

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

MARS, INCORPORATED,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:17-cv-346 (LO/JFA)
)	
COCOAAA, LLC, <i>et al.</i> ,)	
)	
Defendants.)	
)	

PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS OR TRANSFER VENUE

Plaintiff Mars, Incorporated (“Mars” or “Plaintiff”), by counsel and pursuant to Local Civil Rule 7.1, hereby opposes Defendants’ “Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, to Transfer Venue Pursuant to 28 U.S.C. § 1404(a)” (“Motion”). This case was brought in the jurisdiction where Mars is headquartered, and into which Defendants sold and shipped products bearing the infringing COCOAAA mark. Jurisdiction is proper here. The legal test for transfer is not met. Accordingly, Defendants’ motion should be denied.

FACTUAL BACKGROUND

As Defendants’ “Memorandum of Law in Support” of their Motion (“Memorandum” or “Memo”) acknowledges, Plaintiff Mars is a corporation with its principal place of business in McLean, Virginia. Complaint ¶ 2; *see* Memo at 2. The trademark that Defendants are infringing is owned by Plaintiff Mars. Complaint ¶¶ 18-19, Ex. A. Mars Symbioscience is not a “subsidiary” or distinct legal entity, but merely a business segment of Mars. *See* Complaint ¶¶ 9-10. Discussion of any other locations in which Mars might have operations or conducts business does not change the fact that Plaintiff is located in Virginia, in this judicial district.

Defendant CocoVaa LLC is a Wisconsin corporation with its headquarters and operations in Wisconsin. Complaint ¶¶ 3-4, Declaration of Syovata K. Edari attached to Defendants' Memorandum ("Edari Decl.") ¶ 3. Defendants make a number of incorrect or misleading statements in their Memo in their attempt to minimize their contacts with Virginia. For example, they state that they do "not target Virginia with any advertising or marketing," including on their web site. Memo at 3. This assertion misses the mark. Defendants' web site does not limit itself geographically. It targets everywhere equally, including Virginia. Moreover, Defendant Edari has told customers that she ships orders nationwide and has shipped orders to Virginia. Dec. of Thomas Wagner, ¶ 4. Defendants have sought to expand their business nationwide through online or phone sales. *See* screenshot from Defendants' web site at www.cocovaa.com, dated December 2, 2016, attached herein as Exhibit A (asking potential customers to "check back in mid-November for Online ordering"); screenshot from Defendants' web site at www.cocovaa.com, dated February 15, 2017, attached herein as Exhibit B (asking potential customers to "call to order" and stating "Online ordering coming in Spring 2017").

Similarly, Defendants assert that "it is not possible to purchase" infringing products through the web site. This assertion is misleading. The web site facilitates the orders, including electronic orders. It states, "[t]o order, call us or email us ..." and includes a phone number, an e-mail address, and a form through which emails can be submitted. *See* Exhibit C. Defendant Edari confirmed this in person. Wagner Decl. ¶ 4 ("orders were taken by telephone and email").

Indeed, Defendants admit that they make sales to "various parts of the country." Memo at 3; *see also* Wagner Decl. ¶ 3. Interestingly and tellingly, in response to an email serving Mars' Petition for Cancellation of Defendants' COCOVAA mark in the Trademark Trial and Appeal Board, Defendant Edari suggested counsel for Mars—a law firm with 30 offices

nationwide, none of which are in the State of Wisconsin—consider buying Defendants chocolates for holiday gifting.

Contrary to the assertions in their Memo, Defendants have made sales for products to be shipped to Virginia. Plaintiffs are aware of at least two shipments by Defendants into Virginia. Wagner Decl. ¶¶ 5-6. Both of those sales were initiated by email to the address advertised on Defendants’ web site. *Id.* Further, Plaintiff has found a social media post by Defendants—an Instagram post with a photo of Defendant Edari being served with the Complaint and Summons in this case—where Defendants solicit business from a Virginia resident by telling him to contact her by phone to place an order to be shipped to Virginia. *See* screenshot from Defendants’ Instagram page, attached herein as Exhibit D. As no discovery has yet occurred, it is not known what other sales Defendants made into Virginia, or what proportion of their total sales are into Virginia, or what other contacts they have with Virginia.¹ Defendant Edari’s statement in her Declaration that “the only way to get my confections is either at my shop on Saturdays, by appointment, or through my consumer referral networks” thus is demonstrably incorrect.

