

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BATTLE FOAM, LLC, an Arizona company,

Plaintiff,

vs.

OUTRIDER HOBBIES, an Arizona company,
and Bryan Wade, an Individual

Defendants.

CIVIL ACTION NO. 1:10-cv-116-SM
MEMORANDUM

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF
JURISDICTION AND IMPROPER VENUE OR, IN THE ALTERNATIVE,
TO TRANSFER PURSUANT TO 28 U.S.C. § 1404**

I. INTRODUCTION

This case involves a litigious Plaintiff with a history of harassment towards the Defendants. Plaintiff BATTLE FOAM, LLC (BATTLE FOAM) has failed to show cause related to this lawsuit and strategically filed this lawsuit in a forum where it would be difficult for the Defendants to defend themselves due to their lack of resources.

As set forth in greater detail below, this Court lacks jurisdiction of OUTRIDER HOBBIES and BRYAN WADE. OUTRIDER HOBBIES is a sole proprietorship that mainly does business in Arizona and does not do, nor has it ever done, business in New Hampshire. BRYAN WADE is a resident of Arizona and has never been to New Hampshire and his only contact with someone from New Hampshire has been with the Plaintiff's attorney.

Even if the Court did have jurisdiction over Defendants, the appropriate venue does not lie in the District of New Hampshire. Most of Defendant OUTRIDER HOBBIES sales are in the District of Arizona and hence that is where the witnesses who will be able to give competent testimony reside. All of OUTRIDER HOBBIES's employees, agents, and contractors reside in the District of Arizona. In addition, all of BATTLE FOAM's employees, agents, and contractors reside in the District of Arizona. At a minimum, this matter should be transferred to the District of Arizona because every factor to be considered weighs heavily in favor of a transfer:

- Most of Defendant OUTRIDER HOBBIES' sales are in the District of Arizona,
- Defendant OUTRIDER HOBBIES has never transacted any business in New Hampshire
- All of Defendants witnesses reside in the District of Arizona
- Defendant OUTRIDER HOBBIES' principal BRYAN WADE resides in the state of Arizona
- Defendant OUTRIDER HOBBIES is organized and licensed to do business in Arizona
- Plaintiff BATTLE FOAM is organized and licensed to do business in Arizona

II. LAW AND ARGUMENT

A. Plaintiffs' Claims Against Defendant Should be Dismissed Because This Court Lacks Jurisdiction over the Defendant

The Court does not have jurisdiction over Defendants because Defendants do not maintain contacts with New Hampshire sufficient for this Court to constitutionally exercise jurisdiction over them. See generally *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). Plaintiff bears the burden of proving facts sufficient to establish personal jurisdiction. *Third National Bank in Nashville v. WEDGE Group*, 882 F.2d 1087, 1089 (6th Cir. 1989). The law is clear that Arizona residents may not be subjected to litigation in a foreign jurisdiction unless that defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend the 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Specific jurisdiction may be established where the claim asserted arises out of or is substantially related to the defendant's minimum contacts with the forum state and general jurisdiction may be established where a defendant maintains substantial, systematic and continuous contacts with the forum state. See *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1992), *Bridgeport Music v. Agarita Music*, 182 F. Supp. 2d 653, 658 (M.D. Tenn. 2002). Plaintiffs can establish neither specific nor general jurisdiction as to each of the Defendants.

(1) Plaintiffs Have Failed to Establish Specific Jurisdiction

Before this Court can exercise specific jurisdiction over any of the Defendants, Plaintiff must establish that the Defendant purposefully directed its activities at New Hampshire and that the present litigation results from alleged injuries that arise out of, or relate to, Defendants' resulting contacts with New Hampshire. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Plaintiffs have wholly failed to make any such showing for any of the Defendants named in this matter.

B. Venue Does Not Lie in the District of New Hampshire

Under any venue analysis, the District of New Hampshire is not the proper venue for the present action. Plaintiffs' claims should be dismissed for failing to establish this District as a proper venue pursuant to the requirements of Federal Rule of Civil Procedure 12(b)(3), 28 U.S.C. §§ 1406(a) & 1391(b). Alternatively, the Court should transfer this matter to the District of Arizona.

