UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PARK WEST GALLERIES, INC.,
a Michigan corporation,

Plaintiff,

CASE NO.2:08-CV-12247
HON. LAWRENCE P. ZATKOFF
MAG. VIRGINIA M. MORGAN

v

FINE ART REGISTRY, an Internet site based out of Arizona, **BRUCE HOCHMAN**, a California resident, and **THERESA FRANKS**, an Arizona resident,

Defendants.

and consolidated case

PARK WEST GALLERIES, INC.,
A Michigan corporation,

Plaintiff,

CASE NO. 2:08-CV-12274

v.

DAVID CHARLES PHILLIPS,
A Washington resident,

Defendant.

DEFENDANTS FINE ART REGISTRY AND THERESA FRANKS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND/OR FOR IMPROPER VENUE PURSUANT TO FED. R. CIV. P. 12(b)(2) AND (b)(3) , OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE PURSUANT TO 28 U.S.C. § 1406

NOW COME Defendants Fine Art Registry and Theresa Franks, by and through their attorneys, KAUFMAN, PAYTON & CHAPA, and for their Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue, Pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(3) state,

1. Movants/Defendants request that the forgoing case against Defendants Fine Art Registry and Theresa Franks be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(3) for the reason that Michigan and this Honorable Court do not have any personal jurisdiction over these Arizona Defendants and because venue is improper.

2. Defendant Theresa Franks is an Arizona resident with no contacts to the state of Michigan and Defendant Fine Art Registry is an Arizona corporation with no contacts to the state of Michigan. (Exhibit A, Affidavit of Franks)

3. Movants/Defendants rely on the attached brief to support their contention that this case should be dismissed for lack of personal jurisdiction and because venue is improper.

4. According to Fed. R. Civ. P. 12(b)(2) and (b)(3) dismissal is appropriate if this court lacks jurisdiction over the person and if venue is improper.

5. In the alternative, these Defendants request that this Honorable Court transfer this case from the state of Michigan to the U.S. District Court in the state of Arizona, where venue and personal jurisdiction over these Arizona Defendants may be proper, and where venue is more convenient for the parties and the witnesses, or Florida, where a similar action is presently pending against the same Defendants involving a subsidiary of Plaintiff..

WHEREFORE, Defendants Fine Art Registry and Theresa Franks, respectfully request that this Honorable Court grant their Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue Pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(3), or, in the alternative, transfer this matter to federal court in Arizona and/or Florida.

Respectfully Submitted

KAUFMAN, PAYTON & CHAPA, P.C.

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Date: January 13, 2009

I hereby certify that on January 13, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Rodger D. Young, and Ian C. Simpson.

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Plaintiff,

v.

DAVID CHARLES PHILLIPS,
A Washington resident,

Defendant.

CASE NO. 2:08-CV-12274

DEFENDANTS FINE ART REGISTRY AND THERESA FRANKS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND/OR FOR IMPROPER VENUE PURSUANT TO FED. R. CIV. P. 12(b)(2) AND (b)(3) , OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE PURSUANT TO 28 U.S.C. § 1406

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Does Michigan's long-arm statute confer personal jurisdiction over these Arizona Defendants?

2. Whether Due Process permits the exercise of personal jurisdiction over Defendants?

3. Whether venue is proper in this forum under 28 U.S.C. § 1391(a)(1)?

4. Whether this case should be transferred to Arizona pursuant to 28 U.S.C. § 1391(a)(1), even if venue in this District is proper?

CONTROLLING AUTHORITY FOR RELIEF SOUGHT

ISSUE NO. 1:

M.C.L. § 600.705 (individual Defendant) and MCL §600.715 (corporation Defendant)

ISSUE NO. 2:

Neogen Corp. v. New Gen Screening, Inc., 282 F.3d 883, 888-890 (6th Cir. 2002)

ISSUE NO. 3:

28 U.S.C. § 1391(a) and *Lomanno v. Black*, 285 F. Supp. 2d 637, 642 (E.D. Pa. 2003)

ISSUE NO. 4:

28 U.S.C. § 1406(a)

BREIF IN SUPPORT OF DEFENDANTS' MOTION

I. BACKGROUND

This lawsuit arises out of a complaint filed on July 11, 2008, in Oakland County Circuit Court by Plaintiff Park West Galleries, Inc., alleging that Defendants, Fine Art Registry (sometimes herein referred to as "FAR") and Theresa Franks, committed: (1) defamation; (2) tortuous interference; (3) interference with prospective business advantage; and (4) civil conspiracy against Plaintiff Park West Galleries, Inc. (Exhibit B, Plaintiff's Complaint) Co-Defendant Bruce Hochman filed a Notice of Removal with this Court on May 22, 2008.

