

VIRGINIA: IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

**JOSHUA EVERTETT BUSHMAN,
ADMINISTRATOR FOR THE ESTATE
OF CALVIN VAN PELT, et al.,**

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Case No. CL2023-06260

Plaintiff,

*

v.

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OKORI, LLC, d/b/a 80P BUILDER, et al.,

*

Defendants.

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MEMORANDUM IN SUPPORT OF OKORI, LLC D/B/A 80P BUILDER’S MOTION TO DISMISS, BY SPECIAL APPEARANCE, FOR LACK OF PERSONAL JURISDICTION

Defendant, Okori, LLC d/b/a 80P Builder (“Okori”), by special appearance, hereby objects to this Honorable Court’s exercise of jurisdiction over it, and moves to dismiss each of the plaintiffs’ claims against it for lack of personal jurisdiction because plaintiffs have failed to show that Okori is at home in Virginia, or that Okori has maintained such sufficient contacts to Virginia related to plaintiffs’ causes of action that this Court’s exercise of jurisdiction over Okori’s person would comport with the due process clause of the Fourteenth Amendment of the U.S. Constitution.

ALLEGATIONS WITHIN THE AMENDED COMPLAINT

Plaintiffs allege in their Amended Complaint that “Okori, LLC is a North Carolina limited liability company headquartered in North Carolina[,]” see *Amend. Compl.* at ¶ 20, and that Okori “transacted business in the Commonwealth of Virginia through its operation of the 80P Builder website.” *Id.* at ¶ 20. In that regard, plaintiffs allege that Okori and others “operated” the “webstore” where Defendant Burkard “purchase[d]” a “gun-building kit” on “or about February 2021.” *Id.* at ¶¶ 4, 11. Plaintiffs go on to allege that this kit “include[ed] a Polymer80 PF940C pistol frame kit, a slide, and all the other parts [Defendant Burkard] needed to quickly assemble a handgun.” *Id.* at ¶ 11. Plaintiffs also allege that Defendant Burkard “clutch[ed] his loaded

Polymer80 PF940C pistol . . . [before] . . . point[ing] his ghost gun” at the plaintiffs and shooting them dead in Fairfax County on April 25, 2021. *Id.* at ¶¶ 13-14. Plaintiffs also allege that Okori and others “shipped the kit” from North Carolina to Virginia, *id.* at ¶¶ 11, 96, and that Okori and others made these items available “for []sale to the public on the 80P website.” *Id.* at ¶ 73. Further, plaintiffs allege that “80P Builder sold [these items] to consumers in Virginia, including Defendant Burkard”, *id.* at ¶ 81, as well as “to the citizens of Virginia.” *Id.* at ¶ 179. It is also alleged that Okori and others “distributed ghost gun kits into Fairfax County, Virginia[,]” *id.* at 195, and that Okori and others “actions created a significant threat to the public health and safety of the citizens of Virginia.” *Id.* at 200.

STANDARD OF REVIEW

When challenged on the Court’s exercise of personal jurisdiction over a particular defendant, it is the plaintiffs’ burden to “establish a *prima facie* case” that such jurisdiction exists. *See Volkswagen “Clean Diesel” Litig.*, 100 Va. Cir. 134, 136 (Va. Cir. Ct. 2018) (citation omitted). The Court must draw all reasonable inferences and resolve all factual disputes in plaintiff[s]’ favor.” *Id.* (internal citation and quotation marks omitted). However, this Court must ultimately dismiss the case if “all the specific facts which the plaintiff[s]’ allege[] collectively fail to state a prima face case for jurisdiction.” *Davey Tree Expert Co. v. Jackson*, 69 Va. Cir. 350, 351–52 (Va. Cir. Ct. 2005) (cleaned up). Accordingly, there are two kinds of personal jurisdiction for this Court to consider: specific and general. *Carter v. Wake Forest Univ. Baptist Med. Ctr.*, 76 Va. App. 756, 766 (2023) (internal citation omitted). Each of these are addressed in turn below.

ARGUMENT

I. OKORI SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ADEQUATELY ALLEGED THAT THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER OKORI

a. General Jurisdiction: Plaintiffs have not made a *prima facie* case that this Court may exercise general jurisdiction over Okori

This Court may not exercise general personal jurisdiction over Okori because plaintiffs have not alleged facts sufficient to show that Okori is at home in Virginia.

