

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

J v - : J

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

**DEFENDANTS' RESPONSE TO PLAINTIFF'S OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS**

**I. INTRODUCTION**

Defendants Bryan Wade, an individual, and Outrider Hobbies, a sole proprietorship, have asked this Court to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12 because this Court lacks jurisdiction over the Defendants and the appropriate venue lies in the District of Arizona and not in the District of New Hampshire. In the alternative, Defendants have asked this Court to transfer this case to the District of Arizona under 28 U.S.C. § 1404. Plaintiff objects to Defendants' Motion to dismiss Plaintiff's complaint, or in the alternative, to transfer the case to the District of Arizona. At no time, however, does Plaintiff explain why New Hampshire is a more appropriate venue than Arizona, where the Plaintiff and the Defendant both reside. For this reason, and for the reasons set forth in Defendants' Motion to Dismiss, Plaintiff's complaint should be dismissed, or in the alternative, the case should be transferred to the District of Arizona.

**II. LAW AND ARGUMENT**

**A. Plaintiff Has Failed to Satisfy its Burden of Establishing that the Court has Personal Jurisdiction.**

Defendants maintain that Plaintiffs' claims against Defendants should be dismissed because this Court lacks jurisdiction over the Defendants. Plaintiff objects to Defendants' claim that the Court lacks jurisdiction by claiming that Defendants have "sufficient minimum contacts mainly because the Defendants own and operate an online website." Opposition to Motion to Dismiss, page #2. At the same time, Plaintiff acknowledges that "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." Opposition to Motion to Dismiss, page #2. Notwithstanding "the plaintiff bears the burden of establishing that the Court has personal jurisdiction over the Defendants, Plaintiff spends an inordinate amount of time emphasizing its own contacts with New England." Opposition to Motion to Dismiss, pages #3 and #4. While these facts would be useful in establishing that the Court has personal jurisdiction over Plaintiff, they fail to satisfy Plaintiff's burden of establishing that the Court has personal jurisdiction over the Defendants.

In Plaintiff's Opposition to Motion to Dismiss, page #6, Plaintiff reminds the Court that it's 'analysis should focus on the whether the exercise of personal jurisdiction over Defendants is consistent with the due process clause " Plaintiff also acknowledges that whereas the Defendants are not residents of the state of New Hampshire, the Defendants should not be required to defend themselves in New Hampshire if doing so would offend "traditional notions of fair play and substantial justice " Opposition to Motion to Dismiss, page #7 In this case, Defendants have never done business in New Hampshire, Defendants lack the resources to defend themselves in New Hampshire and requiring Defendants to do so would cause undue hardship to Defendants and result in the shutting down of Defendants business, which is ultimately what Plaintiff hopes to accomplish Each of these outcomes would offend "traditional notions of fair play and substantial justice" in direct contradiction to the due process clause

In Plaintiff's Opposition to Motion to Dismiss, page #7, Plaintiff sets for a three part requirement for a finding of specific jurisdiction "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 " Notwithstanding Plaintiff sets forth the requirements for a finding of specific jurisdiction, Plaintiff has failed to establish that any of the above referenced requirements have been met

**a Plaintiff Has Failed to Establish that Defendants Have Purposeful 'Minimum Contacts' with the State of New Hampshire.**

Plaintiff spends a significant amount of time discussing the fact that Defendant, Outrider Hobbies, maintains a website on which it sells products that are similar to those sold by Plaintiff Plaintiff fails, however, to provide any proof that Defendants have purposeful 'minimum contacts' with the State of New Hampshire Instead, Plaintiff tries to mislead the Court regarding Defendants activities For example, on pages #9 and #10 of the Opposition to Motion to Dismiss, Plaintiff alleges that "Outrider Hobbies and Bryan Wade enter into contracts with customers all over the United States through their website and online store " Plaintiff then goes on to allege that "Defendants most likely have at least advertised their products" at "multiple trade shows throughout New Hampshire " Opposition to Motion to Dismiss, page #10 The fact is, however, that Plaintiff is unable to provide any proof regarding these allegations This is because Defendants have never done business in the State of New Hampshire, nor have the Defendants advertised their products in the State of New Hampshire Bryan Wade Declaration, Exhibit A

