alone the continuous and systematic contacts that the law requires. Personal jurisdiction based only the appearance of items on a retail site does not satisfy the requirements of due process. The First Amended Complaint must therefore be dismissed with respect to Defendant ESP.

II. STATEMENT OF FACTS

A. ESP and the '542 Patent.

Defendant ESP is a Kentucky limited liability company with its principal place of business in Burlington, Kentucky. (*See* Declaration of Mr. Jackson ("Jackson Decl.") ¶ 1 attached hereto as **Exhibit A**). ESP sells cellular phone accessories, and is run out of the basement residence of its only two members, Mr. and Mrs. Jackson, husband and wife, both of whom have resided in Kentucky for decades. ESP has no employees and no business operations outside the basement of its two members.

B. Peppermints Does Not Do Business In Utah.

In mid-2005, ESP began offering cellular phone accessories for sale on the Internet. None of these activities took place in Utah. (*Id.* ¶ 5). Plaintiffs commenced this action in a forum which has no connection whatsoever with Defendant ESP.

ESP does not own, lease or control any offices, property or assets of any kind in Utah. (*Id.* ¶ 7). None of its members, employees or affiliates reside or work in Utah. (*Id.* ¶ 4). Although Utah appears in a drop down menu on the registration and check out pages of its website along with every other state, ESP does not market its products specifically to Utahans through cost-per-click advertising (CPC), banner advertising, mass emails, print ads, television commercials, radio commercials or through any other means. None of its members or employees have ever traveled to Utah to conduct or solicit business.

ESP has never marketed, sold, contracted to sell or otherwise distributed any of the allegedly infringing items to wholesale distributors, retail distributors, customers or anyone else located in Utah. (*Id.* ¶ 4). ESP has never (1) been licensed to do business in Utah; (2) maintained telephone or facsimile listings within Utah; (3) paid taxes in Utah; or (4) recruited employees in Utah. Because ESP conducts no business in Utah, none of its revenue has been generated in Utah or from persons residing in Utah. (*Id.*).

Additionally, ESP's website <electronicsshowplace.com> is not registered or hosted in the State of Utah.

III. ARGUMENT

A. This Motion Is Governed By the Law of the Federal Circuit Not the Tenth Circuit.

In patent cases, the law of the Federal Circuit rather than the law of the regional circuit is employed to determine personal jurisdiction. *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1358 (Fed. Cir. 1998) citing *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1664-65 (Fed. Cir. 1994) and *Akro Corp. v. Luker*, 45 F.3d 1541, 1543 (Fed. Cir. 1995); *Hildebrand v. Steck Mfg. Co., Inc.*, 279 F.3d 1351, 1354 (Fed. Cir. 2002); *Deprenyl Animal Health, Inc. v. U. of Toronto Innovations Found.*, 297 F.3d 1343, 1348 (Fed. Cir. 2002);

iAccess, Inc. v. WEBCard Tech., Inc., 182 F. Supp.2d 1183, 1186 (D. Utah 2002) (Campbell, J.) (“Federal Circuit law governs the personal jurisdiction analysis for purposes of compliance with federal due process”). On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2), where as here, the parties have not conducted discovery, the plaintiff(s) carries the burden of making a prima facie showing that the Defendants are subject to personal jurisdiction. *See Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1201 (Fed. Cir. 2003). The Court construes the pleadings and affidavits in the light most favorable to the plaintiff. *Id.*

B. Specific Jurisdiction is Lacking.

1. Test for Specific Jurisdiction Fails with Respect to ESP

Specific jurisdiction may exist over a defendant if the cause of action “arises out of” or “relates to” the defendant’s in-state activity. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985). The test for determining whether specific jurisdiction may be exercised over a nonconsenting out-of-state defendant, requires a two step inquiry. *Red Wing*, 148 F.3d at 1358, *Silent Drive*, 326 F.3d at 1200. First, the party must be amenable to service of process under the state’s long-arm statute. *See* Fed. R. Civ. P. 4(k)(1)(A); *Red Wing Shoe*, 148 F.3d at 1358; *Silent Drive*, 326 F.3d at 1200; *Hildebrand*, 279 F.3d at 1354; *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Second, the exercise of personal jurisdiction must satisfy the requirements of due process. *Silent Drive*, 326 F.3d at 1200; *Red Wing Shoe*, 148 F.3d at 1358. That is, “the culmination of the party’s activities in the forum state must satisfy the minimum contacts requirement of the due process clause.” *Hildebrand*, 279 F.3d at 1354, citing *Int’l Shoe Co.*, 326 U.S. at 316.

