

UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

	§	
Battle Foam, LLC	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:10-CV-116GLA
	§	JURY DEMAND
	§	
Outrider Hobbies and Bryan Wade	§	
Defendants.	§	
	§	
	§	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO TRANSFER VENUE**

I. INTRODUCTION

In this action, Battle Foam LLC, a company that specializes in laser cutting protective foam for carrying cases, seeks preliminary and permanent injunctive relief, other equitable relief, and damages as a result of the actions of the Defendants, Outrider Hobbies and Bryan Wade. These actions include, but are not limited to: trademark infringement; unfair competition and false designation of origin; trademark dilution; unfair competition and deceptive trade practices; injury to business reputation, dilution, and common law infringement; irreparable harm from the misappropriation of trade secrets; and common law trademark infringement and unfair competition. Although the case is still in its earliest stages, there is evidence showing a likelihood of confusion, including actual confusion, which causes harm to Battle Foam. In particular, the Defendants, Outrider Hobbies and Bryan Wade are trying to ride off of the good will of the BATTLE FOAM mark in adopting a similar military oriented FOAM CORPS mark,

are passing their products off as Battle Foam products, and have taken other steps to improperly obtain trade secrets from Battle Foam's innovative foam laser cutting technology.

Defendants, Outrider Hobbies and Bryan Wade, are asking this court to dismiss the case on personal jurisdiction grounds. Defendants argue that their actions are not directed at New Hampshire and that the Defendants must have sufficient minimum contacts in order to exercise specific jurisdiction. In the present case, there are sufficient minimum contacts mainly because the Defendants own and operate an online website that customers in New Hampshire and across the United States can easily access and directly purchase the goods in question.

Defendants' alternative request to transfer venue to the District of Arizona is similarly misguided. Battle Foam's choice of New Hampshire as the venue for this dispute is presumptively valid and not to be disturbed, especially since New Hampshire is a state where Battle Foam conducts many of its activities. Defendants' Motion does nothing more than assert that the District of Arizona would be a more convenient forum, without carrying the heavy burden required to transfer venue under 28 U.S.C. § 1404(a).

II. STATEMENT OF RELEVANT FACTS

The applicable rules of law for deciding a motion to dismiss based on lack of personal jurisdiction are well established. When a defendant contests personal jurisdiction under Rule 12(b) of the Federal Rules of Civil Procedure, the plaintiff bears the burden of establishing personal jurisdiction. *Massachusetts Sch. of Law at Andover v. American Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998); *Sawtelle v. Farrell*, 70 F.3d 1381, 1387 (1st Cir. 1995). Where, as here, jurisdictional issues are raised in a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) without an evidentiary hearing, the plaintiff may establish personal jurisdiction by making a *prima facie*

showing of jurisdiction over the defendant. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 51 (1st Cir. 2002). Under the *prima facie* standard, the court accepts the plaintiff's properly documented facts as true and construes them in the light most favorable to jurisdiction, whether or not they are disputed by the defendant. *Id.* Facts put forward by the defendant are also considered, but only to the extent that they are uncontradicted. *Id.* This "burden of proof is light," and the *prima facie* method does *not* authorize the Court to resolve issues that are intertwined with the merits of Battle Foam's substantive claims against Defendants. *Jet Wine & Spirits, Inc. v. Bacardi & Co., Ltd.*, 298 F.3d 1, 4, 8 (1st Cir. 2002). Accordingly, the following facts must be accepted as true for purposes of addressing Defendants' Motion to Dismiss. *See Northern Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 22 (1st Cir. 2005); *Daynard*, 290 F.3d at 51.

Plaintiff Battle Foam, LLC, is an Arizona limited liability company that specializes in laser cutting foam for carrying cases sold in the war gaming market under the mark, BATTLE FOAM, mainly through their website www.battlefoam.com. The Plaintiff has a principal place of business at 240 N. Sunway Drive, Suite 102, Gilbert, AZ. Battle Foam does business throughout the United States, including maintaining two assembly plants, one located in Elk Grove Village, IL and the other located in Gilbert, AZ, where product is assembled, packaged and shipped to customers. Battle Foam has a strong presence in New England, selling its products not only online, but also in twenty-three different brick and mortar stores throughout the region: one store in both Rhode Island and Vermont, two stores in Maine, three stores in Connecticut, four stores in Massachusetts, and six stores in both New York and New Hampshire. The stores in New Hampshire are found throughout the state in cities such as Salem, Nashua, Londonderry, Concord, Dover, and Keene. A list of the details for all of these stores can be

found in Exhibit A.

