

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

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

**Plaintiffs,**

**v.**

**CASE NO: CL2023-06260**

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

**Defendants**

**MOTION FOR RECONSIDERATION**

On February 23, 2024, this Court entered an order dismissing Defendant Polymer80, Inc. from this case on the basis that Virginia courts lack personal jurisdiction, and further denied Plaintiffs' request for jurisdictional discovery. Although the Court did not issue a written opinion, the Court read its reasoning into the record. See Tr. 23:7-32:9, Ex. A. Plaintiffs respectfully submit that the Court's ruling is contrary to on-point authority from state courts and the federal court of appeals applying Virginia law. Plaintiffs request that this Court reconsider its decision, on either of two independent bases.

First, case law clearly establishes that whether a defendant "derives substantial revenue" under the long-arm statute, Va. Code Ann. § 8.01-328.1(A)(4), should be determined by reference to the absolute (dollar) value of the revenue derived from the forum. Accordingly, Polymer80's assertion that it derives no more than 4% of its revenue from Virginia is insufficient as a matter of law to defeat jurisdiction. Polymer80's direct sales into Virginia plainly constitute purposeful availment of the Virginia market.

Second, the operative complaint clearly alleges (1) that Polymer80 conspired with other defendants (the “80P Builder Defendants”) to sell unserialized handgun-building kits to residents of Virginia, in violation of federal and state law; (2) that the sale of one such kit by the 80P Builder Defendants to Defendant Burkard was done in furtherance of the conspiracy; and (3) that the sale of the kit by the 80P Builder Defendants to Burkard was tortious and proximately caused the deaths of Calvin and Ersheen, Plaintiffs’ decedents. That makes out a prima facie case of civil conspiracy sufficient to establish jurisdiction in Virginia courts.

## **ARGUMENT**

### **I. Personal Jurisdiction over Polymer80 Directly**

The Court ruled that “the long-arm statute is not satisfied in this case” because, as relevant here, “Polymer80 [lacks] substantial revenues or other connections to Virginia.” Tr. 31:13-19. The Court made this ruling despite observing that (1) “Plaintiffs allege” that “Polymer80 has ... substantial revenue from Virginia,” Tr. 26:7-10, and (2) Polymer80 has admitted that it “derives what’s either one percent or four percent of its revenue from Virginia,” Tr. 26:16-18.

That assertion is legally insufficient to defeat jurisdiction. “Although percentage of total sales may be a factor to be considered, it cannot be dispositive, for a small percentage of the sales of a corporation giant may indeed prove substantial in an absolute sense.” *Ajax Realty Corp. v. J.F. Zook, Inc.*, 493 F.2d 818, 821-22 (4th Cir. 1972). For this reason, courts in Virginia have recognized that as little as 0.5% or even 0.05% of a defendant’s sales may constitute “substantial revenue.” *Frizzell v. Danieli Corp.*, 81 Va. Cir. 427, 434 (2010) (first citing *Ajax Realty*, 493 F.2d at 822; and then citing *Sutherland*

*v. Robby Thruston Carpentry, Inc.*, 68 Va. Cir. 43, 46 (2005)). As such, Plaintiffs respectfully submit that it would be appropriate for this Court to allow jurisdictional discovery into the dollar amount of Polymer80's Virginia-derived revenue before making a ruling based on the long-arm statute.<sup>1</sup>

As for due process, the Court also stated that "Polymer80 did not purposely avail itself of the protection of Virginia's laws." Tr. 31:9-12. Specifically, the Court stated that "Polymer80's only contact with Virginia is through occasional sales through its website," which the Court found insufficient to establish purposeful availment. Tr. 29:7-10.