Fine Art Registry is a limited liability company located in the state of Arizona, which operates a website that disseminates information pertaining to art and art purchases throughout the country. (Exhibit A, Affidavit of Franks). Fine Art Registry is devoted, in part, to preventing forgery and fakery in the art world. In that capacity, it writes articles and raises awareness about problems in the art world. These articles are available for everyone to see, and no monies have to be paid to access these articles. (Exhibit A).

In addition, Fine Art Registry allows artists and art owners to subscribe to the Registry, which costs approximately $10.00 per year. (Exhibit A). Members can then purchase tags for their artwork, at a cost of $2.25 each, which helps register the artwork to prevent fraud, reproduction, and related problems. Fine Art Registry has approximately 1,500 members, with only a handful of those members residing in Michigan.[1]

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[1] Of the over 1,500 members, less than 2% have listed Michigan as their state of residence. (Exhibit A).

Theresa Franks[2], an Arizona resident, is a principal of Fine Arts Registry, an Arizona limited liability company. (Exhibit A). Plaintiff's allegations against FAR and Franks can be summarized as follows: (1) these Defendants published articles critical of Plaintiff on the FAR website; and (2) these Defendants have "sought out customers of Park West and repeated their defamatory statements to them." (Exhibit B, Plaintiff's Complaint).

While these Defendants insist that everything they have written or said about Plaintiff was entirely accurate; even taking the plaintiff's claim as true for purposes of this Motion only, these Defendants still cannot be subject to suit in the United States District Court for the Eastern District of Michigan, Southern Division, because this Honorable Court lacks personal jurisdiction over these Defendants and because venue is improper. At the least, this matter should be transferred to federal court in the state of Arizona or to a federal court in the State of Florida, where a similar suit between the same parties, and/or their privies, is presently pending.

II. ANALYSIS

A. *STANDARD OF REVIEW FOR PERSONAL JURISDICTION*

Without jurisdiction, the court cannot proceed at all in any cause. *Ex parte McCardle,* 74 U.S. 506, 514 (1869). Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them. *Ruhrgas Ag v Marathon Oil Co.*, 526 U.S. 574 (1999). Since subject matter jurisdiction in this case is based solely on diversity, this Court must apply the law of the state Michigan, subject to constitutional limitations, to determine

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[2] Ms. Franks is an individual, and is personally not responsible for the actions of Fine Art Registry. All her actions, as complained of by Plaintiff, were done in her capacity as principal of Fine Art Registry. Accordingly, Franks has been improperly named as a defendant in this action.

whether it also has personal jurisdiction over these Defendants. *Reynolds v Int'l Amateur Athletic Fed'n*, 23 F3d 1110, 115 (6th Circuit 1994). Plaintiff bears the burden to establish the existence of personal jurisdiction over defendant. *Serras v. First Tennessee Bank Nat'l. Ass'n.*, 875 F.2d 1212, 1214 (6th Cir. 1989).

It is well settled that this Court's exercise of personal jurisdiction must be both (1) authorized by Michigan law under the long-arm statute and (2) in accordance with the Due Process Clause of the Fourteenth amendment. *Neogen v Neo Gen Screening,* 282 F3d 883, 888 (6th Cir. 2002). In determining whether it may exercise personal jurisdiction over defendant, the court ". . . must engage in a two-step process: (1) first, the court must determine whether any of Michigan's relevant long-arm statutes authorize the exercise of jurisdiction over Defendants; and, if so, (2) the court must determine whether exercise of that jurisdiction comports with constitutional due process." *Air Products and Controls, Inc., v. Safetech International, Inc.*, 503 F.3d 544, 550 (6th Cir. 2007).

It is this Court's duty, in other words, to determine whether Michigan would intend its long-arm statute to reach these Arizona Defendants. *Rann v W P McInnis, M.D.*, 789 F2d 374 (6th Circuit 1986). Michigan law permits the exercise of both limited jurisdiction over individuals (MCLA §600.705) and limited personal jurisdiction over corporations (MCLA §600.715). It is the Defendants' position that none of the relationships permitting jurisdiction exist over these Arizona Defendants. It is also Defendants' position that, even were the imposition of personal jurisdiction proper under any Michigan long-arm statute, any exercise of such personal jurisdiction over these Defendants would violate due process.

