UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARS, INCORPORATED 6885 Elm Street McLean, Virginia 22101 Plaintiff, v. COCOVAA®, LLC 1 Sherman Terrace, 102b Madison, Wisconsin 53704, and SYOVATA K. EDARI 1 Sherman Terrace, 102b Madison, Wisconsin 53704 Defendants.	)	Case No. 17-CV-346

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR TO TRANSFER

Defendants COCOVAA®, LLC ("COCOVAA®") and Syovata K. Edari ("Ms. Edari") (collectively referred to herein as "Defendants") file this reply to Plaintiff's Opposition to Defendants' Motion to Dismiss or Transfer this case. This Court should not construe any failure to address Plaintiff's other arguments made in their Opposition as a concession regarding the merits of those arguments. Rather, Defendants believe they have adequately addressed those arguments in their Memorandum in Support of their Motion to Dismiss or Transfer Venue.

I. Introduction

Under Rule 12(b)(2), Fed. R. Civ. P., "a defendant must affirmatively raise a personal jurisdiction challenge, but the plaintiff bears the burden of demonstrating personal jurisdiction at every stage following such a challenge." *Grayson v. Anderson*, 816 F.3d 262, 267 (4th Cir. 2016) (emphasis added). Despite Plaintiff's attempts to shift the burden to Defendants, it has failed to meet its burden to establish jurisdiction. First, Plaintiff's attempts to "manufacture" jurisdiction by orchestrating Wisconsin purchases of Wisconsin-made chocolate, to be shipped as gifts to Virginia, does not change the fact that Defendants do not and have not conducted transactions in or with Virginia. Second, Plaintiff fails to establish Defendants' "minimum contacts" from Defendants' operation of a passive website that lacks any online purchasing or "eCommerce" capability through which consumers can interact with Defendants and order products. Finally, given the vast disparities in resources between the parties, an exercise of jurisdiction over Defendants would violate fundamental notions of fairness. If this case is not dismissed for lack of jurisdiction, it should be transferred to the Western District of Wisconsin, where Defendants do make their chocolates, and make sales thereof.

II. Plaintiff Has Not Met, and Cannot Meet, its Burden

This Court can exercise personal jurisdiction over a defendant only if "(1) such jurisdiction is authorized by the long-arm statute of the state in which the district court sits; and (2) application of the relevant long-arm statute is consistent with the Due Process Clause." *Carefirst of Md., Inc. V. Carefirst Pregnancy Ctrs,. Inc*. 334 F.3d 390, 396 (4th Cir. 2003). Therefore, application of Virginia's Long Arm Statute does not end this Court's jurisdictional inquiry and analysis. The Long Arm statute "extends the jurisdiction of its courts as far as federal due process permits." *ePlus Tech.,*

Inc. v. Aboud, 313 F.3d 166, 176 (4th Cir. 2002). Therefore, the statutory inquiry "necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." *Id*.

a. Defendants Lack Sufficient Minimum Contacts with this District to Support this Court's Exercise of Personal Jurisdiction Over Defendants.

i. Shipments to Virginia of Purchases Made in Wisconsin

As an initial matter, personal jurisdiction cannot be manufactured by a party. A plaintiff's attempt to concoct jurisdiction by purchasing an allegedly infringing product do not count in the minimum contacts calculation. *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc*., 148 F.3d 1355, 1359 (Fed. Cir. 1998). The rationale is that a defendant cannot be said to have purposefully availed itself of the privilege of conducting activities in a forum based on sales orchestrated only by a plaintiff.