This finding is contrary to well-established case law surrounding online sales. As explained in *Thousand Oaks Barrel Co. v. Deep South Barrels LLC*, "courts have persuasively concluded that personal jurisdiction exists ... where the defendant has a national interactive e-commerce website that generates a small amount of e-commerce sales in the forum state." 241 F. Supp. 3d 708, 716 (E.D. Va. 2017). Although this Court suggested during the hearing that "[e]very website is an interactive website," Tr. 11:21-22, not every website can create jurisdiction. "A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." *ALS Scan, Inc. v. Digit. Servs. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (alteration in original) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). But at the other "end of the spectrum are situations where a defendant clearly does business over the Internet." *Id.* at 713 (quoting *Zippo*, 952 F. Supp. at 1124). "[T]here is no doubt that such websites

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<sup>1</sup> Plaintiffs note that both Plaintiffs *and* Defendant Polymer80, in their briefing, requested the opportunity to take jurisdictional discovery. See Polymer80's Br. Supp. Def.'s Obj. 10; Pls.' Am. Mem. P. & A. 9.

satisfy the purposeful availment requirement of specific jurisdiction.” *Thousand Oaks*, 241 F. Supp. 3d at 716.<sup>2</sup>

Because Polymer80’s conduct thus constitutes purposeful availment, the decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), applies squarely to this case. *Cf.* Tr. 28:4-8 (distinguishing *Ford* on basis that “the Defendant in that case conceded purposeful availment”). Accordingly, it does not matter that Polymer80 did not sell the firearm that was used to kill Calvin and Ersheen directly into Virginia. *See Ford*, 592 U.S. at 361-71. Specific jurisdiction over Polymer80 comports with due process.<sup>3</sup>

## **II. Personal Jurisdiction over Polymer80 as a Coconspirator**

The Court ruled that Plaintiffs’ conspiracy allegations do not form an independent basis for jurisdiction because the “alleged conspiracy is clearly not actionable by the Plaintiffs here, since it’s a criminal conspiracy claim.” Tr. 31:1-5. Specifically, the Court found that the common-law-conspiracy claim in this case failed “because the underlying offenses are only violations of criminal statutes with no personal cause of action.” Tr. 30:14-17.

“A common law conspiracy consists of two or more persons combined to accomplish, by some concerted action, some criminal or unlawful purpose or some lawful

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<sup>2</sup> In *Thousand Oaks*, only 1.21% of the defendant’s customers and only 1.17% of the defendant’s shipments were tied to Virginia. 241 F. Supp. 3d at 715.

<sup>3</sup> Because jurisdiction would not offend due process, the long-arm statute is satisfied as well. *See Nathan v. Takeda Pharms. Am. Inc.*, 83 Va. Cir. 216, 221 (2011) (“[I]t is firmly established that Virginia’s long-arm statute asserts jurisdiction to the extent permissible under the Due Process clause.”); *Carter v. Wake Forest Univ. Baptist Med. Ctr.*, 76 Va. App. 756, 765 (2023) (“Given that Virginia’s long-arm statute coincides with the limitations imposed by the Fourteenth Amendment, ‘[both] inquiries essentially become one.’” (alteration in original) (citation omitted)), *argued*, No. 230260 (Va. Feb. 29, 2024). Jurisdictional discovery is therefore not even needed to deny Polymer80’s motion.

purpose by a criminal or unlawful means.” *Gelber v. Glock*, 293 Va. 497, 533 (2017) (citation omitted). To be sure, “[t]he gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination” itself. *Id.* (citation omitted). “Thus, a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury.” *Id.* at 534 (citation omitted); *cf.* Restatement (Second) of Torts § 876 (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”).

That fits Plaintiffs’ allegations precisely. As the Court correctly noted, Plaintiffs alleged that Polymer80 and the 80P Builder Defendants conspired to sell handgun-building kits into Virginia in violation of federal and state laws. See Am. Compl. ¶¶ 184, 186. But that is not all that Plaintiffs alleged. Plaintiffs further alleged that the 80P Builder Defendants’ sale of a handgun-building kit to Defendant Burkard was in furtherance of the conspiracy, *id.* ¶ 185, and that that sale was a negligent (i.e., tortious) act that was a proximate cause of the deaths of Calvin and Ersheen, *id.* ¶¶ 145, 147, 175, 188. Because Plaintiffs have an actionable claim of negligence, they have stated a claim for civil conspiracy.<sup>4</sup>