**b Plaintiff Has Failed to Establish that the Exercise of Jurisdiction over Defendants Would be Reasonable.**

On page #10 of the Opposition to Motion to Dismiss, Plaintiff argues that '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 " Notwithstanding this assertion, however, Plaintiff fails to show how Plaintiff would be harmed if the Court refused to exercise jurisdiction over Defendants as Plaintiff could easily bring this case in Arizona, where Plaintiff and Defendants reside Not only has Plaintiff failed to show how Plaintiff would be harmed if the Court refused to exercise Jurisdiction, Plaintiff has also failed to establish that it would be reasonable for the Court to exercise jurisdiction over Defendants As set forth in Bryan Wade's Declaration, Exhibit A, Defendants have never had any contacts with the State of New Hampshire and Defendants have never advertised in the State of New Hampshire Therefore it would be unreasonable for the Court to exercise jurisdiction over Defendants

**c Plaintiff Has Failed to Establish that the Plaintiff's Claims are Related to Defendants' Contact with the State of New Hampshire.**

On page #10 of the Opposition to Motion to Dismiss, Plaintiff alleges that it'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 " While Plaintiff has asserted trademark infringement and unfair competition claims against Defendants, Plaintiff has failed to establish that these claims are in any way related to Defendants' contact with the State of New Hampshire As set forth in Bryan Wade's Declaration, Exhibit A, Defendants have never had any contacts with the State of New Hampshire and Defendants have never advertised in the State of New Hampshire Therefore it would be unreasonable for the Court to exercise jurisdiction over Defendants since the Defendants have never had contact with the State of New Hampshire

**B The Pro Se Representation of Defendant Outrider Hobbies is Proper.**

In conjunction with Plaintiff's attempts to put Defendants out of business, Plaintiff tries to mislead the Court into believing that Outrider Hobbies is a corporation and therefore it should have to hire an attorney to represent its interests in this matter Plaintiff does this by claiming on page #4 of the Opposition to Motion to Dismiss that "Defendant Outrider Hobbies is a de facto corporation While Plaintiff fails to explain what a 'de facto corporation' is, Plaintiff then proceeds on page #11 of the Opposition to Motion to Dismiss to cite various cases as well as the 'Pro Se Litigant Guide' which provide "that a corporation must be represented by licensed counsel ' Despite Plaintiff's attempts to mislead the Court Outrider Hobbies is not a duly licensed corporation but is, in fact a sole proprietorship It is well settled that a sole proprietor can 'proceed pro se under section 1654 ' *National Independent Theatre Exhibitors, Inc v Buena Vista Distribution Company*, 748 F 2d 602 (11<sup>th</sup> Cir 1984) In 28 U S C § 1654, it states

'In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein "

Whereas Defendant, Outrider Hobbies, is not a corporation but a sole proprietorship, and whereas a sole proprietorship is not required to be represented by licensed counsel, the Court should not deny Defendants' motion due to improper representation and Defendant, Bryan Wade, should be allowed to continue to represent Outrider Hobbies as a *pro se* litigant

**C The District of New Hampshire is not the Proper Venue for this Dispute.**

As set forth in Defendants' Motion, most of Defendant Outrider Hobbies' sales are in the District of Arizona, most of the witnesses who will be able to give competent testimony are in the District of Arizona all of Outrider Hobbies' employees, agents, and contractors reside in the District of Arizona and Plaintiff's employees, agents, and contractors reside in the District of Arizona Notwithstanding, Plaintiff devotes the majority of his time discussing why he believes that the Court can hear this case rather than focusing on whether the Court should hear this case A review of the three factors set forth by the Plaintiff below (see Opposition to Motion to Dismiss on page #12) clearly manifest that New Hampshire is not the proper venue for this dispute

**a. Convenience of the Parties.**

Notwithstanding the fact that the Plaintiff acknowledges that the Court should consider the convenience of the parties when considering where the proper venue is for a dispute to be heard, Plaintiff fails to indicate why New Hampshire would be a convenient forum for Defendants Instead, Plaintiff asserts that New Hampshire is more convenient for Plaintiff because Plaintiff has done business in the state and that is where Plaintiff's counsel happens to reside Plaintiff then goes on to argue that it would be inconvenient for Plaintiff to have to seek counsel in another venue Despite Plaintiff's claims that any other venue would