Courts may exercise general personal jurisdiction “over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.” *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (internal quotations omitted); *see also Valone v. Valone*, 80 Va. Cir. 45, 48 (Va. Cir. Ct 2010) (pointing out that “[a] limited liability company is a hybrid entity.”). This “broader jurisdiction, in the context of corporate defendants, exists where the defendant is incorporated or has its principal place of business.” *Carter*, 76 Va. App. at 766 (internal citations omitted).

Here, plaintiffs have not alleged that Okori was organized under the laws of the Commonwealth, and/or that Okori maintains its principal place of business in the Commonwealth. Instead, Plaintiffs allege that “Okori, LLC, is a North Carolina limited liability company headquartered in Charlotte, North Carolina.” *See Amend. Compl.* at ¶ 20.

Thus, plaintiffs have not made a *prima facie* case that this Honorable Court may exercise general jurisdiction over Okori.

b. Specific Jurisdiction: Plaintiffs have not alleged sufficient facts to subject Okori to specific personal jurisdiction

This Court likewise should not exercise specific personal jurisdiction over Okori because plaintiffs have failed to allege that Okori has maintained such sufficient contacts to Virginia, related to plaintiffs’ causes of action, in that this Court’s exercise of jurisdiction over Okori’s person would comport with the due process clause of the Fourteenth Amendment.

As this Court has pointed out, “[t]he determination of whether [specific] personal jurisdiction exists over a nonresident defendant is a two step inquiry.” *Massey Energy Co.*, 69 Va. Cir. at 121. “ ‘The first step in analyzing the exercise of personal jurisdiction is to determine whether Virginia's long-arm statute reaches the non-resident defendant given the cause[s] of action alleged and the nature of the defendant's Virginia contacts’[; and] [t]he second step is to ensure that the exercise of in personam jurisdiction over a non-resident [d]efendant complies with the ‘due process requirements of the Fourteenth Amendment to the United States Constitution.’ ” *Id.*

A. Step One: Virginia’s long-arm statute does not reach non-resident Okori

Virginia’s long-arm statute “enumerates ten categories^[1] of ‘contacts’ which confer jurisdiction on a nonresident” defendant, and “requires that the *cause of action aris[es] from*’ conduct within one of the enumerated categories.” *Nathan v. Takeda Pharms. Am., Inc.*, 83 Va. Cir. 216, 220 (Va. Cir. Ct. 2011); *Mireskandari v. Daily Mail & Gen. Trust PLC*, 105 Va. Cir. 370, 374 (Va. Cir. Ct. 2020) (citing VA. CODE ANN. § 8.01-328.1(A)) (emphasis and alteration in original).

¹ Subsection A(3) confers jurisdiction over a non-resident defendant if that defendant causes tortious injury by an act or omission in the Commonwealth that gave rise to plaintiffs’ alleged cause of action. *See id* A(3). As such, plaintiffs “must allege that one essential act of the alleged tort occurred in Virginia.” *See People Express Airlines, Inc. v. 200 Kelsey Assocs., LLC*, 922 F. Supp. 2d 536, 545 (E.D. Va. 2013). Here, plaintiffs have failed to properly allege that Okori’s actions took place in the Commonwealth, i.e., that the sale occurred in the Commonwealth. As will be explained *infra*, even assuming that Okori owned and operated the 80P Builder website “around February 2021”, the alleged sale of the kit likely occurred in North Carolina—not Virginia.

Subsection A(4) confers jurisdiction over Okori if Okori caused tortious injury in the Commonwealth by an act or omission outside the Commonwealth if Okori regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the Commonwealth which gave rise to the alleged causes of action. *See id* A(4). Here, plaintiffs fail to allege, or properly show, that Okori regularly solicits business, engages in persistent conduct in, or derives substantial revenue from within the Commonwealth. Even if plaintiffs did, plaintiffs would still have to show that these actions gave rise to the plaintiffs’ causes of action against Okori.

Okori submits that categories A(5)–10 are irrelevant because plaintiffs do not allege a breach of warranty. *See id* A(5). Second, plaintiffs do not allege that Okori owns or operates real property in the Commonwealth. *See id.* A(6). Third, plaintiffs do not allege that Okori operates as an insurance carrier. *See id.* A(7). Fourth, plaintiffs do not allege that Okori must pay child support in the Commonwealth. *See id* A(8). Fifth, plaintiffs do not allege that Okori has matrimonial domicile in the Commonwealth. *See id* A(9). Sixth, plaintiffs do not allege that Okori incurred liabilities for taxes, fines, penalties, interest, or other charges to any political subdivision of the Commonwealth. *See id.* A(10).