B. ***APPLICATION OF THE PERSONAL JURSIDICTION STANDARDS TO THE FACTS OF THIS CASE***

1. Michigan's Long-Arm Statute Does Not Confer Personal Jurisdiction Over These Arizona Defendants

There are two long-arm statutes governing the exercise of personal jurisdiction over corporations in Michigan courts. M.C.L. § 600.711 allows for the exercise of ***general*** personal jurisdiction over a corporation where a corporation: (1) is incorporated in the State Michigan; (2) consents in writing to the waiver of any defects of lack of personal jurisdiction; or (3) carries on a continuous and systematic part of its general business in the State of Michigan.[3] M.C.L. § 600.715 permits the exercise of ***limited*** personal jurisdiction where the following relationships give rise to the cause of action:

(1) The transaction of any business within the state.

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

(3) The ownership, use, or possession of any real or tangible personal property situated within the state.

(4) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

Michigan law similarly provides two long-arm statutes governing the exercise of personal jurisdiction over individuals. Under M.C.L. § 600.701, Michigan courts may exercise ***general***

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[3] "The exercise of general jurisdiction is possible when a defendant's contacts with the forum state are of such nature and quality as to enable a court to adjudicate an action against the defendant, even when the claim at issue does not arise out of the contacts with the forum. When a defendant's contacts with the forum state are insufficient to confer general jurisdiction, jurisdiction may be based on the defendant's specific acts or contacts with the forum." *Electrolines, Inc. v. Prudential Assur. Co.*, 260 Mich. App. 144, 166, 677 N.W.2d 874 (2003).

personal jurisdiction over an individual where the person resides in the State, is served with process in the State, or has provided consent to being sued in the State. M.C.L. § 600.705 permits the exercise of ***limited*** personal jurisdiction where the following relationships give rise to the cause of action:

> (1) The transaction of any business within the state.
>
> (2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.
>
> (3) The ownership, use, or possession of real or tangible personal property situated within the state.
>
> (4) Contracting to insure a person, property, or risk located within this state at the time of contracting.
>
> (5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.
>
> (6) Acting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within this state.
>
> (7) Maintaining a domicile in this state while subject to a marital or family relationship which is the basis of the claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody.

Here, it is undisputed that there is no evidence warranting the exercise of general personal jurisdiction over either of the Arizona Defendants. Moreover, as analyzed *infra*, there is insufficient evidence to warrant the exercise of limited personal jurisdiction over either of those Defendants. Fine Art Registry is an Arizona limited liability corporation (LLC), and its principal and only place of business is in Arizona. (Exhibit A). Theresa Franks is a resident of Arizona. (Exhibit A). Defendants maintain that they have no connection with the state of Michigan that would justify it having to litigate this lawsuit in Michigan. Defendants' only

contact with Michigan is that it operates a website in Arizona that can be viewed by citizens in the state of Michigan. Accordingly, Plaintiff cannot establish even limited jurisdiction.

a. *MCLA §600.715 does not Confer Personal Jurisdiction over Defendant Fine Art Registry*

Of the five different relationships contemplated by Michigan's long-arm statute for the exercise of limited personal jurisdiction over corporations, it is anticipated that Plaintiff will argue that two provisions may be applied to FAR. The first basis concerns the alleged "transaction of business" in Michigan under M.C.L. § 600.715(1). The second basis focuses on FAR allegedly ". . . doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort" pursuant to M.C.L. § 600.715(2).

i. Limited Personal Jurisdiction over FAR Cannot be Premised Upon M.C.L. § 600.715(1)

For the purposes of determining whether personal jurisdiction may be exercised over a foreign corporation pursuant to M.C.L. § 600.715(1), the Michigan Court of Appeals has defined the concept of transacting business as follows:

> "Transact" is defined as "'to carry on or conduct (business, negotiations, etc.) to a conclusion or settlement.'" *Id.*, quoting *Random House Webster's College Dictionary* (1997). "Business" is defined as "'an occupation, profession, or trade . . . the purchase and sale of goods in an attempt to make a profit.'" *Id.*

Electrolines, Inc., *supra*, 260 Mich. App. at 168.