Additionally, Battle Foam executives and sales personnel are regularly present in the New England area through trade shows and other events. Within the past eight months alone, Battle Foam has attended, marketed, and sold its products at four gaming tournaments in New Hampshire, and has also attended two different events or “cons” – the Econocon in Plymouth, NH and the Templecon in Warwick, RI. A list of all of the events can be found in Filip’s Declaration, Exhibit A.

On information and belief, Defendant Outrider Hobbies is a de facto corporation owned and operated by Mr. Bryan Wade. Through Outrider Hobbies, Wade operates a laser cutting foam business selling the same laser cut protective foam products as Plaintiff under the mark, FOAM CORPS, and having the domain www.outriderhobbies.com. The Defendants have a principal place of business at 85 W. Combs Rd., Suite 101-231 Queen Creek, AZ. Defendants’ products are directed in to and are accessible from New Hampshire using an internet connection. Daniels Declaration, Exhibit B. On Defendants’ home landing page to their website, there is a link to “The Store” which takes the user to the “Outrider Hobbies Online Store” and allows the user to buy FOAM CORPS foam products. To order a product, the typical online ordering process is performed by selecting the products wanted, adding them to a cart, checking out, filling in personal and billing information, and then submitting the information. All of this is performed internal to the website, retaining the base outriderhobbies.com domain name. Daniels Declaration, Exhibit B. Therefore, Defendants are directing the sale of their goods at numerous states including New Hampshire and making it easy to purchase their products at their online website. Daniels Declaration, Exhibit C.

Defendants argue in their motion, albeit without any supporting affidavits, that they do

not do business in New Hampshire. No supporting facts, evidence, or affidavits are presented by either Wade or Outrider Hobbies to confirm this assertion. Defendants are a direct nationwide competitor of Battle Foam, selling and marketing the exact same products to the exact same businesses and individuals as Battle Foam. Since Battle Foam does not have any of Defendants' sales or marketing information at this point prior to discovery, it is difficult to know the extent of Defendants' sales in New Hampshire. However, the www.outriderhobbies.com website and online store selling the FOAM CORPS products are clearly accessible from New Hampshire and it is easy for a business or resident of New Hampshire to log on to this site and purchase goods from the website itself. Therefore, Defendants' are purposefully availing themselves within this forum and are deriving the benefits associated with selling online to all residents of the United States, including those in New Hampshire.

III. LEGAL ARGUMENT

Application of the foregoing facts to the governing legal principles leads to the conclusion that Defendants' Motion to Dismiss should be denied. Outrider Hobbies and Bryan Wade have the requisite "minimum contacts" with New Hampshire to support this Court's exercise of "specific" personal jurisdiction over them. *See ICP Solar Techs., Inc. vs. TAB Consulting, Inc.*, 413 F. Supp. 2d 12, 15 (D.N.H. 2006); *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999). Also, Defendant Bryan Wade, an individual, has *pro se* filed the Motion to Dismiss on behalf of both Defendants. It is well settled law that a corporation, trust, or any other unincorporated association may not be represented *pro se*, and in New Hampshire, a *pro se* litigant can only represent him/herself, therefore Wade's Motion to Dismiss on behalf of his company Outrider Hobbies is improper. *Briand v. Watson*, No. 08-cv-24-JL,

2008 WL 3200670, at *4 (D.N.H. Aug. 5, 2008). *See* N.H. Local Rules 83.2 (d) & 83.6 (b).

This Court should similarly deny Defendants' alternative request to transfer venue of this action to the District of Arizona, because Defendants have failed to sustain their heavy burden of showing that Arizona is a far more convenient and appropriate venue than New Hampshire - the venue properly chosen by Battle Foam. *See Sousa v. TD Banknorth Ins. Agency, Inc.*, 429 F. Supp. 2d 454, 457 (D.N.H. 2006).

A. This Court has Personal Jurisdiction over Outrider Hobbies and Bryan Wade

In assessing Defendants' Motion to Dismiss, this Court is the functional equivalent of a state court sitting in the forum state of New Hampshire. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 204 (1st Cir. 1994). Accordingly, this Court may properly exercise personal jurisdiction over Defendants if (1) New Hampshire's long-arm statute (RSA 510:4) authorizes such jurisdiction, and (2) the due process requirements of the federal Constitution are not violated by the exercise of such jurisdiction. *See Sawtelle v. Farrell*, 70 F.3d 1381, 1387 (1st Cir. 1995). The New Hampshire Supreme Court has consistently held that New Hampshire's long-arm statute authorizes the exercise of personal jurisdiction over a non-resident party to the fullest extent permitted by the due process clause. *See, e.g., Vt. Wholesale Building Prods., Inc. v. J. W. Jones Lumber Co.*, 154 N.H. 625, 628 (2006).