Defendant Edari’s statements about the difficulty of her litigating in Virginia also cannot be accepted. She advertises that she trained at Valrhona, in L’Hermitage France. *See* screenshot from Defendants’ web site at www.cocovaa.com, dated May 25, 2017, attached herein as Exhibit E (“[h]er fascination with chocolate took her to L’Hermitage, France where she was trained at Valrhona”). Defendants requested an extension of time to respond to the complaint in this case (to which Plaintiff agreed) because Ms. Edari was traveling to Italy for two weeks to attend a chocolate making course. Her ability to manage her business and law practice in order to be able

¹ If there is any doubt about jurisdiction and the extent of contacts with Virginia or efforts to market nationwide, including Virginia, and beyond, the Court may also allow discovery on these issues.

to make these lengthy trips abroad refutes the notion that she cannot make the few brief trips that might be required by litigating in Virginia.

Defendants ignore, and do not dispute that Defendant Edari originally launched her chocolate business under a different name: “Gilded Artisan Chocolates.” Complaint ¶ 33. She operated under that name for over a year. Complaint ¶¶ 33, 34. Only then did she change her name to something confusingly similar to Mars’ trademark. Promptly after learning of that change, and only a few months after Defendant Edari began using the infringing name, Mars asked Defendant Edari to cease and desist from using the new name. Complaint, Ex. B. Rather than Defendant Edari responding directly to Mars herself, Mars received a response on her behalf from a trademark attorney at a large firm recognized as the “‘Best Law Firm’ in Wisconsin.” Complaint, Ex. C; *see* <http://www.dewittross.com/our-law-firm-madison-milwaukee-minneapolis>.

ARGUMENT

I. This Court Has Jurisdiction Over Defendants.

The parties agree that (i) personal jurisdiction over the Defendants (who are non-residents of Virginia) in this case is determined by application of Virginia’s long-arm statute, and (ii) Virginia’s long-arm statute extends to the limit of the due process clause. *See* Memo at 5; *John G. Kolbe, Inc. v. Chromodern Chair Co.*, 211 Va. 736, 180 S.E.2d 664 (1971), citing *Carmichael v. Snyder*, 209 Va. 451, 456, 164 S.E.2d 703, 707 (1968). As explained by the Fourth Circuit, “[w]hen, ... as here, a district court decides a pretrial personal jurisdiction motion without conducting an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction.” *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003). Further, the Court “must take all disputed facts and reasonable inferences in favor of the plaintiff.” *Id.*

The exercise of personal jurisdiction over a defendant satisfies the Constitutional requirement of due process if the defendant “purposely directed his activities at residents of the forum” as opposed to being hauled into a forum “solely as a result of ‘random,’ ‘fortuitous’ or ‘attenuated’ contacts.” *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985). There is no need for the defendant physically to enter the forum state; mail or electronic communications are sufficient. *Id.* at 476. Further, “even a single act can support jurisdiction.” *Id.* at 475, n. 18.

The Virginia long-arm statute, Va. Code § 8.01-328(A)(1) expressly provides that the exercise of personal jurisdiction is proper over a defendant “transacting any business” in Virginia or “causing tortious injury by an act or omission” in Virginia. The statute “is a single act statute requiring only one transaction in Virginia to confer jurisdiction on its courts.” *Kolbe, Inc. v. Chromodern, Inc.*, 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971), citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), and *Longines-Wittnauer W. Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 456, 261 N.Y.S.2d 8, 17-18, 209 N.E.2d 68, 74-75 (1965); *Peninsula Cruise, Inc. v. River Yacht Sales, Inc.*, 257 Va. 315 (Va. 1999).

In this case, Defendants maintained a web site accessible by people in all states, including Virginia. That web site includes a mechanism for people to order Defendants’ products and have the products shipped anywhere. It thus is not an entirely passive web site providing only information. Moreover, Defendants knowingly shipped their products to Virginia. That is not “random,” “fortuitous,” or “attenuated.” To the contrary, it is precisely the type of activity that is at issue in this case, and which Plaintiff seeks to stop: the sale of products labeled with or sold under the infringing mark. The sale and shipment to Virginia was neither haphazard nor accidental, as Defendants had to address the package. Indeed, Defendant Edari responds to email orders from customers herself and confirms shipment. Wagner Decl. ¶¶ 5-6, Ex. B, C.

That is a much more intentional act than, for example, having an automated download or transmission process whereby a company might accidentally or unknowingly sell its products into a state.