The first enumerated category allows this Court to “exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action arising from the person’s: (1) transacting any business in this Commonwealth.” VA. CODE ANN. § 8.01-328.1(A)(1). While plaintiffs allege that Okori “transacted business in the Commonwealth of Virginia through its operation of the 80P Builder website[,]” Amend. Compl. at ¶ 20, plaintiffs do not allege facts sufficient to demonstrate that the operation of a website by a North Carolina entity qualifies as a business transaction within the Commonwealth. They likewise do not allege sufficient facts to demonstrate that the alleged online sale and shipment from North Carolina to Virginia qualifies as a transaction of business.

- i. Plaintiffs fail to allege sufficient facts to demonstrate that the alleged online sale and shipment from North Carolina to Virginia qualifies as a transaction of business in Virginia*

Plaintiffs fail to allege sufficient facts to demonstrate that the alleged online sale and shipment from North Carolina to Virginia qualifies as a transaction of business in Virginia. As provided by plaintiffs in their Motion for Leave to Amend Complaint and Memorandum of Points and Authorities as an Exhibit to the Declaration of Len Kamdan (Exhibit V), the 80P Builder website provides, in its “Terms of Use” Section 3 – Risk of Loss the following:

Title to goods herein being purchased, passed to the purchaser upon acceptance of the shipment by the carrier (once said goods are no longer under 80P Builder’s control) in the shipment of goods to the purchaser []. Loss or damage that occurs during shipping by a carrier is the purchaser’s responsibility. . . .

According to the Terms of Service, title to the kit transferred to Defendant Burkhard in North Carolina—not Virginia. Therefore, any alleged transaction of business between Okori and Defendant Burkhard likely occurred in North Carolina—not Virginia. *See Frizell v. Danieli Corp*, 81 Va. Cir. 427, 432 (Va. Cir. Ct. 2010) (recognizing that an FOB term “ ‘diminishe[s] the jurisdictional significance of such shipments’ to a Virginia company” and does not show that a

North Carolina company “transacted business in the Commonwealth.”) (citing *Bay Tobacco v. Bell Quality Tobacco Product*, 261 F. Supp. 2d 483, 494 (E.D. Va. 2003)).

- ii. *Plaintiffs fail to allege facts sufficient to demonstrate that the operation of a website by a North Carolina entity qualifies as a business transaction within Virginia*

Plaintiffs allege that Okori and others’ operation of the 80P Builder website constitutes a transaction of business in Virginia. The mere operation of a website, however, does not provide this Court with the power to exercise specific jurisdiction over a nonresident defendant related to that transaction or otherwise. Instead, plaintiffs would have to plead facts tending to show that Okori intentionally directed its website business to Virginians. *See ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (stating that defendant must have directed electronic activity into the state with the “manifest [] intent” to target and focus on Virginia and not an undefined audience of internet users around the world.).

In *Mireskandari*, this Court recognized the hurdles the Internet poses to a court’s exercise of personal jurisdiction, noting that plaintiffs cannot “sue anywhere one may access material on the Internet.” 105 Va. Cir. 370, 376 (Va. Cir. Ct. 2020). Thus, to “fashion some reins on jurisdiction via internet connections” this Court adopted a two-prong test for determining whether a nonresident defendant “has conceptually entered the State via the Internet for jurisdictional purposes.” *Id.* at 377. Accordingly, “the defendant [must] ‘manifest an intent to direct [its] website content . . . to a Virginia audience,’ [] such that the defendant ‘should reasonably anticipate being ha[i]lled into court in Virginia;” and second “ ‘that activity created, in a person within the State, a potential cause of action’ under Virginia law[.]” *Id.* at 376 (quoting *Young v. New Haven Advocates*, 315 F.3d. 256, 263 (4th Cir. 2002)).