However, even if Plaintiff's orchestrated purchases of Defendants' products was factored into the jurisdictional analysis, they are not sufficient to establish minimum contacts as they do not constitute transactions in or with Virginia. A critical piece of information which Plaintiff and its investigator failed to disclose to this Court is the fact that investigator Wagner – Plaintiff's agent that made the purchase shipped to Virginia – appears to have made the purchase in Milwaukee, Wisconsin. Wagner is from Milwaukee; he is a well-known investigator in Wisconsin; according to his website, his only place of business is in Milwaukee (*https://wagnerassociatesllc.com/about/*); and he purchased Defendants' chocolates using a credit card with a Milwaukee zip code, and after identifying himself to Defendants as having met them at Defendants' "Holiday Pop Up Boutique" at a hotel in Milwaukee. Additionally, contrary to Plaintiff's assertion that its investigator purchased the chocolate through Defendants' website, he could not have done so, and he did not. (*2nd*

Declaration of Syovata Edari in support of Motion to Dismiss/Transfer Venue attached*)*. Defendants do not now, and never have, had online ordering capability on their website. Rather, Wagner made the purchase by contacting Defendant Syovata Edari personally through her company email address. (Dkt #16, Opposition, *Declaration of Thomas Wagner*, ¶5.) He likely obtained this email address by viewing Defendants' business card. The fact remains that Defendants' website is a "passive" one of the type that does not support the exercise of personal jurisdiction. *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713-714 (4th Cir. 2002). The website merely contains information about COCOVAA® and Edari (including contact information), but it does not take orders from customers.

Despite Plaintiff's contention otherwise, COCOVAA® does not have an "online store." Wagner likely obtained a menu of items from Defendant Edari personally at her Milwaukee pop-up shop because COCOVAA® has never listed its product line on its COCOVAA® website. After emailing her with his order, Wagner paid with his credit card, which linked to a Milwaukee address, as is apparent from the zip code associated with the card. Defendants were required to get his zip code information before processing his purchase. Defendants simply shipped the gift Wagner purchased in Milwaukee to his chosen recipients in Virginia, who remain unknown to Defendants. It remains unknown whether the chocolates were even received, as Plaintiff has failed to provide proof of their receipt to this Court. This Wisconsin-based transaction between Wisconsin parties does not support the minimum contacts requirement to give this Court jurisdiction over Defendants in Virginia. Minimum contacts do not include those that are random, fortuitous, or attenuated, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 299), or those that are the

product of the "'unilateral activity of another party or a third person,'" *Id*. (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). This activity also does not support Plaintiff's contention that Defendants conduct sales in Virginia. Defendants have not sold products in Virginia; they have only sold in Wisconsin, with the purchaser requesting shipment to Virginia.

ii. Hypothetical Future Sales do not Give Rise to Specific or General Jurisdiction over Defendants

Plaintiff asks this Court to consider potential sales to Virginia: actions that have not taken place, and where there is no indication that such actions will even occur. In addition to their orchestrated sales in Wisconsin, Plaintiff discloses an email from Defendant Syovata Edari – who serves as Defendants' counsel -- inviting Plaintiff's counsel Greenberg Traurig to hire her chocolate company for holiday gifting once this case concludes. Plaintiff requests that the Court consider the email as evidence that Defendants' conduct business with Virginia. Plaintiff's argument is absurd. First, Defendant Edari's "invitation" to handle Plaintiff's firm's gifting was stated in jest, and in the context of confidential negotiation discussions motivated by a desire to humanize the interactions and "break the ice" between the parties in the hopes of early settlement. Such discussions are protected from use as evidence under Rule 408. Furthermore, they in no way demonstrate a sale that has occurred with or in Virginia. Second, Greenberg Traurig holds offices all over the world. Lead counsel for Plaintiff in this case appears to be located in either New York or Washington, D.C. Plaintiff's attorney Barger, who holds an office in Virginia, has indicated to Defendants' counsel that he is "only local counsel." To date, neither the Virginia office of Greenberg Traurig, nor any other, has taken Defendants' counsel up on her "offer" to handle their holiday gifting.

Plaintiff continues to stretch the facts, and in an attempt to create jurisdiction, it also highlights a screenshot of an "Instagram" page where Defendant Syovata Edari is pictured, and where a person (who Edari speculates may also be employed by Plaintiff's counsel) inquires whether Edari would ship to Virginia. Edari responds "yes please do! Call me anytime 414-779-0074 or come by at 1 Sherman terrace." (Opposition, Exhibit D). That person did not follow through with a purchase to Virginia.