Indeed courts have found jurisdiction on facts similar to those present here. In *Young Again Prods. v. Acord*, the court found that sales constituting only .02% (2 out of 10,000), were sufficient to constitute engaging in business in a state so as to be subject to jurisdiction. 307 F. Supp. 2d 713, 717 (D. Md. 2004).² Moreover, any suggestion that Defendants' sales to Virginia were only a small proportion of their overall sales cannot be accepted, particularly not at this time. Defendants have provided no information about their total sales volume, or about the volume of their sales outside of Wisconsin or to any other geographic location. Defendants thus cannot succeed in showing that this Court does not have jurisdiction over them.

II. The Exercise of Jurisdiction Over Defendants Is Reasonable.

In addition to arguing that they lack minimum contacts with Virginia, Defendants argue that the exercise of jurisdiction over them would be unreasonable. The case on which Defendants rely, *Intercarrier Communs. LLC v. WhatsApp Inc.*, 2013 U.S. Dist. LEXIS 131318, 2013 WL 5230631 (E.D. Va. 2013) (Gibney, J.), does not support the conclusion that this Court's exercise of jurisdiction over Defendants would be unreasonable. In *Intercarrier Communs.*, the plaintiff was located in Texas, while the defendant was in California. Because all parties were non-Virginians, the Court concluded that Virginia had no interest in the dispute. *Id.* 2013 U.S. Dist. LEXIS 131318, *16. Moreover, as a nonresident with no ties to Virginia, the plaintiff had no judicially recognizable interest in litigating in Virginia.

² Maryland's long-arm statute is similar to Virginia's, most notably in extending to the limit of the due process clause.

In this case, however, Plaintiff undeniably is a Virginia resident. Defendant attempts to dispute that and to argue both that Virginia has no interest in this dispute and that Plaintiff has no interest in litigating in Virginia by focusing on the location of Mars Symbioscience. Mars Symbioscience is not a legal entity, but merely a business segment of Plaintiff. *See* Complaint ¶¶ 9-10. The fact that Plaintiff, through one of its business segments, might have operations in Maryland is irrelevant. A plaintiff corporation, “shall be deemed to reside, ..., only in the judicial district in which it maintains its principal place of business.” 28 U.S.C. § 1391(c)(2). Mars, the owner of the infringed trademark, has its principal place of business in Virginia – specifically within this jurisdiction – and thus, resides in Virginia. Complaint ¶ 2, Ex. A.

Defendants also argue to the effect that Plaintiff chose this forum because of the docket’s speed. *See* Memo at 9. There is no factual basis whatsoever for this argument. Indeed, Defendants cite none. Mars filed suit in this judicial district because it is located here. Further, to the extent this jurisdiction handles cases faster than other jurisdictions, that fact should inure to both parties’ benefit, as well as the public’s.

Defendants argue that litigating in this district would burden them. That is true in every case. Defendants have made no showing that the burden on them is any different than the burden on any other comparably sized business. What Defendants thus effectively are arguing is that small businesses should only be sued where they are located. That is not the law.

Moreover, Defendants are not as burdened as they suggest. In addition to Defendant Edari having traveled at least twice to Europe for extended periods of time for her business, as mentioned above, Defendants hired capable counsel to respond on their behalf to Mars’ request that they cease and desist from their infringing conduct. Defendants are not represented in this litigation solely by Defendant Edari, but rather have engaged experienced counsel in this district.

It is apparent that Defendants do not face any “hardship” by litigating in this Court. Further, this case is not unduly complex, should not engender significant motions practice or undue discovery. Any trial would likely last only a few days. Defendants’ experienced local counsel could handle all routine matters, and to the extent Defendants wish to appear by telephone and participate in argument to avoid travel for the rare hearing, Plaintiff has no objection.³

Finally, Defendants entirely miss the point in attempting to argue that “judicial efficiency” and “social policy” weigh against the exercise of jurisdiction. The court in *Intercarrier Communs.* did not extensively discuss what those meant as it simply noted that “judicial efficiency and fundamental social policy” were served by dismissing the case because out of thirteen similar lawsuits filed by plaintiff, only three remained in this district. It thus was more appropriate for the cases to be resolved in the individual districts which had the greatest nexus to the dispute rather than all in one district with no connection to the dispute. *Id.* *17-18. Here, the case is pending in a district with a nexus to the dispute. Specifically, the owner of the infringed trademark resides here.

The *Intercarrier Communs.* court did not discuss the merits of the claim or the size of the parties in addressing this factor. Nonetheless, Defendants again argue that because they are a small business, they should be sued only in their home district, and be given a free pass to engage in trademark infringement (or presumably any other activity for which they might be sued) throughout the country without being required to answer for that activity where that activity occurs.