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<sup>4</sup> Indeed, Plaintiffs’ claims are not far removed from an example given in the Restatement. See Restatement (Second) of Torts § 876 cmt. d, illus. 8 (“A sells to B for resale a gun known by him to be dangerously defective. B negligently fails to examine the gun before selling it to C, who is hurt while attempting to discharge it. A is subject to liability to C.”). Although Plaintiffs’ case does not involve a *defective* gun, the point is that the upstream seller of a product can be liable for the distributor’s negligence when the two entities are working in concert. See *id.*

Finally, the Court stated that “the alleged conspiracy was not directed at Virginia, but was a national scheme to evade gun laws, as written in the Complaint.” Tr. 31:6-8. But the law does not require the conspiracy to be “directed at” the forum state in particular. See *Nathan*, 83 Va. Cir. at 231 (“a defendant who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum”). The operative complaint specifically alleges that “the Firearm Defendants [including Polymer80] conspired with each other to unlawfully sell complete handgun-building kits to citizens of the Commonwealth of Virginia.” Am. Compl. ¶ 187. Personal jurisdiction over these defendants in Virginia is proper.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court reconsider its order granting Defendant Polymer80’s Motion to Dismiss and instead enter an order either denying Polymer80’s motion or staying the motion pending jurisdictional discovery.

Joshua Everett Bushman, Administrator  
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## **CERTIFICATE OF SERVICE**

I certify that on this 7th day of March 2024, a true copy of the foregoing Motion for Reconsideration was served by electronic mail and File & ServeXpress to:

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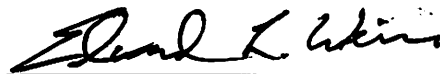


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Edward L. Weiner

**EXHIBIT A**

1 do everything. And I'm very solid on the foundation and  
2 what the law is in this matter.

3 And I think it's important for these cases to  
4 get their resolution as soon as possible.

5 So let me just read some of the things that  
6 I've already prepared, okay?

7 In this matter Plaintiffs allege jurisdiction  
8 over Defendant Polymer80 on two bases.

9 One, that Defendant's commercial activities  
10 towards Virginia, in addition to the actual sale of the  
11 kit to 80P Builders -- another codefendant -- which did  
12 eventually end up in Virginia, satisfied the minimal  
13 contacts test.

14 And the second basis is -- again, just for the  
15 conspiracy claim I agree with Defendant -- Defendant's  
16 alleged engagement in the conspiracy which targeted  
17 Virginia subjects to an automatic personal jurisdiction.

18 Okay. So, first, general personal  
19 jurisdiction. Everybody agrees that there is no general  
20 personal jurisdiction in this matter, which means we have  
21 to turn to specific jurisdiction.

22 When we look at specific jurisdiction, we have

1 to look at long-arm jurisdiction in Virginia.

2 And the Plaintiff alleges the long-arm statute  
3 is satisfied as to A.1 -- transacting business in the  
4 Commonwealth, and A.4 -- causing tortious injury in the  
5 Commonwealth by act or omission outside the Commonwealth.

6 But he also has to regularly -- Defendant also  
7 has to regularly does and solicit business or engage in  
8 any persistent course of conduct or derive substantial  
9 revenue from goods used or consumed or services rendered  
10 in this Commonwealth.

11 All of that is part of A.4, not just causing  
12 tortious injury. It's not just causing the injury. It's  
13 also that they regularly do and solicit business in  
14 Virginia or engage in any persistent course of conduct in  
15 Virginia or derive substantial revenue from goods or  
16 consumed services rendered in the Commonwealth of  
17 Virginia.

18 It's very important to make that distinction.

19 So, first, when we look at A.1 -- transaction  
20 of business --

21 (To court reporter) Let me know if I go too  
22 fast for you, okay?

1 THE COURT REPORTER: You're good.

2 THE COURT: (To court reporter) All right.

3 Thank you.

4 A.1 -- transaction of business in the  
5 Commonwealth.

6 Neither Plaintiff or Defendant cite to any  
7 case law to any case law to support their position with  
8 regards to this subsection of the long-arm statute.