In addition to requiring that plaintiff establish that defendant "transacted business" within the state of Michigan, M.C.L. § 600.715 requires that the cause of action arise out of the business so transacted by defendant. *See*, *Electrolines* at 168-69. Under this requirement, there must be some nexus between the business transacted by Defendant in the State of Michigan and cause of action asserted by Plaintiff. *See*, *Electrolines*, *supra*, at 169. Judge Gadola, in assessing the

"arising out of" requirement of M.C.L. § 600.715(1), discussed and adopted the reasoning set forth in *Lanies v. American Bd. of Endodontics*, 843 F.2d 901, 908-09 (6th Cir. 1988).

> Two possible theories defining the "arising from" requirement were considered: one was whether the business transactions "made possible" the cause of action, and the other was whether the cause of action arose in the "wake" of the business transactions.

LaFarge Corp. v. Altech Environmental USA, 220 F. Supp.2d 823, 829 (E. D. Mich. 2002). Here, neither FAR's mere publication or dissemination of allegedly defamatory statements in Michigan nor FAR's reaching out to customers of Park West constitutes the transaction of business within the State of Michigan.

Even were one to assume, *arguendo*, that FAR transacted business in the State of Michigan, one cannot establish a link between any such business and Plaintiff's cause of action. Defendant FAR's only business transactions in Michigan consist of the selling of memberships and tags to those requesting such items. The selling of tags and memberships to Michigan residents did not make possible Plaintiff's lawsuit nor did the lawsuit arise in the wake of the selling of tags or memberships. This business is unrelated to the causes of action made in the Complaint, namely that articles were defamatory or that the alleged defamations were repeated. Accordingly, any so-called business transaction by Defendant FAR in Michigan is not related to the Plaintiff's cause of action for defamation, and personal jurisdiction does not exist.

ii. Limited Personal Jurisdiction over FAR Cannot be <u>Premised Upon M.C.L. § 600.715(2)</u>

The only other possible basis for the application of long-arm jurisdiction under Michigan law is that Defendant FAR's alleged defamation occurred in the state of Michigan. *See* MCLA §600.715(2). Under M.C.L. § 600.715(2), a Michigan court may exercise personal jurisdiction

over a non-resident defendant where plaintiff's cause of action arises out of ". . . the doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."

As stated above, the only thing done by FAR in Michigan is the sale of identification tags and memberships. Moreover, Plaintiff may not argue that the consequence of the alleged defamatory comments made by FAR on its website has caused Plaintiff's injury in Michigan, as a basis for limited personal jurisdiction. This precise argument was addressed and rejected in *Amburn v. Harold Forster Industries, Ltd.*, 423 F Supp 1302 (E.D. Mich, 1976). The court held:

> The interpretation which plaintiffs seek to place on this statute would subject anyone who has caused any resident of Michigan damage in any way or anywhere to be sued in Michigan. It would equate 'consequences' with 'damages.' Any Michigan citizen injured anywhere could sue in Michigan. It would substitute the plaintiffs' close contacts to the forum state for the due process requirements of the defendants' contacts. It would permit an injured plaintiff to forum shop -- to move to Michigan, or any forum where the case law was more favorable to the plaintiffs' position, in order to bring suit there.

The alleged defamatory actions taken by Defendant FAR did not take place in Michigan. All articles of which Plaintiff complains were published on FAR's Arizona website. Thus, no actions by FAR related to the alleged defamation have taken place in Michigan. M.C.L. § 600.715(2) simply does not give this Court personal jurisdiction over these Defendants solely because Plaintiff is a Michigan resident who was purportedly damaged by Defendants who are Arizona residents. Accordingly the case against Defendant FAR should be dismissed for lack of personal jurisdiction.

b. ***MCLA §600.715 does not Confer Personal Jurisdiction over Defendant Franks***

This Court similarly does not have personal jurisdiction over Defendant Franks. Of the seven different relationships contemplated by Michigan's long-arm statute for individuals, none

are applicable to Defendant Franks. Theresa Franks is not a Michigan resident. (Exhibit A) She is an Arizona resident. Even were FAR deemed to have transacted business in Michigan, Ms. Franks did not. Accordingly the case against Defendant Franks should be dismissed.

2. Due Process Does Not Permit the Exercise of Personal Jurisdiction <u>Over The Arizona Defendants</u>

If this Court determines that Plaintiff has met the minimum requirements under Michigan's long-arm statutes, it must then determine whether an assertion of jurisdiction over Defendants comports with the notions of fundamental fairness required by the Due Process Clause of the Fourteenth Amendment. Even where plaintiff can satisfy one of the relationships under Michigan's long-arm statute, this Court must determine if due process will permit the exercise of personal jurisdiction. *Neogen Corp,* 282 F3d at 883.