Instead of arguing the facts and merits of this case in relation to this factor, Defendants (i) improperly accuse Plaintiff of trademark bullying, and (ii) conclusorily assert that Plaintiff’s

³ As noted, Defendants have traveled internationally in connection with their business, so the rare hearing in the E.D. Va. does not create any burden.

“odds of success do not seem high.” Memo at 10. Defendants’ assertion depends on an incorrect definition of “trademark bullying.” “Trademark bullying” does not occur simply because a larger corporation sues a smaller one, which is essentially all that Defendants argue. To the contrary, trademark owners, as owners of valuable intellectual property, have the affirmative obligation to police violations of their intellectual property rights. A trademark owner’s rights may be substantially restricted if it fails to control third-party use. Refraining from enforcement measures may cause a likelihood of consumer confusion in the marketplace, lost profits, and harm to the goodwill of the trademark. Accordingly, if the trademark owner does not proactively monitor and enforce its rights against infringers, the owner’s ability to preclude others from using a confusingly similar mark in commerce will quickly dissipate.

The United States Patent and Trademark Office (“USPTO”) described the amorphous term “trademark bullying” as the vexatious practice of a “trademark owner that uses its trademark rights to harass and intimidate another business beyond what the law might be reasonably interpreted to allow.” *See Request for Comments: Trademark Litigation Tactics*, available at https://www.uspto.gov/trademarks/litigation_study.jsp (last visited May 25, 2017). Enforcement of one’s trademarks rights does not, and should not, automatically equate to abuse or bullying. Here, Mars carefully considered the use of Defendants’ COCOVAA name and mark, and conducted extensive due diligence even before sending a letter on September 9, 2016. *See* Complaint Ex. B. Mars did not, and does not, engage in any predatory practices in enforcing its rights. It is simply trying to protect its valuable trademark and brand, and the goodwill and reputation associated with it in order to avoid the erosion of rights that may result from inaction. In an effort to reach a possible amicable resolution, Mars even invited Defendants to discuss

Defendants' infringing activities, which Defendants declined through its trademark counsel. As a result, Mars had no choice but to file this lawsuit.

In fact, while Mars has acted prudently and has provided Defendants the utmost courtesy both before and during this case, Defendants have engaged in a shaming campaign—falsely calling Mars “bullies”—in an attempt to generate negative public scrutiny of Mars. *See e.g.*, Facebook posts on Defendants' Facebook page and a Facebook page called “Boycott Mars Inc For Attacking Small Business,” attached herein as Exhibit F.

Defendants' assertion that Plaintiff's “odds of success do not seem high” also is not correct. To establish trademark infringement under the Lanham Act, a plaintiff must prove that (1) it owns a valid mark; (2) the defendant used the mark “in commerce” without the plaintiff's authorization; (3) the defendant used the mark (or an imitation of it) “in connection with the sale, offering for sale, distribution, or advertising” of goods or services; and (4) the defendant's use of the mark is likely to confuse customers. *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012); 15 U.S.C. §§ 1114(a), 1125(a). Plaintiff readily can prove each factor in this case.

Defendants do not contest that Mars's COCOAVIA® mark is valid. *See* Memo at 4. There also is no dispute that Defendants are using “COCOAAA” in commerce in connection with their sale, offering for sale, distribution, advertising of cocoa-based chocolate products, and are doing so without authorization from Mars. The first three factors thus are not in dispute.

Defendants dispute only the likelihood of confusion. As an initial matter, Defendants themselves demonstrate how easily the two marks are confused. On page 12 of their Memo, they write “Plaintiff's COCOAAA® dietary supplement.” Memo at 12 (5th line). Plaintiff's

supplement, of course, is COCOAVIA®. COCOVAA® is Defendants' mark. Defendants cannot thus credibly contend that there is no, or negligible, likelihood of confusion.

If any further discussion of the likelihood of confusion is necessary, the Fourth Circuit has adopted a list of nine factors to guide courts in this analysis: (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods and services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public. *Rosetta Stone*, 676 F.3d at 153. Defendants ignore most of these factors, asserting only that the goods are dissimilar. Even that argument, however, ignores that both parties' products are cocoa-based and thus likely to be seen as related. Defendants ignore that the marks are virtually identical in appearance, sound, and commercial impression, as the marks at issue essentially only differ by one letter. Defendants' claim that there is no likelihood of confusion thus can carry no weight.

None of Defendants' arguments thus show that judicial efficiency or social policy provide any reasons for dismissal of this case.

