

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JOSHUA EVERETT BUSHMAN
Administrator for the Estate of
Calvin Van Pelt, et al.,

Case No: 2023-06260

Plaintiffs,

v.

SALVO TECHNOLOGIES, INC.
d/b/a 80 P BUILDER, et al.,

Defendants.

**DEFENDANT BUL USA’S REPLY IN SUPPORT OF
ITS OBJECTIONS TO PLAINTIFFS’ AMENDED COMPLAINT**

Plaintiffs’ theory of personal jurisdiction as to BUL USA (“BUL”) hinges on their allegation that BUL operated the 80P Builder website on or about the date on which Zackary Burkard purchased a product from that website that he later used in his crimes. This is not sufficient to “transact business” in Virginia under Virginia’s long-arm statute, Va. Code Ann. § 8.01-328.1(A)(1), and, even if it were, it would not comport with due process. It is also flatly false: BUL never operated the 80P Builder website, and Plaintiffs have no response to BUL’s explanation of the same beyond blind professions of continuing concern.

For all of these reasons, and all of those stated in BUL’s Objections, the Amended Complaint as to BUL must be dismissed for lack of personal jurisdiction.

I. A Single Alleged Sale and Shipment via a National Website Is Insufficient To Establish Personal Jurisdiction.

Plaintiffs contend that the single alleged sale and shipment via the 80P Builder website was a “transaction” under Virginia’s long-arm statute and is sufficient to support jurisdiction

under due process principles. Pls.’ Opp’n at 4-7.¹ In support, Plaintiffs rely primarily on two cases, neither of which supports jurisdiction over BUL here.²

In *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.*, 257 Va. 315, 319 (1999), the Virginia Supreme Court confirmed that the long-arm statute “is a single-act statute requiring only one transaction in Virginia to confer jurisdiction on our courts.” 257 Va. at 319 (citations omitted). But the “single-act” transaction that was sufficient in *Peninsula* was much more extensive: the defendant’s employees, *inter alia*, traveled to Virginia to perform repair work on a boat that the defendant also transported to Virginia; the defendant there also had multiple phone conversations with the plaintiff. 257 Va. at 321. None of these took place here.

The second case, *Malcolm v. Esposito*, 63 Va. Cir. 440 (2003), is not controlling, and in any event expressly confined itself to facts that do not apply. The court found jurisdiction over a Connecticut dealership that sold a Virginia resident an allegedly defective BMW on eBay. 63 Va. Cir. 440. That court recognized its departure from similar cases outside Virginia, but made clear the facts were distinct. *Id.* In particular, the defendants in *Malcolm* sold automobiles on “a well-known, national auction website,” i.e., eBay, advertising themselves as “power sellers,” and advertising national and even international customers. *Id.*; *id.* n.4.

¹ BUL also explained why Section 8.01-328.1(A)(4)—which provides for jurisdiction if a defendant “engaged in any other persistent course of conduct” in Virginia—does not apply. Objections at 6-7. The Opposition does not reference this provision; Plaintiffs have waived reliance on it. *See, e.g., Fentress Fams. Tr. v. Virginia Elec. & Power Co.*, 93 Va. Cir. 98 (2016). Plaintiffs insist that the Amended Complaint alleges multiple sales by 80P Builder into Virginia, Opp’n at 5, citing Am. Compl. ¶¶ 19, 21, 81, 136, 191-201. But none of these allege actual facts re such sales; those are not allegations “well grounded in fact.” Va Code Ann. § 8.01-271.1.

² Plaintiffs cite *Animaccord Ltd. v. Individuals, et al.*, No. 1:22-cv-868, 2023 WL 3940548 (E.D. Va. June 9, 2023), for the proposition that an attempt to sell is sufficient. Opp’n at 5. But the underlying report and recommendation makes clear there were multiple sales into Virginia, which the complaint documented in detail. *See Animaccord*, No. 1:22-cv-868 (Dkt. 113) at 6-8. Plaintiffs allege nothing of the kind.

That is a far cry from this case: BUL is not eBay, and one sale and shipment to Virginia is not “direct[ing] electronic activity into the State” as articulated in *ALS Scan Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002)—a test that *Malcolm* expressly declined to apply, but which Plaintiffs concede applies here. Opp’n at 7.³ While no court has applied *ALS Scan* in this context, the caselaw that a single shipment via a website is not enough under the long-arm statute is clear. Plaintiffs argue that *DeSantis v. Hafner Creations, Inc.*, 949 F. Supp. 419, 425 (E.D. Va. 1996) is inapposite because the plaintiff had ordered a shipment to Virginia to manufacture jurisdiction. That ignores *DeSantis*’s critical point: that “[n]umerous courts have held that a single shipment of goods to Virginia, without more, *does not constitute the transacting of any business under § 8.01–328.1(A)(1).*” *Id.* (emphases added) (citing *Processing Research, Inc. v. Larson*, 686 F. Supp. 119, 122–123 (E.D. Va.1988); *Ajax Realty Corp. v. J.F. Zook, Inc.*, 493 F.2d 818, 821 (4th Cir.1972)); *see also* BUL Objections at 4-5 (discussing cases).