Plaintiffs' allegation in paragraph seven of the Complaint that Defendant "advertises products for sale to residents of New Hampshire on their website, www.outriderhobbies.com" is legally insufficient to establish grounds for venue or jurisdiction. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). Under any analysis, this matter should not be heard here.

(1) Plaintiffs' Complaint should be dismissed for improper venue Pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §§ 1391(b) & 1406(a)

28 U.S.C. § 1391(b) defines proper venue for federal question cases, such as the case before this Court. A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, 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.

Plaintiffs have the burden of establishing that at least one of these elements is met.

In the present matter, Plaintiffs have failed to meet their burden.

(a) 1391(b)(1) Does Not Apply Because the Defendants Reside in Arizona and not New Hampshire

Plaintiff acknowledges in their Complaint (see paragraph 3) that the Defendants are located in Arizona and therefore 1391(b)(1) is an improper basis for venue

(b) 1391(b)(2) Does Not Apply Because a Substantial Part of the Alleged Events or Omissions Giving Rise to the Claims Did Not Occur in this District

Section 1391(b)(2) provides that venue is proper in a judicial district in which a substantial part of the events giving rise to the claim arose or where a substantial part of the subject property is situated 28 U S C § 1391(b)(2) The substantial events giving rise to the claim did not arise in this District See *Miles v WTMX Radio*, 15 Fed Appx 213, 215 (6th Cir 2001) (holding that, when plaintiff had "not claimed that any event, act, or omission that is the basis of his claims occurred in any part of Michigan, let alone the Eastern District[,] [t]he court did not err in finding venue improper, and the court did not abuse its discretion by dismissing the suit ")

First, Defendant OUTRIDER HOBBIES does not do, nor has it ever done, any business in this District Second, Plaintiff has not and cannot establish that any of the substantial events giving rise to Plaintiff's claims arose in this District Despite Plaintiff's contentions, Defendant OUTRIDER HOBBIES' sales all primarily occur in the District of Arizona

Accordingly, this District is not the proper venue for Plaintiffs' claims

(c) 1391(b)(3) Does Not Apply Because the District of Arizona is a District in Which This Suit May be Brought

1391(b)(3) allows for venue in "a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought " Because the Defendants, as well as the Plaintiff, are located in Arizona, and because practically all of the events and transactions that are the subject of this case occurred in the District of Arizona, this action may be brought in that District

Because this District is not a proper venue under 1391(b), this Court should dismiss the present action in its entirety for improper venue

(3) This Matter Should Be Transferred for Convenience to the District of Arizona Pursuant to § 1404

This Court should transfer this case to the District of Arizona under 28 U S C § 1404(a) because a balance of convenience strongly favors such transfer Section 1404(a) states "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought "

In ruling on a motion to transfer under 1404(a), the Court should generally consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systematic integrity and fairness, which come under the rubric of "interest of justice " *Moses v Business Card Exp , Inc* , 929 F 2d 1131, 1137 (6th Cir 1991)

This Court has set forth a number of factors for determining the issue of convenience under § 1404(a), including (1) the location of witnesses, (2) the residence of the parties, (3) the location of the operative events, (4) the governing law, (5) the availability of compulsory process, and (6) the plaintiff's choice of forum See *Nat'l Indep Pharm Coalition v Am Pharm Coop , Inc* , No 3 05-1088, 2006 U S Dist LEXIS 46538, at **8-9 (M D Tenn July 10, 2006) (Echols, J), *Carborundum Co , Pollution Control Div v Bay Fabricators, Inc* , 461 F Supp 437, 440 (E D Tenn 1978), *Vector Co v Urban Sys Dev Corp* , 360 F Supp 864, 866 (E D Tenn 1972)

Under any scenario, the factors weigh heavily on the side of transfer

(a) The Location of Potential Witnesses Favors Transfer

The convenience of the witnesses is generally considered the most important factor in evaluating a motion to transfer venue. Here, all non-party witnesses, as well as the Defendants, are and were at all relevant times to this action, located within the District of Arizona. Conversely, Plaintiff has not alleged that any potential witnesses reside in this District. Thus, the balance of this factor also weighs in favor of transfer.