Applying the test here, it would seem that this Court would not find Okori’s alleged activities online to have caused it to “enter[] the State via the Internet for jurisdictional purposes[.]” *Young*, 315 F.3d at 262 (internal citations and quotations omitted). First, the plaintiffs have not established that Okori developed specific advertising campaigns that constitute a “manifestation [of] intent to direct [its] website content . . . to a Virginia audience.” *See Mireskandari*, 105 Va. Cir. at 37. Nor do the plaintiffs sufficiently plead that Okori, by and through the alleged operation of the website, has entered the Commonwealth to promote the content of its website. Additionally, it does not appear that plaintiffs’ allegations establish that Okori’s alleged operation of the website “create[ed], in [Defendant Burkhard], a potential cause of action” by plaintiffs. *Young*, 315 F.3d. at 263.

Plaintiffs merely allege that Okori and others made these items available “for []sale to the public on the 80P website.” *Id.* at ¶ 73. Plaintiffs further allege that “80P Builder sold [these items] to consumers in Virginia, including Defendant Burkard”, *id.* at ¶ 81, as well as “to the citizens of the Commonwealth of Virginia.” *Id.* at ¶ 179. Plaintiffs also allege that Okori and others “distributed ghost gun kits into Fairfax County, Virginia . . .” *Id.* at 195. None of these allegations indicate that Okori and others intentionally directed its website business to Virginians. Thus, plaintiffs’ allegations that Okori merely operated a website online does not qualify as a transaction of business under the statute.

B. This Court’s exercise of personal jurisdiction over Okori does not comport with due process

The Court’s second inquiry is whether “the exercise of [specific] personal jurisdiction over the nonresident defendant comports with the Due Process Clause of the Constitution of the United States.” *TalentHunter LLC v. Southern Co. Servs.*, 87 Va. Cir. 363, 365 (Va. Cir. Ct. 2014). “The primary focus of the due process inquiry is on ‘the defendant’s relationship to the forum State.’ ”

Carter, 76 Va. App. at 766 (2023) (internal citations omitted). As such, the defendant must “purposefully avail itself of the privilege of conducting the activities within the forum State, *id.* (internal quotations and citations omitted), and these acts by the defendant “cannot be ‘random, isolated, or fortuitous.’” *Id.* (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)).

In *Carter*, the Virginia Court of Appeals adopted the Fourth Circuit’s three-pronged test for finding the due process requirement of specific personal jurisdiction. *Id.* at 767. Accordingly, this Court should consider the following: “(1) the extent to which the defendant purposefully availed itself to the privilege of conducting activities in the State; (2) whether the plaintiffs’ claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.” *Id.* Each prong is addressed in turn.

- i. Plaintiffs have not sufficiently pled that Okori purposefully availed itself of the privilege of conducting business under the laws of the Commonwealth*

The “first prong, purposeful availment, requires the Court to determine if, and to what extent, the ‘defendant [has] purposefully avail[ed] himself to the privilege of the conducting business under the law of the [Commonwealth].’” *Id.* (cleaned up). The Virginia Appellate Court has listed some non-exclusive factors “considered helpful in determining whether a defendant has purposefully availed themselves.” *Id.* They are as follows:

- (1) whether the defendant maintained offices or agents in the State;
- (2) whether the defendant maintained property in the State;
- (3) whether the defendant reached into the State to solicit or initiate business;
- (4) whether the defendant deliberately engaged in significant or long-term business activities in the State;
- (5) whether a choice of law clause selects the law of the State;
- (6) whether the defendant made in-person contact with a resident of the State regarding the business relationship;
- (7) whether the relevant contracts required performance of duties in the State; and
- (8) the nature, quality, and extent of the parties' communications about the business being transacted.

Id. (internal citation omitted). Here, plaintiffs do not allege that Okori maintained offices or agents in Virginia, or that it owned property in Virginia. Likewise, plaintiffs have not shown that Okori solicited or initiated business with Defendant Burkhard in Virginia. The choice of law provision found in the 80P Builder website’s “Terms of Use” provides that another state—Florida—is the appropriate forum for litigation. As such, prong one of the due process analyses is not satisfied.

ii. Plaintiffs have not sufficiently pled that their claims against Okori arise out of Okori’s activities directed at the Commonwealth

The second prong of the due process analysis requires this Court to determine whether the plaintiffs’ claims “arise out of activities directed at the forum state ‘if substantial correspondence and collaboration between the parties, one of which is based in the forum state, forms an important part of the claim.’” *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354 (4th Cir. 2020).