To satisfy due process, plaintiff must show that defendant has sufficient "minimum contacts" with the forum state such that the maintenance of a lawsuit there does not offend "traditional notions of fair play and substantial justice." *International Shoe Comp v Washington*, 326 US 310, 316; 66 S Ct 154, 158; 90 L Ed 95 (1954). Would it be foreseeable, in other words, for a defendant to believe that he could be sued in a foreign state based on his contact with that foreign state. *Id.* The foreseeability test of this analysis has been stated to be whether defendant's conduct and connection with the forum state are such that they should reasonably anticipate being haled into court there. *World Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 297; 100 S.Ct. 559, 567; 62 L.Ed. 2d 490 (1980).

The Sixth Circuit has distilled the due process requirements for personal jurisdiction into a three-part test:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Neogen, 282 F.3d at 888-890 (quoting *Southern Machine Co v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). To establish personal jurisdiction, Plaintiffs must satisfy all three parts of the test. *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1303 (6th Cir. 1989).

a. *Defendants Did Not Purposely Avail Themselves of the Privilege of Acting in the State of Michigan*

Simply releasing a product into the stream of commerce without purposefully directing it toward the forum state is insufficient to result in "purposeful availment" of the privilege of acting in the forum state. *Ashahi Metal Industry Co v Superior Court of California*, 480 US 102, 115 (1987). Here, FAR never reached out or targeted the State of Michigan, and never singled out Michigan for its public advocacy. On the contrary, most of Defendant FAR's articles, even those related to Plaintiff, discuss Plaintiff's activities in other states and out of the country. Similarly, as discussed above, Defendant FAR's business in Michigan is *de minimus*, and only comprises a tiny portion of its membership, which, as has been established, **is unrelated** to the causes of action alleged by Plaintiff. Simply maintaining a website is not enough to constitute purposeful availment. A defendant purposefully avails itself of the privilege of acting in a state through its website only if its website is interactive to a degree that reveals specifically intended interaction with residents of the state. *Neogen Corp*, 282 F3d at 890.

In *Paws with a Cause, Inc. v. Paws for a Cause*, LLC, 2005 U.S. Dist. LEXIS 8605 (W.D., Mich., May 11, 2005), the Court dismissed a trademark infringement action because the nonresident defendant's alleged contacts with Michigan were attenuated, holding that

maintenance of a passive internet website accessible to Michigan residents did not constitute purposeful availment of acting in the forum and exercising jurisdiction over defendant did not comport with due process. Similarly, in the instant case, the articles complained of by Plaintiff were on the passive part of the internet site that was accessible to anyone, but not directed at the forum state, and therefore is similar to the situation in *Paws*.

Likewise, Defendant Franks did not avail itself to the privileges of Michigan to allow her to be subject to personal jurisdiction here. Franks is an Arizona resident who has never been to Michigan. (Exhibit A) All her actions related to this case have been on behalf of FAR, in her capacity as CEO. In *Fakhoury Enterprises, Inc. v. J.T. Distributors*, 1994 U.S. Dist. LEXIS 7864 (E.D. Mich. Mar. 8, 1994)(Exhibit D), Plaintiff franchisee, a Michigan resident, brought an action against defendant, distributor, a New York Corporation, and its officer, a New York resident, alleging breach of contract, fraud, and misrepresentation in an agreement for the rights to distribute a product. The distributor's officer engaged in written correspondence and telephone conversations with the franchisee. In granting the distributor's officer's motion to dismiss for lack of personal jurisdiction, the Court held that the distributor's officer simply did not purposefully avail himself of the privileges of conducting business within the State of Michigan, such that he should reasonably anticipate being hauled into court there. For these reasons, this Court cannot exercise personal jurisdiction over these Defendants.

b. *The Claims did not arise from Defendant's activities in Michigan*

Defendant FAR operates a web site from the State of Arizona. It has no activities in Michigan, other than selling a couple memberships, and art tags which are wholly unrelated to the causes of action alleged by Plaintiff. Defendant Franks is a resident of Arizona who has

never been to Michigan in her life. Her actions therefore cannot have taken place in the State of Michigan. She is not responsible personally for the activities of FAR. For these reasons, the second prong of the Sixth-Circuit's test for personal jurisdiction also fails, and this case should be dismissed.

c. *The acts or consequences do not have a substantial connection with the forum state to make exercise of jurisdiction reasonable*

The actions of Defendant FAR or the alleged consequences of those actions have no connection with Michigan, and therefore exercise of jurisdiction in Michigan would be unreasonable. Defendant FAR posted articles on its website in Arizona, and none of its actions as complained of by Plaintiff have any connection, let alone a substantial connection with the State of Michigan.