Moreover, any exercise of personal jurisdiction must comport with due process, and the U.S. Supreme Court has made clear that “isolated or sporadic transactions” do not suffice. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1028 n. 4 (2021). Tellingly, Plaintiffs do not address *Carter v. Wake Forest Univ. Baptist Med. Ctr.*, 76 Va. App. 756, 767 (2023), a recent and controlling case with eight factors “helpful in determining whether a defendant has purposefully availed themselves” of Virginia under due process principles. *Id.* (cited in Objections at 7-8). Plaintiffs’ allegations, taken as true, plead *none* of these factors.⁴

³ *Thousand Oaks Barrel Co., LLC v. Deep S. Barrels LLC*, 241 F. Supp. 3d 708, 717 (E.D. Va. 2017) is not to the contrary. Opp’n at 4, 5-7. That case found *DeSantis* inapplicable because the defendant had made 99 shipments to Virginia, i.e., “*far more than one.*” *Id.* (emphasis added).

⁴ *Robinson v. Bartlow*, No. 3:12-cv-00024, 2012 WL 4718656, at *5 (W.D. Va. Oct. 3, 2012); and *Savvy Rest, Inc. v. Sleeping Organic, LLC*, No. 3:18-cv-00030, 2019 WL 1435838, at *5 (W.D. Va. Mar. 29, 2019), are inapposite, because both involved multiple sales alleged to Virginia.

II. BUL Never Operated the 80P Builder Website.

Even if there remained any doubt about the legal merits of Plaintiffs' personal jurisdiction theory, the factual record eliminates it. Mr. Sousana, principal of both BUL and Okori, has sworn that BUL did not run the 80P Builder website. Sousana Supp. Decl. ¶ 8. This is only confirmed by another defendant, Salvo Technologies, which proffered an Asset Purchase Agreement that makes clear Salvo purchased the 80P Builder website from Okori—and *only* Okori—just weeks after the alleged sale of gun parts occurred. Salvo Objections Exhibit 1.

Plaintiffs contend that the Court should not credit Mr. Sousana's representations. They cite: (1) BUL's registration of 80P Builder as a "d/b/a" on its ATF license and in North Carolina; and (2) BUL having shared an owner, address, and phone number with Okori. Opp'n at 3, 7-8. On the first, Mr. Sousana has explained that registration and thus why it does nothing to indicate that BUL ever actually operated the 80pbuilder website. On the second, numerous small businesses, particularly ones with a shared owner, share contact information; again, Plaintiffs' rejoinder does nothing to indicate that BUL ever actually operated the relevant website.

Plaintiffs cite *Massey Energy Co. v. United Mine Workers of Am.*, 69 Va. Cir. 118, 120 (2005), for the proposition that the Court must "resolve all factual disputes" in their favor at this stage. Opp'n at 3. Again, however, there is no factual dispute here: Plaintiffs plead no actual facts in support of the assertion that BUL operated the relevant website. They assert that contention in conclusory fashion and then allege facts that, even taken as true, don't show that BUL operated the website—it simply shared an address with an entity (Okori) that later sold that website to Salvo. That Plaintiffs claim the truth is "hard for [them] to swallow" is not a valid basis to hale

Opp'n at 4. BUL further adopts and incorporates by reference the objections raised by the other defendants, particularly those of Okori LLC, which has similarly explained that merely operating a website is insufficient to confer personal jurisdiction. *See* Okori Objections at 6-10.

BUL into a Virginia court. Opp’n at 3. Finally, the defendants’ affidavits in *Massey*, unlike here, were themselves conclusory, e.g., simply denying that they “expressly aim[ed] [the] advertisement at Virginia” and insisting that they “did not expect its effects to be felt there.” *Id.*⁵

At least one other Virginia court has found a defendant’s affidavit sufficient to support dismissal for lack of personal jurisdiction. In *Loria v. Regelson*, 38 Va. Cir. 283 (1995), the court dismissed a Virginia professor’s claims against his California research sponsor for lack of personal jurisdiction, based on the sponsor’s affidavit stating that (1) his only contacts with Virginia were related to his work on these research contracts; and (2) “the acts of writing and mailing the allegedly defamatory material were performed in California and not Virginia.” *Id.*

The same result is warranted here. BUL has provided evidence, corroborated by Salvo, that it did not operate the 80P Builder website. “[P]laintiffs are not ethically permitted to plead by guesswork.” *Mireskandari v. Daily Mail & Gen. Tr. PLC*, 105 Va. Cir. 370 (2020), 105 Va. Cir. 370 (citing Va. Code Ann. § 8.01-271.1). Haling BUL—a now-dissolved North Carolina corporation—into court in Virginia to defend this lawsuit would violate that principle.⁶

CONCLUSION

For the foregoing reasons, those stated in BUL’s Objections, and all others the Court may deem just and proper, BUL, by special appearance, respectfully requests that the Amended Complaint be dismissed as to it on the basis of the Court’s lack of personal jurisdiction.

⁵ The *Massey* court also held that the alleged “minimum contacts are buttressed by allegations of a conspiracy with a Virginia resident.” 69 Va. Cir. 118. Here, Plaintiffs have not alleged any conspiracy with a Virginia resident. *See* Am. Compl. ¶¶ 175-88. BUL joins Salvo’s objections that these allegations are not sufficient to establish personal jurisdiction. *See* Salvo Reply in Support of Motion to Dismiss, January 26, 2024, page 2-3.

⁶ Jurisdictional discovery is not necessary or warranted here, at least as to BUL. BUL joins in the other defendants’ objections to this as well. *See* Salvo Reply, page 5.

Dated: January 26, 2024

/s/ William Pittard

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CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2024, I caused the foregoing to be served on the following parties by e-mail, and/or via File&ServeXpress:

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