be inconvenient for Plaintiff, Defendants are aware that Plaintiff has retained Arizona counsel in the past in connection with other legal matters involving Defendant Bryan Wade and therefore it is unlikely that Plaintiff would be inconvenienced if Plaintiff was required to hire Arizona counsel. Bryan Wade Declaration, Exhibit A. On the other hand, it is clear that New Hampshire would be a huge inconvenience for the Defendants. Defendant Bryan Wade, is employed full time as a customer service representative and also works as a process server, in addition to operating Outrider Hobbies. To require him to travel back and forth to New Hampshire to defend himself in the case would not only be inconvenient but it would seriously jeopardize his ability to keep his job and support his family which would not be the situation if this case was being adjudicated in Arizona. Bryan Wade Declaration, Exhibit A.

**b. Convenience of the Witnesses.**

Notwithstanding the fact that the Plaintiff acknowledges that the Court should consider the convenience of the witnesses when considering where the proper venue is for a dispute to be heard, Plaintiff fails to show how New Hampshire would be convenient for any of the potential witnesses in this case. Some of the potential witnesses that Defendants would call would include the owner of the laser where Defendant manufactures his products, the laser manufacturer that advised Defendant Bryan Wade on how to cut foam using a laser and Romeo Filip, the owner of Battle Foam, LLC all of whom reside in Arizona.

While Plaintiff claims that there is a potential witness in this case that resides in Ohio, e-mails to this individual at the address listed in the correspondence attached to the Complaint as Exhibit E have gone unanswered, phone calls to the same individual's cell phone have either gone unanswered or resulted in him hanging up the phone at the mention of the name Romeo Filip the owner of Battle Foam, LLC, and voice messages left for this individual have not been returned. Bryan Wade Declaration, Exhibit A. There is also the odd coincidence that the individual listed in the correspondence attached to the Complaint as Exhibit E is also listed as a user of bats that are produced by Romeo Filip's other company, Diablo Bats. Bryan Wade Declaration, Exhibit A. In fact, within 24 hours of pointing out to Plaintiff's counsel that this witness was also listed on Plaintiff's Diablo Bats website, the name Jim Kavourias was removed as a user although his testimonial under the name Jim K was not removed. Bryan Wade Declaration, Exhibit A. Finally Defendants have no record of ever having done business with or received any correspondence from Jim Kavourias. Bryan Wade Declaration, Exhibit A. Based on these facts, it can only be assumed that either this mystery witness does not in fact exist, or that that the supposed witness will not be testifying in connection with this case.

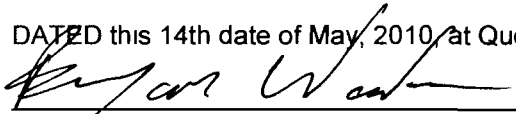
**c. The Interest of Justice.**

Notwithstanding the fact that the Plaintiff acknowledges that the Court should consider the interest of justice when considering where the proper venue is for a dispute to be heard, Plaintiff fails to show how justice would be served by having this case heard in New Hampshire. Based on the convenience of the parties as well as the witnesses, it is clear that Plaintiff would not be harmed by having this case heard in the District of Arizona. In fact, having this case heard in the District of Arizona would ensure that justice is meted out equally to all of the parties involved and that the case can be permitted to proceed in a more expeditious manner.

**III. CONCLUSION**

For the reasons stated above, and for those stated in Defendants' original Motion to Dismiss for Lack of Jurisdiction and Improper Venue or, in the Alternative, to Transfer Pursuant to 28 U S C § 1404, Defendants respectfully request that this Court grant its Motion

DATED this 14th date of May, 2010, at Queen Creek, Arizona



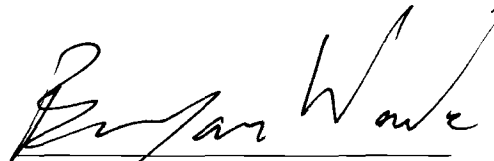
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**CERTIFICATE OF SERVICE**

I, Bryan Wade, hereby certify that on May 14, 2010, I caused a copy of the foregoing Response to Plaintiff's Opposition to Motion to Dismiss to be served on Plaintiff Battle Foam, LLC by mailing the documents by first class mail to the duly authorized legal representative of the Plaintiff as follows:

Counsel for BATTLE FOAM, LLC:

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A handwritten signature in black ink that reads "Bryan Wade". The signature is written in a cursive style with a horizontal line underneath the name.

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