9 But when you look at it, the cause of action  
10 did not arise from Polymer80's transaction of business in  
11 the Commonwealth, as it was in Thousand Oaks where they  
12 bought -- where they -- the infringement argument was that  
13 they bought directly from that website.

14 But the sale or the action did not arise from  
15 Polymer80's action in the Commonwealth as the sale of the  
16 gun kit in question was made in -- made to North Carolina  
17 based 80P Builders which then sold it to the co-defendant  
18 Burkard.

19 Polymer80 then transacted business in North  
20 Carolina and Nevada where they are registered. And they  
21 have a brick and mortar, but not in Virginia. Okay.

22 So then we look to the regular business or

1 conduct in Virginia and Plaintiffs must allege the  
2 Defendant either, again, regularly conducted or solicited  
3 business in Virginia or engaged in any persistent course  
4 of conduct or derived substantial revenue from goods.

5 That's the only way that you can get through  
6 this hurdle of the long-arm jurisdictional statute.

7 It does not appear that Polymer80 has  
8 substantial activities or substantial revenue from  
9 Virginia. Plaintiffs allege that they do, but they do not  
10 step beyond legal conclusions as they do so.

11 Polymer80 does not merely contradict the  
12 allegations of Plaintiff, but supplies additional  
13 information.

14 Polymer80 has no property or employees in  
15 Virginia, which is different from Ford -- the Ford case.

16 And it does not send mailers or physical media  
17 into Virginia and derives what's either one percent or  
18 four percent of its revenue from Virginia.

19 Plaintiffs point to the Thousand Oaks Barrel  
20 case, which we've already discussed, in support of their  
21 position that just the mere maintenance of the -- of the  
22 website -- of the interactive website may support

1 jurisdiction in Virginia, but that case clearly falls  
2 under the A.1 subsection.

3 And it is a trademark infringement case that  
4 they would -- and got the goods directly from that  
5 website. And the Court there just skipped the long-arm  
6 statute analysis and went straight to due process.

7 And then when we look at the constitutional  
8 inquiry, Plaintiffs address most of their argument to  
9 whether personal jurisdiction is constitutionally  
10 reasonable.

11 Plaintiffs rest most of their argument on  
12 Polymer80 having placed its products into the stream of  
13 commerce. And as Polymer80 points out, that's not enough  
14 for contacts in Virginia.

15 The central inquiry in addressing this issue  
16 is the due process requirements of specific personal  
17 jurisdiction. There's a three-prong test for the due  
18 process.

19 Number one, the extent to which the Defendant  
20 purposely availed itself of the privilege of conducting  
21 activities in the state.

22 Number two, whether the Plaintiffs' claims

1 arise out of those activities directed at the state, and  
2 whether the exercise of personal jurisdiction would be  
3 constitutionally reasonable.

4 The personal jurisdiction jurisprudence was  
5 recently shifted by the Ford case, relied by the  
6 Plaintiffs, but as the Defendants point out, the Defendant  
7 in that case conceded purposeful availment, the prong most  
8 directly challenged here by the Defendant.

9 And Ford Motor Company has been applied in the  
10 Virginia Courts in the Carter versus Wake Forest  
11 University Baptist Medical Center, 76 Va. App. 756 (2023)  
12 where they applied the Ford in conjunction with purposeful  
13 availment factors, adding those factors to the analysis.

14 And those factors included, number one,  
15 whether the Defendant maintained offices or agents in the  
16 state; number two, whether the Defendant maintained  
17 property in the state; number three, whether the Defendant  
18 reached into the state to solicit or initiate business;  
19 number four, whether the Defendant deliberately engaged in  
20 significant or long-term business activities in the state;  
21 number five, whether a choice of law clause selects the  
22 law of the state; number six, whether the Defendant made



1 in-person contact with the resident of the state regarding  
2 the business relationship; number seven, whether the  
3 relevant contracts required performance of duties in the  
4 state; and, number eight, the nature, quality and extent  
5 of the parties' communications about the business being  
6 transacted.