In *Cadle Company v. Schlichtmann*, 123 Fed. Appx. 675 (6th Cir. 2005), the case revolved around a ten-year dispute between Plaintiff Cadle and Defendant Schlichtmann. One day Schlichtmann made a website called www.truthaboutcadle.com to inform others of what he believed were the unlawful activities of Cadle in Massachusetts. Ohio-based Cadle sued Defendant website owner, who was a Massachusetts resident, claiming defamation. The Sixth Circuit relied on *Reynolds v. Int'l Amateur Athlete Federation*, 23 F.3d 1110 (6th Cir. 1994) to affirm the dismissal of the case for lack of personal jurisdiction.

In *Reynolds*, the Court determined that there was no personal jurisdiction over an international sports organization when it published a press release about the plaintiff, an athlete residing in Ohio, and his failure of a drug test. The *Cadle* Court determined that since most of Defendant's website was related to Plaintiff's activities in Massachusetts, and not Ohio, and the

website was not directed specifically at Ohio residents, then personal jurisdiction was not present over Defendant.

Similarly, in this case, FAR's website and the articles complained of by Plaintiff, refer mainly to Plaintiff's actions outside of Michigan, and mostly outside of the country. Additionally, Defendant FAR's website is not specifically directed at Michigan residents or the State of Michigan. For the same reasons, this Court should determine that no personal jurisdiction exists over FAR.

In *Cadle*, the Court also made a point to write that "There is no allegation that Schlichtmann used this forum to make repeated online contacts with Ohio residents." Similarly, most or all of FAR's contacts have been with people outside of the State of Michigan, so there is no personal jurisdiction, and this case should be dismissed. For the above stated reasons, it would be violative of Due Process for this Court to subject Fine Art Registry or Theresa Franks to the jurisdiction of this Court. Therefore, this case should be dismissed for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(2).

In conclusion, Defendants lack the minimum contacts necessary to subject it to the personal jurisdiction of this Court, as envisioned in *International Shoe, supra.* In *McGill Tech. Ltd. v Gourmet Techs., Inc.* 2004 U.S. Dist. LEXIS 985 (U.S. Eastern Dist., S.D., January 27, 2004)(Exhibit C), the Court held that there was no personal jurisdiction when the Defendant company's only contact with the forum state was its website which generated a single sale, which was unrelated to the owner's alleged injury and represented a miniscule amount of the company's business.

In the instant case, FAR's only contact with Michigan is through its website. Fewer than 2% of FAR's members are Michigan residents. (Exhibit A). Similarly, as stated above, the Plaintiff's defamation complaint is not the result of someone purchasing a membership or tags. Additionally, FAR's website is not directed at Michigan, it is available to everyone, so it cannot be considered to have any contacts to Michigan. Website owners certainly do not "have 'fair warning that [the content of their respective sites] may subject [them] to the jurisdiction of a foreign sovereign.'" *Oasis Corporation v Dan A. Judd*, 132 F. Supp.2d 612 (U.S. Dist, Ohio 2001), citing *Burger King*, 471 U.S. at 472, quoting *Shaffer v Heitner*, 433 U.S. 186, 218 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). It would be unreasonable to expect Defendants to believe that they could be sued in every location where someone has access to the Internet. This Court, therefore, lacks personal jurisdiction over Defendants.

C. *VENUE IS IMPROPER IN THIS FORUM*

Even if Plaintiff satisfies the requirements of personal jurisdiction over these Arizona Defendants, dismissal is still appropriate because venue in Michigan is improper. Under the federal statute governing venue in diversity cases, a lawsuit may be litigated 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 is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. 1391(a). At least one court has held that 28 U.S.C. § 1391(a)(1) controls venue where all defendants reside in the same state.

> Viewed in the proper historical context, § 1391(a), like § 1391(b), provides that in a case in which all defendants reside in the same state, venue lies only in that state, and, specifically, only in a district within that state in which one of the defendants resides. If,

> and only if, defendants do not all reside in the same state, then, and only then, venue lies in a district in which a substantial part of the events or omissions giving rise to the claim occurred."