2. Utah’s Long-Arm Statute is Not Long Enough.

Utah’s long-arm statute is set forth at Utah Code Ann. § 78-27-24. By statute, the Utah

legislature declared that the long-arm statute should be “applied so as to assert jurisdiction to the fullest extent permitted by the due process clause of the Fourteenth Amendment of the United States Constitution.” Utah Code Ann. § 78-27-22; *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999); *Hydro Eng’g Inc. v. Kircher*, 231 F. Supp.2d 1130, 1134 (D. Utah 2002).

The Utah Supreme Court “frequently makes a due process analysis first because any set of circumstances that satisfies due process will also satisfy the long-arm statute.” *Soma*, 196 F.3d at 1297 (quoting *SII Megadiamond, Inc. v. Amer. Superabrasives Corp.*, 969 P.2d 430, 433 (Utah 1998)). As a result, the Federal Circuit’s two-step inquiry “folds into one: whether an exercise of personal jurisdiction over [ESP] would offend due process.” *Red Wing*, 148 F.3d at 1358; *see also HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1307 (Fed. Cir. 1999) (where forum state’s long arm statute is coextensive with the limits of due process, the question before the district court is whether the assertion of personal jurisdiction over the defendant is “a violation of due process under the Constitution of the United States”).

C. The Exercise of Personal Jurisdiction Fails the Minimum Contacts Test.

For due process standards to be met, Defendant ESP must have established “‘minimum contacts’” with Utah “‘such that [they] should reasonably anticipate being haled into court here.’” *Red Wing*, 148 F.3d at 1358-59 quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). “Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” *Red Wing*, 148 F.3d at 1359 quoting *Burger King*, 471 U.S. at 476 (quoting *Int’l Shoe*, 326 U.S. at 320). In a patent infringement case, whether the exercise of

personal jurisdiction satisfies due process depends on three factors: (1) whether the defendant ‘purposefully directed’ its activities at residents of the forum; (2) whether the claim ‘arises out of or relates to’ the defendant’s activities with the forum; and (3) whether assertion of personal jurisdiction is ‘reasonable and fair.’ *Silent Drive*, 326 F.3d at 1201, citing *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1360 (Fed. Cir. 2001) (citing *Akro Corp.*, 45 F.3d at 1545). As the Federal Circuit explained in *Inamed*, “the first two factors correspond with the ‘minimum contacts’ prong of the *International Shoe* analysis, and the third factor corresponds with the ‘fair play and substantial justice’ prong of the analysis.” *Silent Drive*, 326 F.3d at 1201 citing *Inamed*, 249 F.3d at 1359. Here, as alleged in the Complaint and as set forth in the Jackson Declaration, ESP has had no contacts with the State of Utah.

The basis for personal jurisdiction in this patent infringement action rests entirely on the fact that the word “Utah” appears in a menu on the Defendant’s website where potential customers can enter their address. ESP’s website <electronicsshowplace.com> is not registered or hosted in the State of Utah. Personal jurisdiction is lacking.

In the persuasive federal case *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), the plaintiff corporation, in Arizona, sued a Florida corporation who was using the plaintiff’s registered trademark on its website. The website created by the defendant was for a small company that advertised its website construction services under the name CyberSell. The website had no "active" parts, and simply offered a number for someone who viewed the webpage to call to get more information about the services offered for sale. Furthermore, there was no evidence that they ever advertised in Arizona, or had any contacts with Arizona. The court found that there was no evidence that the defendant’s passive webpage purposefully availed itself of Arizona, and that the court could not exercise personal jurisdiction over the defendant.

Likewise, in *Mink v. AAAA Development L.L.C.*, 190 F.3d 333 (5th Cir. 1999), the plaintiff Hearst Corp., owner of Esquire magazine, brought a trademark infringement action against the defendant Goldberger for his <esquire.com> website. Goldberger had created the website, but had not sold any products or services in New York. While Goldberger had emailed several people in New York preparatory to making sales and in contemplation of them, these emails were not sufficient contacts to establish personal jurisdiction in the forum state. The court found that Goldberger's website amounted to nothing more than an advertisement, and even advertisements targeted at New York have been found inadequate for granting jurisdiction under the transaction of business standard. The defendant's emails were analogous to letters or phone calls into New York, which are again insufficient to establish personal jurisdiction.