See *Returns Distrib Specialists, LLC v Playtex Prods, Inc*, No. 02-1195-T, 2003 U.S. Dist. LEXIS 9004, at *21 (W.D. Tenn. May 28, 2003) ("The most significant factor when considering a transfer under § 1404 is the convenience of the witnesses"), 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3851 at 415 (2d ed. 1986) ("Probably the most important factor, and the factor most frequently mentioned, in passing on a motion to transfer under 28 U.S.C.A. § 1404(a) is the convenience of witnesses"), 17 James Wm Moore, *Moore's Federal Practice* § 111.13[1][f][i] (3d ed. 2006) ("The convenience of witnesses has been called the most powerful factor governing the decision to transfer a case") (internal quotation marks omitted), cf. *Vector Co.*, 360 F. Supp. at 866 (considering the location of witnesses a "paramount" factor).

(b) The Residence of the Parties Favors Transfer

While the Plaintiff has only alleged that Defendant OUTRIDER HOBBIES operates a web site accessible in the District of New Hampshire (Complaint ¶ 5), Defendants, as well as the Plaintiff, actually reside and are located in the District of Arizona.

(c) The Location of the Operative Events Favors Transfer

The location of the operative events also militates in favor of transfer. "A fundamental principle guiding the court's analysis is that litigation proceed in that place where the case finds its center of gravity." *Audi AG and Volkswagen of America, Inc v D'Amato*, 341 F. Supp. 2d 734, 751 (E.D. Mich. 2004). All of the manufacturing and sales that are the subject of this litigation occurred in the District of Arizona. All of the relevant documents and records are located at Defendant OUTRIDER HOBBIES' principal place of business, which is located in the District of Arizona. The District of Arizona is clearly the center of gravity with respect to this suit. Thus, this factor also weighs in favor of transfer.

On timely motion, the issuing court must quash or modify a subpoena that (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person – except that the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held.

Because witnesses located in Arizona would have to travel more than 100 miles, this Court could not command their attendance. The District of Arizona, however, could command those same witnesses to attend a trial because the witnesses are located in the same state where the trial is held.

As the Supreme Court held, "to fix a place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on depositions, is to create a condition not satisfactory to the court, jury or most litigants." *Gulf Oil Co v Gilbert*, 330 U.S. 501, 508 (1947). This factor, therefore, also strongly favors transfer.

(d) Plaintiffs' Choice of Forum Is Not Entitled to Any Weight

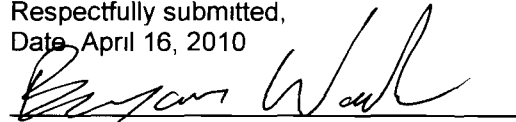
While the Plaintiff's choice of forum is typically afforded deference, "deference to a plaintiff's choice of forum is inappropriate where the plaintiff freely contracted to select a different judicial forum." *Inghram*, 2006 U.S. Dist. LEXIS at *17. This factor, therefore, should not be granted any weight under the analysis because the parties contemplated and mutually agreed on the most convenient forum for disputes.

III. CONCLUSION

Based upon the forgoing, the question before this Court should not be whether to dismiss or to transfer, but rather why was this matter ever brought here in the first place. As every factor dictates that this matter should be heard in the District of Arizona, Defendants respectfully request that this Court dismiss this action for lack of jurisdiction and/or lack of venue. In the alternative, Defendants request that the facts clearly establish that the present matter should not be heard by this Court.

Respectfully submitted,

Date, April 16, 2010

A handwritten signature in black ink, appearing to read "Bryan Wade", is written over a horizontal line.

Bryan Wade, Defendant Pro Se

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