Dashman v. Peter Letterese & Assocs., 999 F. Supp. 553, 554 (S.D. N.Y. 1998).

Plaintiff bears the burden of establishing that venue is proper. *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). In meeting this burden, Plaintiff may not rely solely on a claim of economic harm in a particular venue to support the propriety of venue in that jurisdiction under 28 U.S.C. § 1391(a)(2).[4] Here, Plaintiff alleges only that the defamatory statements by Defendant ". . . were made with the full knowledge of defendant of the effect such statements would have on the business reputation of Michigan based Park West." (¶ 11 of Complaint, Exhibit B). The only other possible Michigan action to which Plaintiff refers is FAR's acceptance of payment of membership fees from Michigan residents (¶ 9 of Complaint, Exhibit B). These allegations do not support venue in Michigan.

Again the only contact that these Arizona Defendants have with the state of Michigan are the registration of some Michigan residents to Defendants' services. However, the registration of Michigan members is absolutely irrelevant to the defamation and tortious interference claims against Defendant. Those actions, in other words, are not the "events or omissions giving rise to the claim." 28 USC § 1391 (9) (2) Finally, the only allegation of any Michigan connection

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4 *Lomanno v. Black*, 285 F. Supp. 2d 637, 642 (E.D. Pa. 2003)("venue will not be proper in a district for a defamation claim if injury is the only event occurring in that district"); *Loeb v. Bank of Am.*, 254 F. Supp. 2d 581, 587 (E.D. Pa. 2003). In *Lomanno*, the court held that venue was not proper regarding tort claims against co-workers because all of the events giving rise to those claims occurred in the district where the co-workers lived and worked. The test for determining venue is not a defendant's contact with a district, but rather the location of those events giving rise to the claim. Here, all such events occurred in Arizona.

relates solely to the harm allegedly caused by Arizona Defendants. This allegation of harm in the forum state cannot, of itself, satisfy the dictates of 28 U.S.C. § 1391(a)(2). *Lommano, supra.* As such, venue is improper in the State of Michigan, and this lawsuit should be dismissed pursuant to Fed R. Civ. P. 12 (b) (3).

D. *EVEN WERE VENUE PROPER IN THIS DISTRICT, THIS CASE SHOULD BE TRANSFERRED TO ARIZONA UNDER 28 U.S.C. § 1404,*

Even were venue in the eastern District of Michigan proper, or if this Court is not inclined to dismiss the lawsuit for improper venue or lack of personal jurisdiction, Defendants respectfully suggest that the lawsuit should be transferred to the state of Arizona. Under 28 U.S.C. §1406(a):

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Under 28 U.S. C. § 1404(a) the Court may transfer a civil action for the convenience of the parties and the witnesses.

To transfer an action under section 1404(a) the following criteria must be met: (1) the action could have been brought in the transferee district court; (2) a transfer serves the interest of justice; and (3) transfer is in the convenience of the witnesses and parties. *International Show Car Ass'n v. ASCAP,* 806 F. Supp. 1308, 1310; *In re Crash Disaster at Detroit Metropolitan Airport,* 737 F. Supp. 391, 393 (E.D. Mich. 1989). In deciding a section 1404(a) motion, the court must consider the following factors: (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the

practical problems associated with trying the case most expeditiously and inexpensively; and (7) the interest of justice. *ASCAP,* 806 F. Supp. at 1310.

The present situation meets the three criteria necessary to transfer an action under Section 1404(a). First, this action could have been brought U.S. District Court for Arizona as Defendant FAR is an Arizona corporation and Defendant Franks is an Arizona resident. Moreover, all actions taken by Defendants that Plaintiff finds objectionable took place in the State of Arizona, not Michigan.

Second, a transfer would serve the interest of justice. Defendants are residents of the State of Arizona who live thousands of miles away from the U.S. District Court for the Eastern District of Michigan. All articles related to this case were published in the State of Arizona, and all potentially discoverable information related to Defendants' written statements are located in the State of Arizona, or elsewhere, but not in the State of Michigan. Defendants would incur an enormous cost both monetarily, and in time spent, should they be forced to face trial in the State of Michigan. Additionally, Defendant's ability to assist in his defense would be seriously hampered if venue is not transferred because she would have to confer with her attorneys over long distance telephone calls as opposed to in person. Therefore, in order to avoid bankrupting Defendants and to allow them a fair opportunity to defend themselves against the false charges made by Plaintiff, it is clearly in the interest of justice to transfer this case to the U.S. District Court for Arizona.