Likewise, Plaintiff's Exhibits A-B of its Opposition, which contain screenshots of Defendants' website in December of 2016 and February 15, 2017, do nothing to support its argument that jurisdiction rests in Virginia. The website screenshots make promises of future online ordering services which have not occurred, and which may never occur. To this day, the COCOVAA® website has never included online "eCommerce" ordering of products.

Finally, Plaintiff has not alleged even one instance of confusion between its products and Defendants', such that it can be said an injury has actually occurred in the Eastern District of Virginia or elsewhere. Plaintiff's investigator was clearly not confused by COCOVAA® chocolates since he was assigned by Plaintiff to purchase the chocolates. The only "evidence" of likelihood of confusion referenced by Plaintiff is a typo in Defendants' Motion to Dismiss/Transfer Venue where counsel Edari inadvertently cut and pasted "COCOVAA" instead of "COCOAVIA" during the editing process. (Dkt. # 16 P. 10 of Opposition.) This does not demonstrate "how easily the two marks are confused." This demonstrates nothing more than a cut and paste error in the drafting of a brief by an attorney who is repetitively using the same words over and over. In reality, COCOAVIA and COCOVAA would never be found side by side in a retail outlet, would not be

encountered together anywhere by consumers, would never be associated with each other, and, but for this lawsuit, would never have been cross referenced on the internet.

iii. The Operation of a Passive Website Incapable of Generating Online Orders Does Not Support Jurisdiction in this District

Plaintiff again accuses Defendants of misleading the Court via Defendants' statement that Defendants do not have online ordering. The truth is that Defendants *do not* have online ordering. COCOVAA® LLC does not have an interactive eCommerce store for products which allows customers to select products, order them, and have them shipped. In *ALS Scan, Inc. v. Digital Services Consultants, Inc*. 293 F.3d 707, 713-714 (4th Cir. 2002), the Fourth Circuit established the test for determining whether a forum can exercise specific jurisdiction over a non-resident defendant based on the defendant's internet contacts with the forum. The Fourth Circuit adopted the "sliding scale" model established in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*., 952 F. Supp. 1119 (W.D. Pa. 1997), which looks to the nature and quality of defendant's internet activity to determine whether personal jurisdiction exists:

> 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.*

Id. (quoting *Zippo,* 952 F. Supp. at 1124) (emphasis added). Defendant COCOVAA'S® site clearly "does little more than make information available to those who are interested in it[, and] is not grounds for the exercise [of] personal jurisdiction."

The Fourth Circuit has adopted and adapted that sliding scale approach. As a result, a state can exercise personal jurisdiction over a non-resident defendant when the defendant "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." *Id*. Plaintiff has failed to establish personal jurisdiction over Defendants under the *ALS Scan* test. Defendants have never directed electronic activity into Virginia, with the manifest intent to do business with Virginia residents, because it never set up an interactive e-commerce website accessible to Virginia residents, and used that website to fulfill Virginia customers' internet purchases. Plaintiff has not pointed to one single occasion where Defendants consummated a purchase of its products through its website with anyone in Virginia (or anywhere else). Plaintiff cannot do so because Defendants' website cannot do so: it does not accommodate online ordering, and customers must contact Defendants via phone or email to make purchases.

Defendants' website does offer enrollment in an "Intensive Chocolate Workshop," a day-long held in Defendants' "nano-factory" in Madison, Wisconsin. The location, length, and nature of the class are clearly such that only those in proximity to Madison would (and should) attend, as the resources involved for further travel would likely lead to attendee dissatisfaction. In fact, Defendants received an inquiry via their business Facebook page where someone in Virginia – which, again, Defendants suspects to be an agent of Plaintiff -- expressed interest in enrolling in the class. Defendant Edari turned her away and referred her to Valrhona's school in New York, explaining that the classes were for her local community. (Exhibit 1, attached).