Here, no such correspondence or collaboration is apparent. A widely accessible website that Virginians can visit to purchase good(s) is not a sufficient correspondence and collaboration as defined by this prong. Plaintiffs do not allege that Okori, through the 80P Builder website, created a complex marketing campaign specifically targeting Virginia visitors. *See cf. UMG Recordings, Inc.*, 963 F.3d at 355 (holding that correspondence or collaboration is apparent when the defendant collected from Virginia visitors “personal data as they visited the Website[][,] . . . sold the collected data and advertising spaces on the Website[][,] . . . [a]nd “enabled advertising location-based advertising[.]”) Thus, allegations that Okori and others merely operated the 80P Builder website does not appear to rise to the level of an activity directed at the Commonwealth.

iii. This Court’s exercise of personal jurisdiction would be unreasonable under the U.S. Constitution

Finally, this Court must consider “whether the exercise of specific personal jurisdiction is constitutionally reasonable.” *Carter*, 76 Va. App. at 767 (internal citation omitted).


Here, the Court may consider, among other factors: “[]the burden on the defendant of litigating in the forum[.]” *See Consulting Engr ’rs Corp v. Geometric Ltd.*, 561 F.3d. 273, 279 (4th Cir. 2009) (citing *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 477 (2009)). A burden being the “mobility of the defendant’s defense.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (1980) (“the Constitution [] require[s] special consideration for the defendant’s interest[]” . . . where “being away from home for the duration of the trial would work some special hardship on the defendant[.]”). Since plaintiffs plead that Okori is a limited liability company and does not allege that any of its managing or other members are residents of Virginia, it is likely that having to travel to Virginia for trial or other discovery or hearings would be a special hardship.

CONCLUSION

Defendant, Okori, LLC d/b/a 80P Builder, by special appearance prays for the foregoing reasons, and for any other reason raised in its motion to dismiss and/or hearing on this matter, that this Honorable Court dismiss this action as against Okori for lack of personal jurisdiction, and award any and all just and further relief that this Court deems just and appropriate.

Respectfully Submitted,

OKORI, LLC d/b/a 80P Builder, by special appearance



Diane E. DiBlasio, Esq. (VSB# 90925)
Jeffrey A. Wothers, Esq. (VSB# 91966)
111 S. Calvert Street, Suite 1400
Baltimore, Maryland 21202
Tel.: (410) 783-6340
Fax: (410) 783-6454
E: dediblasio@nilesbarton.com
E: jawothers@nilesbarton.com
Counsel for defendant, Okori, LLC, d/b/a 80P Builder, by special appearance

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via e-mail, postage prepaid

thereon, this **15th day of December 2023** to:

Edward L. Weiner, Esquire, VSB #19576
Lawson D. Spivey, Esquire, VSB #42411
Eugene C. Miller, Esquire, VSB #24678
Paul R. Pearson, Esquire, VSB #18730
10605 Judicial Drive, Suite B6
Fairfax, VA 22030
P: 703-273-9500; F: 703-273-9505
eweiner@wsminjurylaw.com
Counsel for Plaintiffs

Eric Tirschwell, pro hac vice
Len Hong Kamdang, pro hac vice
450 Lexington Ave
P.O. Box 4184
New York, NY 10017
P: 646-324-8222
etirschwell@everytown.org
lkamdang@everytown.org
Counsel for Plaintiffs

KaiserDillon PLLC,-BUL USA, LLC by special appearance
Willian Pittard, VSB #47294
Amelia J. Schmidt, pro hac vice
Noah Brozinsky, pro hac vice
1099 14th Street, NW, 8th Floor West
Washington, D.C. 20005
P: 202-640-2850; F: 202-280-1034
wpittard@kaiserdillon.com
aschmidt@kaiserdillon.com
nbrozinsky@kaiserdillon.com

Wilcox & Savage, P.C.-Polymer 80, Inc. by special appearance
Kevin L. Keller, VSB #30731
Patrick D. Blake, VSB #45194
Bryn L. Clegg, VSB #96923
440 Monticello Avenue, Ste. 2200
Norfolk, VA 23510
P: 757-628-5500
F: 757-628-5566
kkeller@wilsav.com

pblake@wilsav.com
bclegg@wilsav.com

Michael Weitzner, VSB# 45049- Salvo Technologies, Inc. by Special Appearance
David H. Thompson, pro hac vice
Brian W. Barnes, pro hac vice
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
mweitzner@cooperkirk.com



Diane E. DiBlasio, Esq.