As a result of the expansive interpretation given to the New Hampshire long-arm statute, this Court's analysis should focus solely on whether the exercise of personal jurisdiction over Defendants is consistent with the due process clause. *See Northern Laminate Sales*, 403 F.3d at 24. With respect to a non-resident defendant like both Defendants, due process requires only that the non-resident(s) have certain "minimum contacts" with the forum state such that the

maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). A federal district court may exercise personal jurisdiction over a non-resident defendant by virtue of *either* “general” or “specific” jurisdiction. *See Northern Laminate Sales*, 403 F.3d at 24; *see also Harlow v. Children’s Hospital*, 432 F.3d 50, 57 (1st Cir. 2005) (explaining that party asserting jurisdiction need not establish both grounds because “either one, standing alone, is sufficient”).

i. Defendants’ Contacts with New Hampshire Support a Finding of Specific Jurisdiction

The First Circuit has consistently applied a three part requirement for a finding of specific jurisdiction. *ICP Solar*, 413 F. Supp. at 15. “To begin, the defendant must have purposeful ‘minimum contacts’ with the state. Further, the exercise of jurisdiction must be ‘reasonable’ under the circumstances. The third requirement ... is that the plaintiff’s claims be related to the defendant’s contacts.” *Id.*; *Cambridge Literary Props. v. W. Goebel Porzellanfabrik G.m.b.H & Co.*, 295 F.3d 59, 63 (1st Cir.2002).

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D.Pa.1997) has been called a “seminal authority regarding personal jurisdiction based upon the operation of an internet web site.” *See e.g. Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003). *See also Dagesse v. Plant Hotel N.V.*, 113 F.Supp. 2d 211, 221 (D.N.H. 2000) (Barbadoro, J.). “In *Zippo*, the court concluded that, ‘the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.’ Accordingly, the court developed a ‘sliding scale,’ by which to assess whether the amount of commercial activity conducted over the Internet by a defendant is sufficient to warrant the conclusion that it has purposefully availed itself of the

privileges and benefits of conducting business in a particular forum.” *ICP Solar*, 413 F. Supp. 2d at 18.

Zippo goes on to state:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange that occurs on the Web site [with residents of the forum state].

Id. at 18-19 (quoting *Zippo*, 952 F.Supp. at 1124).

After *Zippo*, cases have applied and further shaped its “sliding scale” test by applying the test to certain factual situations. For example, in *The Sports Auth. of Mich. v. Justballs, Inc.*, 97 F.Supp. 2d 806, 812-813 (E.D. Mich. 2000), the court took the *Zippo* test and discovered that it essentially made three categories of defendants. *Id.* A defendant that supplies a website via the internet and the presence of on-line contracts between a defendant and a plaintiff are sufficient for a court to exercise personal jurisdiction over a defendant. *Id.* In contrast, courts have declined to exercise jurisdiction over a defendant operating a website that merely provides information to those who seek it. *Id.* In between these two extremes is the third category, where the interactive website allow an exchange of some information with the host defendant. *Id.* The important concept to keep in mind for each website is the level of interactivity and commercial nature of that website. *See Id.*; *Zippo*, 952 F. Supp. at 1124.

The court in *Sports Authority* looked to another jurisdiction, the Ninth Circuit, to determine how to apply the relevant facts of the case. *See Sports Auth.*, 97 F.Supp. 2d at 814

(finding the *Stomp* court's analysis more compelling, especially in light of the parallels between the facts of the case and *Stomp*'s facts). In *Stomp*, the Central District of California court found that a Connecticut company, NeatO, had a web site that did "something more" to direct activity toward the forum state: It operated as a "virtual store [where] consumers can view descriptions, prices, and pictures of various products . . . add items to their 'virtual shopping cart' and 'check out' by providing credit card and shipping information." 61 F. Supp. 2d at 1078. Thus, the court in *Stomp* found that personal jurisdiction existed based on the nature of NeatO's website being highly commercial. *Id.* "Although NeatO's website provides information about the company, customer service, and technical support, a substantial portion of the site [was] dedicated to allowing the consumer to purchase NeatO's products on-line." *Id.* The California court held that NeatO's on-line sales constituted conducting business over the Internet, and therefore asserting personal jurisdiction comported with due process using the *Zippo* test. *Id.*