To this day, defendants have not conducted electronic commerce with Virginia residents and therefore have not purposefully availed themselves of conducting business in Virginia. See *Zippo*, 952 F. Supp. at 1125-26 ("[The] conducting of electronic commerce with [forum] residents constitutes the purposeful availment of doing business in [the forum]"). Plaintiff's allegations do not show that Defendants purposefully directed their activities toward Virginia or "established regularly recurring and ongoing interactions" with Plaintiff in Virginia. *Perdue Foods v. BRF S.A.*, 814 F.3d 185, 191 (4th Cir. 2016) (concluding that personal jurisdiction did not exist where a contract did "not establish a series of continuing contacts between" the parties in the forum state and the contract did not "promise frequent interactions" between the parties).

Were Defendants' website to be regarded as transacting business with Virginia, then it can equally be considered as transacting business with every state – indeed, with every country in the world wherein others can access Defendants' website. Such a finding would lead to absurd results.

III. An Exercise of Personal Jurisdiction Would be Unreasonable and Contrary to Concepts of Fair Play and Substantial Justice

Exercising personal jurisdiction over Defendants is constitutionally unreasonable. Plaintiff has not shown that (i) Defendants "purposefully availed themselves of the privilege of conducting activities in the forum state," (ii) that plaintiff's claims "arise out" of any sales to or in the forum state, and (iii) that the exercise of personal jurisdiction is constitutionally reasonable. *Universal Leather*, 773 F.3d at 559 (internal quotation marks omitted). As a result, Plaintiff has failed to establish a prima facie case of personal jurisdiction over Defendants.

The disproportional burden of conducting remote litigation in Virginia also weighs against the exercise of jurisdiction. Apart from the cost of being required to travel to Virginia, Defendants

will be hampered by the limited legal resources available. Contrary to Plaintiff's assumptions, Defendants have been receiving *pro bono* assistance in this matter, and it is uncertain how long these arrangements will last. Most law firms and attorneys contacted by Defendants have stated that they have no interest in *pro bono* litigation in a remote forum, by a remotely-located defendant, whereas local litigation would at least merit consideration. These burdens placed on the Defendants in Virginia should be given significant weight in assessing the reasonableness of enforcing jurisdiction over Defendants.

Moreover, Virginia has no interest in adjudicating a case against a small Wisconsin chocolate company, and against its sole owner and employee, when the alleged wrongful conduct and injury is purely speculative. Plaintiff has yet to allege even one instance of actual confusion. Allowing this action to go forward in a Virginia court will not advance any social policies; to the contrary, it would violate concepts of fair play and substantial justice.

Plaintiff makes much of Defendants' characterization of Plaintiff as a "trademark bully." This term was brought to Defendants' and their counsel's attention by several experienced trademark attorneys, including Attorney Craig Fieschko, who responded to the cease and desist letter sent by Mars Inc. The term "trademark bully" is typically applied to a plaintiff who has disproportionately large resources in relation to the defendant, and who engages in trademark enforcement activities where there is no true likelihood of confusion or other cognizable harm. Rather, the trademark bully typically wishes to sweep any similar marks from the market, even where such uses are entirely legal, in an attempt to build the uniqueness / distinctiveness of the bully's mark – not by building consumer recognition via quality and marketing. In effect, the trademark bully uses its disproportionate resources, and the legal system, to its commercial

advantage despite the lack of merits of its case. From counsel's research and discussions with experienced trademark lawyers, Plaintiff does indeed seem to be engaged in bullying behavior. A brief chronology of Plaintiff's conduct and strategy in this case highlight this:

- Plaintiff sends Defendants a "cease and desist" letter on September 9, 2016;
- Attorney Fieschko responded to Plaintiff's September 9, 2016 cease-and-desist letter – its sole pre-lawsuit contact with Defendants – on September 13, 2016 via email (provided as Exhibit C to Plaintiff's complaint), politely explaining why there was no likelihood of confusion, and inviting Plaintiff's counsel to "call or otherwise contact [him] if this matter would benefit from discussion." Plaintiff never replied;
- The COCOVAA mark was published for opposition, pursuant to 15 U.S.C. § 1063, in late December 2016. Plaintiff failed to file an opposition with the United States Patent and Trademark Office (USPTO) by the January 26, 2017 deadline for doing so. (The fact that Plaintiff hired an investigator to manufacture jurisdiction in Virginia even before the COCOVAA mark was published for opposition illustrates that Plaintiff deliberately missed the opposition deadline so that it could take the much more costly route of suing Defendants in federal court in an attempt to essentially "steamroll" Defendants);
- The COCOVAA mark proceeded to registration. During the registration process, the USPTO at no time indicated that it believed that COCOVAA was confusingly similar to COCOAVIA, despite its examination of Defendants' application for confusing similarity with prior marks, pursuant to 15 U.S.C. §§ 1062(a) and 1052(d);
- Nearly three months after Defendants' COCOVAA mark was registered by the USPTO, Plaintiff filed suit in the Eastern District of Virginia, a forum where Defendants have no business whatsoever;

- Syovata Edari discovered the filing of the suit after being contacted by a reporter from IPWorld for a statement. Defendants were shocked and before being served, tried to reach out to Plaintiff's counsel to seek resolution - to no avail. (Pursuant to Rule 408, Defendant will not disclose those communications at this time unless the Court requests);

- Five days after filing suit, Plaintiff filed a totally redundant action in the USPTO to cancel Defendants' registration pursuant to 15 U.S.C. § 1064 – despite the fact that Plaintiff's Complaint already sought the very same remedy from this Court (see Complaint, Fourth Cause of Action, ¶¶ 73-77).

The litigation strategy of Plaintiff demonstrates an intention to overwhelm Defendants with its vastly superior resources. Defendants have sought *pro bono* assistance from practitioners around the country, most of whom echo the characterization of Plaintiff as a trademark bully – but none wish to expend scarce resources on litigating *pro bono* in a remote venue against one of the country's richest privately-held companies.

In summary, though Plaintiff's Opposition goes to great lengths to try to paint itself as other than a trademark bully, Defendants stand by their belief that Plaintiff is indeed that. While Plaintiff complains about statements and actions made about them in connection with this lawsuit (many of which were made and published by third parties without Defendants' knowledge), any impact they have (and Plaintiff alleges none), pales in comparison to the impact of Plaintiff's needlessly aggressive litigation tactics on Defendants' business and defendant Edari's life overall.

IV. Transfer is Appropriate

Transfer is appropriate as an alternative to dismissal and is in the interests of justice. Plaintiff Mars Inc.is owned by the Mars family, which Forbes Magazine ranks as the third richest

in America (as of 2016) with a net worth of $78B (https:// www.forbes.com/ sites/ kerryadolan/ 2016/ 06/ 29/ billion-dollar-clans-americas-25-richest-families-2016/ #552863cf32f5). Mars Inc. has $35B in sales, 80,000 employees, and operates in 78 countries (http://www.mars.com/global/about-us). It has engaged the assistance of at least five attorneys in four states to litigate this matter against Defendants.

The reality is that there is no way that either Defendant COCOVAA®, a startup artisanal chocolate company with extremely limited resources, or Defendant Edari, a solo criminal defense practitioner who is serving as counsel for Defendants, can realistically be expected to defend themselves against an entity with immense resources, especially if this matter remains venued in Virginia – where, again, Defendants have no business whatsoever.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Complaint for lack of personal jurisdiction over Defendants, or, in the alternative, transfer this case to the Western District of Wisconsin.

Dated: June 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served on June 12, 2017 with a copy of this document via the Court's CM/ECF system. Any other counsel will be served electronic mail, facsimile, overnight delivery and/or First Class Mail on this date.

Dated: June 12, 2017

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