Third, transfer of the lawsuit would convenience the witnesses and parties. Since Defendant Franks resides in Arizona, it would be much more convenient for her to face trial in the State of Arizona. Although plaintiffs' choice of forum should be granted some deference, "it

is undisputed that 'courts will not blindly prefer the plaintiff's choice of forum'" over a more convenient location. *Danuloff v. Color Ctr.*, No. 93-73478, 1993 U.S. Dist. LEXIS 18783 (E.D. Mich. Nov. 22, 1993) (citing *Waste Distillation Tech., Inc. v. Pan American Resources,* 775 F. Supp. 759, 764 (D. Del. 1991). Plaintiff is a huge company that does most of its business outside of the State of Michigan. Plaintiff will not be inconvenienced, or will be inconvenienced to a much lesser extent than Defendants would be if they are forced to face trial in Michigan.

As stated in *ASCAP*, *Supra*, this Court should also consider the following factors relevant, and supporting transfer in this case: (1) Defendants would be immensely inconvenienced if the case is not transferred; (2) most of the witnesses in this case live on the Western side of the country, and the U.S. District Court for Arizona will be much more convenient than the federal court in Michigan; (3) the sources of proof, namely the writings of Defendant, and documentation supporting his claims are all in the State of Arizona or on the Western side of the United States; (4) witnesses, most of which are not living in Michigan and which live on the western side of the United States, are going to be difficult to hail into court in Michigan; (5) the cost of getting witnesses from the western side of the country to Michigan for depositions and/or court proceedings will be astronomical; (6) it is much more practical to hold the case in the State of Arizona than in Michigan because of Arizona's closer proximity to witnesses, discovery documents, and for Defendants to mount a fair defense; and (7) the interest of justice, as stated above, are best served by transferring this case.

Case law from the Eastern District of Michigan, Southern Division, supports transfer of cases in similar situations. In *Kepler v. ITT Sheraton Corp.*, 860 F. Supp. 393 (E.D. Mich 1994), Plaintiffs, Michigan residents, sought recovery of damages for injuries sustained by an electric

shock in a Florida hot tub allegedly caused by the negligence of the hotel. The hotels moved for change of venue under 28 U.S.C. § 1404(a) for the convenience of the parties and in the interest of justice. The court granted the § 1404(a) motion for a change of venue and transferred the matter to the requested federal court. The Court held that the requested jurisdiction would be easier, more expeditious, and inexpensive.

Similarly, in our case, it would be easier, more expeditious and inexpensive to transfer the case to Arizona, since Defendants reside there, all actions they took relevant to this case were in Arizona, all or most of the relevant discovery is in the State of Arizona, and most of the witnesses are in the State of Arizona or on the Western side of the United States.

In *Haidar v. Dayton Hudson Corp.*, 1996 U.S. Dist. LEXIS 18870 (E.D. Mich, 1996), Plaintiff was injured when he slipped on ice in one of defendant's Indiana store's parking lots. Plaintiff filed suit in Michigan. Defendant's principal place of business was in Minnesota. Defendant moved pursuant to 28 U.S.C. § 1404(a) to change venue to either Indiana or Minnesota. The court granted the motion for the convenience of the witnesses and parties, many of which lived outside of the State of Michigan. Similarly, many essential witnesses in the present case live in Arizona or on the Western half of the United States. Therefore, Defendants request to transfer venue to U.S. District Court for Arizona pursuant to 28 U.S.C. § 1404(a) should be granted.

VII. CONCLUSION

Defendants Fine Art Registry and Theresa Franks should not be subjected to suit in Michigan because this Court lacks personal jurisdiction over these Defendants and because this is not a proper venue for the matter. At the least, this matter should be transferred to Arizona.

For the above stated reasons, Defendant respectfully requests that this Honorable Court dismiss this case for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(2) and/or for venue improperly lain under Fed. R. Civ. P. 12(b)(3). If dismissal is deemed inappropriate, then Defendants request that this Court transfer this matter to Arizona as provided under 28 U.S.C. §§ 1404 and 1406.

Respectfully Submitted

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Date: January 13, 2009

I hereby certify that on January 13, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Rodger D. Young, and Ian C. Simpson.

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