In the present case, Defendants' are at the end of the spectrum, similar to *Stomp*, where they clearly do business nationwide over the internet. *See Id.* Just as in *Stomp*, where the Connecticut company's website was considered highly commercial primarily based on it providing a virtual store, here, Defendants' website, www.outriderhobbies.com, is similarly highly commercial since the purpose of the website is to promote the FOAM CORPS products and sell them through their virtual store (See Exhibit B). *Id.* The California court in *Stomp* found that exercising personal jurisdiction over the Connecticut company comported with due process based *only* on its highly commercial site; similarly, here, the Court should find that this forum can exercise personal jurisdiction over Defendants residing in Arizona, since they operate and maintain a highly commercial website. *Id.*

Outrider Hobbies and Bryan Wade enter into contracts with customers all over the United

States through their website and online store, and even if they argue that they have not actually sold any goods directly to residents in New Hampshire, there are no facts presented by Defendants to support such an assertion. Although Defendants website does provide information about their company, the site's blog is interactive and the site's main purpose is directed towards selling FOAM CORPS products. Furthermore, Defendants do not argue that they are limiting their offers, sales, and marketing to forums outside of New Hampshire. For example, there are multiple trade shows throughout New Hampshire, including those listed in Exhibit A, at which Defendants most likely have at least advertised their products.

Defendants are purposefully availing themselves of the benefits of selling to consumers in this forum. Wade and Outrider Hobbies are actively engaged in selling products and services to residents of New Hampshire through a readily accessible online store and have therefore purposefully availed themselves of the privilege of conducting business in New Hampshire, and thus can reasonably anticipate being hailed into court here. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Defendants cannot escape jurisdiction by simply claiming that its contacts with New Hampshire are merely fortuitous. *See Id.* at 295. In these situations, personal jurisdiction is proper and to not exercise jurisdiction over Outrider Hobbies and Bryan Wade would result in an unreasonable outcome that is not only unfair, but contrary to the case law that has been adopted by this Court. *See ICP Solar*, 413 F. Supp. 2d at 18-21.

Plaintiff's claims arise directly out of Defendants activities which are directed towards New Hampshire consumers and businesses and thus the claims are related to those activities. *Akro Corp. v. Luker*, 45 F.3d 1541, 1545 (Fed. Cir. 1995). Plaintiff has asserted trademark infringement and unfair competition claims, which are based upon Defendants' use of the confusingly similar FOAM CORPS mark on the same exact goods as Plaintiff's goods, both in

New Hampshire and throughout the country. Defendants' use of this mark will have an impact on and injure Plaintiff in New Hampshire where Defendants and Plaintiff both actively sell the same goods.

The exercise of personal jurisdiction over Defendants is reasonable and fair where Defendants meet the requisite minimum contacts with New Hampshire. Defendants bear the burden of showing a "compelling case that the exercise of personal jurisdiction would be constitutionally unreasonable." *Akro*, 45 F.3d at 1546. Wade has made no effort to meet this burden. New Hampshire has a strong interest in adjudicating trademark infringement and unfair competition disputes in relation to companies and individuals which do business within its borders. Although it may impose a burden upon Outrider Hobbies and Wade to defend a lawsuit in New Hampshire, it is not an undue or unreasonable burden where Defendants have purposefully availed themselves of conducting business in this forum and courts have reasoned that "progress in communications and transportation have made the defense of a suit in a foreign tribunal less burdensome." *World-Wide Volkswagon*, 444 U.S. at 294.

Therefore, this Court should exercise personal jurisdiction over Defendants Bryan Wade and Outrider Hobbies and deny Defendants' motion to dismiss based on lack of personal jurisdiction.

B. The Pro Se Representation of Defendant Outrider Hobbies is Improper

"It is well settled that a corporation, trust, or any other unincorporated association may not be represented pro se, or be a pro se party, but must be represented by licensed counsel." *Briand*, 2008 WL 3200670, at *4. The "*Pro Se Litigant Guide*" for the U.S. District Court for the District of New Hampshire defines "Who You May Represent as a *Pro Se Litigant*" in section I-G and states:

If you do not want an attorney or are unable to find an attorney to represent you, you have the right to pursue your claims in court by appearing *pro se*. As a *pro se* litigant, you are representing only yourself and presenting only your claims and defenses. Under the law, you cannot speak for another person or other entity such as a company, club, association, or trust.