The Court faces an analogous situation in the case at bar. Just as emails in *Mink* were insufficient to establish personal jurisdiction, even those that contemplated future sales, so too is the word "Utah" on Defendant's website, listed with all the other U.S. states. For the reasons set forth above, principles of fair play and substantial justice defeat the reasonableness of personal jurisdiction over ESP. The purported basis for personal jurisdiction therefore violates ESP's due process rights. Because a constitutionally adequate basis for personal jurisdiction does not exist, the First Amended Complaint in this action must be dismissed with respect to ESP.

D. General Jurisdiction Does Not Exist over ESP.

There are no allegations in the Complaint that would establish that ESP's activities with respect to Utah "were extensive enough to confer general personal jurisdiction," or that any of ESP's activities with respect to Utah even exist. The law requires that the defendant have "continuous and systematic" contacts with the forum state and confers personal jurisdiction even when the cause of action has no relationship with those contacts." *Silent Drive*, 326 F.3d at 1200

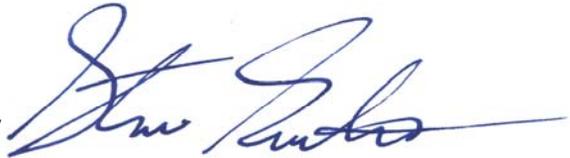
citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1122 (Utah 1992) (Under Utah law, “for [general jurisdiction] to exist, the defendant must be conducting substantial and continuous local activity”). In fact, the Complaint completely fails to allege that ESP or persons acting on its behalf have conducted any substantial or continuous activities in Utah.

The Utah Court of Appeals stated twelve factors that are relevant to the issue of general personal jurisdiction: Whether the corporation defendant is: 1. engaged in business in the state; 2. licensed to do business in the state; 3. owning, leasing, or controlling property (real or personal) or assets in this state; 4. maintaining employees, offices, agents, or bank accounts in this state; 5. present in that shareholders reside in this state; 6. maintaining phone or fax listings in this state; 7. advertising or soliciting business in this state; 8. traveling to this state by way of salespersons, etc.; 9. paying taxes in this state; 10. visiting potential customers in this state; 11. recruiting employees in this state; 12. generating a substantial percentage of its national sales through revenue generated from instate customers. *Hydro Eng’g*, 231 F. Supp.2d at 1133 citing *Soma*, 196 F.3d at 1295-96 (quoting *Buddensick v. Stateline Hotel, Inc.*, 972 P.2d 928, 930-31 (Utah Ct. App. 1998)); cf. *Trintec Indus., Inc. v. Time to Invent, LLC*, 395 F.3d 1275, 1282 (Fed. Cir. 2005) (Federal Circuit examines relevant state law to determine whether continuous and systematic contacts exist). As set forth above and in the accompanying Jackson Declaration, not one of these twelve factors exists with respect to ESP. Therefore, Defendant is not doing business in this state to such an extent that [Utah’s] courts would have general jurisdiction over” them. *Arguello*, 838 P.2d at 1122.

IV. CONCLUSION

For the foregoing reasons, this Court cannot exercise personal jurisdiction over Defendant ESP. The Complaint in this action should therefore be dismissed with respect to Defendant ESP for lack of jurisdiction.

DATED AND SIGNED this 3 day of December, 2009.

/s/ 

Steven L. Rinehart
Attorney for ElectronicShowPlace.com

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of December, 2009, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANT ELECTRONICSHOWPLACE.COM was served by the following method(s) on the person(s) indicated below:

Rand Bateman Perry Clegg BATEMAN IP LAW GROUP, P.C. 8 East Broadway, Suite 550 Salt Lake City, UT 84111 (801) 533-0350	<input type="checkbox"/> US Mail, Postage Prepaid
	<input type="checkbox"/> Facsimile
	<input type="checkbox"/> Hand-Delivery
	<input type="checkbox"/> Federal Express
	<input checked="" type="checkbox"/> Electronically via CM/ECF

DATED and SIGNED this 3 day of December, 2009.

/s/ Steven Rinehart
STEVEN L. RINEHART