III. Transfer is Not Appropriate.

Defendants' alternative request, that this case be transferred to Wisconsin, also should be denied. Once again, the parties agree on the factors the Court is to consider: "(1) plaintiff's choice of forum, (2) convenience of the parties, (3) witness convenience and access, and (4) the interest of justice." *Heinz Kettler GMBH & Co. v. Razor USA, LLC*, 750 F.Supp.2d 660, 667 (E.D. Va. 2010). As the party seeking transfer, however, Defendants "bear[] the burden of proving 'that the circumstances of the case are *strongly* in favor of transfer.'" *Id.* (emphasis in

original), quoting *Jones v. Frazier*, 2009 WL 2601355, at *8 (E.D.Va. Aug. 18, 2009). Defendants have not, and cannot, meet that burden.

Plaintiff's choice of forum, the first factor, "is typically entitled to 'substantial weight,' especially where the chosen forum is the plaintiff's home forum." *Id.*, citing *Koh v. Microtek Int'l Inc.*, 250 F.Supp.2d 627, 633 (E.D.Va. 2003). This is Plaintiff's home forum. Plaintiff's choice thus is entitled to substantial weight. Moreover, *Heinz Kettler* refutes Defendant's only argument against Plaintiff's choice of forum, that Plaintiff's Maryland subsidiary actually manufactures the products marketed under the COCOAVIA® mark.⁴ In *Heinz Kettler*, the plaintiff was the U.S. distributor of a German corporation's products. At the time suit was filed, the German entity owned the patents in suit. Those patents were transferred to the U.S. entity after the suit was filed. Despite the fact that the products embodying the patents were manufactured abroad and the plaintiff was merely a distributor, the Court looked solely to ownership of the patents and gave "substantial weight" to plaintiff's choice of forum. *Id.*

The convenience of the parties, the second factor, also weighs against transfer. Defendants ignore the test for this factor. Courts in this district have noted that "[w]hen plaintiffs file suit in their home forum, convenience to the parties rarely, if ever, operates to justify transfer." *Id.*, quoting *JTH Tax, Inc. v. Lee*, 482 F.Supp.2d 731, 738 (E.D.Va. 2007); *see also Bd. of Trs., Sheet Metal Workers Nat'l Fund v. Baylor Heating & Air Conditioning, Inc.*, 702 F.Supp. 1253, 1259 (E.D.Va.1988) (holding the same). Most importantly for evaluating Defendants' argument, "transfer is not appropriate where it will only serve to shift the balance of inconvenience from one party to the other." *Heinz Kettler*, 750 F.Supp.2d at 668. Defendant

⁴ As discussed earlier, Defendants fail to understand that Mars Symbioscience is not a subsidiary of Mars or a distinct legal entity. Mars Symbioscience is merely a business segment of Mars and its location is irrelevant.

argues only that it would be “far more convenient for Defendants to litigate in the Western District of Wisconsin.” Memo at 12. While that undoubtedly is true, it is only half the balance. It would be inconvenient for Plaintiff to litigate in Wisconsin. Its responsible employees, officers, and documents are located here. In contrast, Defendants identify only one person—Defendant Edari—located in Wisconsin. Defendants have shown nothing more than that transfer would shift the balance of inconvenience from them to Plaintiff. This factor thus weighs against transfer.

The third factor, the convenience of witnesses also does not favor transfer. It is notable that Defendants do not actually identify any witnesses that will be inconvenienced by litigating in Virginia. Defendants repeatedly point out that Defendant Edari is the only employee of Defendant COCOVAA, LLC. It thus is not apparent that any other defense witnesses might be inconvenienced. On the other hand, Plaintiff has multiple employees in this jurisdiction involved with its trademark who have relevant information, and would be inconvenienced by litigating this case in Wisconsin. Defendants’ allusion to issues like actual confusion and the strength of the marks does not alter this analysis. Those topics typically are addressed through testimony of experts, who can be located anywhere.

Finally, the fourth factor in the transfer analysis, the interest of justice, favors this case staying in Virginia. Defendant does not even attempt an argument addressing this factor, but merely asserts the conclusion that this factor weighs in its favor. Actual analysis shows Defendant to be incorrect. Just as in *Heinz Kettler*, Mars “is a local business and Virginia has an interest in providing a forum for its residents to litigate their disputes.” 750 F.Supp.2d at 670. Moreover, “while not a significant factor,” the speedier time to trial in this district weighs against transfer. *Id.*

In sum, Defendants have not shown that the factors to be considered in evaluating their transfer request favor transfer, much less that they are strongly in favor of transfer as required. Accordingly, Defendants request to transfer should be denied.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion should be denied in its entirety.

Respectfully submitted,

Dated: May 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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Respectfully submitted,

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