See N.H. Local Rules 83.2 (d) & 83.6 (b). New Hampshire case law has shed light on the policy behind the requirement that a company not be represented *pro se* by pointing to: the burdens created for the represented party, adversaries, and the court; the inability to draft motions in an articulate manner; and the lack of professional skills and responsibility possessed by a lawyer. *See State v. Settle*, 523 A.2d 124, 128 (N.H. 1987) (citing *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2nd Cir. 1983)).

Defendants Outrider Hobbies and Bryan Wade are being represented, *pro se*, by Bryan Wade in this dispute. Under New Hampshire's Local Rules, it is improper for a *pro se* litigant to represent any other entity. *See* NH Local Rules 83.2 (d), 83.6 (b). Outrider Hobbies is a commercial entity, therefore it is improper for Bryan Wade to be representing Outrider Hobbies as a *pro se* litigant. *Id.* Therefore, this Court should deny Defendants' motion due to improper representation.

C. The District of New Hampshire is the Proper Venue for this Dispute.

In addition to denying Defendants Outrider Hobbies and Bryan Wade's personal jurisdiction challenge, this Court should reject Defendants' alternative request to transfer venue of this action to Arizona. The text of the transfer statute itself sets forth three factors which form the basis of the court's consideration (but to which the court's inquiry is not strictly limited): (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. *See Auto Eur., LLC v. Conn. Indem. Co.*, 321 F.3d 60, 64 (1st Cir. 2003). "The burden of proof rests with the party seeking transfer; there is a strong presumption in favor of the plaintiff's

choice of forum.” *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 11 (1st Cir. 2001). See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Defendants’ have failed to meet their heavy burden, under 28 U.S.C. § 1404(a), of establishing that the relevant factors “predominate” in favor of such a transfer. See *Sousa*, 429 F. Supp. 2d at 457.

Defendants’ point out that the location of potential witnesses favors transfer. The only identified witnesses in this case include the consumers who have been confused. This includes the consumer who submitted the email that was attached to the Complaint as Exhibit E, who is located in Ohio. It is the Defendants’ burden to show the inconveniences any other witnesses may have from keeping this case in the present forum. *Coady*, 223 F.3d at 11. They have not carried their burden, therefore this factor weighs against transfer.

Defendants’ further looked to the residence of the parties in this dispute. However, the First Circuit has cautioned that transfer of venue under section 1404(a) is appropriate only to avoid serious unfairness and that a plaintiff’s choice of forum will be disturbed only rarely. *Private Jet Services Group, Inc. v. Sky King, Inc.*, No. Civ.05-CV-098-JD, 2005 WL 2502704, at *4 (D.N.H. Oct. 11, 2005). Although the parties are both located in Arizona, this should not be enough to weigh against the strong presumption in favor of a plaintiff’s choice of forum. *Coady*, 223 F.3d at 11.

Defendants’ also allege that Battle Foam “freely contracted to select a different judicial forum.” However, Battle Foam has been doing business in the New England area, and New Hampshire specifically, since the existence of its online website. Battle Foam sells its products in six stores throughout New Hampshire and has promoted its carrying cases at five trade shows or tournaments in New Hampshire over the past eight months. Battle Foam is hardly “freely contracting” throughout New Hampshire, but instead has established a legitimate business

connection with the state. Further, Battle Foam's legal representation is located in New Hampshire. It would be an inconvenience to seek out new legal representation in a new forum, especially since the Defendants' are improperly representing themselves and will most likely have to seek counsel somewhere at some point.

Therefore, this Court should find that New Hampshire is the proper forum for this dispute and deny Defendants' motion to dismiss, or in the alternative, transfer, based on improper venue.

IV. CONCLUSION

For the foregoing reasons, Battle Foam respectfully requests that the Court deny Defendants Outrider Hobbies and Bryan Wade's motion to dismiss for lack of jurisdiction and improper venue or, in the alternative, to transfer pursuant to 28 U.S.C. §1404.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2010, I have caused a true copy of the foregoing PLAINTIFF BATTLE FOAM, LLC RESPONSE TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(3) was served via the Court's ECF system, sent by first class mail and emailed on the 30th day of April, 2010, to the following:

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