7 Defendant Polymer80's only contact with  
8 Virginia is through occasional sales through its website.  
9 Every factor -- every other factor weighs against finding  
10 purposeful availment.

11 Now that -- now, turning to the conspiracy  
12 theory of personal jurisdiction which the Plaintiffs have  
13 alleged, which states the Defendants are imputed with  
14 constitutionally sufficient contacts with Virginia through  
15 the actions of their alleged coconspirators, namely the  
16 80P Builder Defendants which clearly have jurisdiction in  
17 Virginia.

18 And since they have jurisdiction in Virginia,  
19 then all Defendants have jurisdiction in Virginia under  
20 the conspiracy theory that Plaintiff alleges, and that 80P  
21 Builders are the ones who sold the gun kits to Defendant  
22 Burkard.

1           To succeed on this theory the Plaintiffs would  
2 have to make a plausible claim that a conspiracy -- that a  
3 civil conspiracy existed; number two, that the four  
4 Defendants participated in the conspiracy, and, three,  
5 that the coconspirators' activities in furtherance of the  
6 conspiracy had -- still had sufficient contacts with  
7 Virginia to subject that conspirator to jurisdiction in  
8 Virginia.

9           To satisfy these requirements the Plaintiff  
10 would have to rely on more than just the bare allegations.  
11 The Plaintiff must plead with particularity the conspiracy  
12 -- the civil conspiracy -- as well as the overt acts  
13 within the forum taking furtherance of the conspiracy.

14           The common law conspiracy claim is not a cause  
15 of action that can be sued by the Plaintiffs in this case  
16 because the underlying offenses are only violations of  
17 criminal statutes with no personal cause of action.

18           Defendant cites case law on point which shows  
19 common law conspiracy is not an independent cause of  
20 action but a way of spreading liability among concerted  
21 tortfeasors, and that the underlying illegality must be  
22 actionable by the Plaintiffs.

1           Because this alleged conspiracy is clearly not  
2 actionable by the Plaintiffs here, since it's a criminal  
3 conspiracy claim, that -- the violation of gun laws --  
4 Plaintiff has not made a plausible claim that a conspiracy  
5 existed.

6           Additionally, the alleged conspiracy was not  
7 directed at Virginia, but was a national scheme to evade  
8 gun laws, as written in the Complaint.

9           So, therefore, Defendant Polymer80 did not  
10 purposely avail itself of the protection of Virginia's  
11 laws and is not liable under a civil conspiracy as pled by  
12 Plaintiffs.

13           Additionally, the cause of action did not  
14 arise from Polymer80's transaction of business in the  
15 Commonwealth, nor does Polymer80 have substantial revenues  
16 or other connections to Virginia as would satisfy the  
17 long-arm statute.

18           Since the long-arm statute is not satisfied in  
19 this case, I'm going to grant the Defendant's motion. All  
20 right.

21           MR. WEINER: Would Your Honor consider  
22 allowing jurisdictional discovery?

1 THE COURT: Excuse me? I'm sorry?

2 MR. WEINER: So we -- would -- would Your  
3 Honor consider allowing jurisdictional discovery so that  
4 some of these things --

5 THE COURT: I've made my ruling, Mr. Weiner.  
6 I saw that -- I saw that as your alternative in your  
7 pleading, but, no. I made my ruling. I either have  
8 jurisdiction or I don't. At this time I don't have  
9 jurisdiction.

10 MR. WEINER: All right.

11 MR. OHANA: I have an order, Your Honor.

12 THE COURT: Okay. You -- you -- do you want  
13 to show it to Mr. Weiner?

14 MR. WEINER: We note our objection. Thank  
15 you.

16 THE COURT: All right. Yes, sir. All right.  
17 I'll go ahead. And if you want to note your objections to  
18 the order too, I'll go ahead and take a recess so you can  
19 do that, Mr. Weiner, okay?

20 MR. WEINER: Okay. Thank you.

21 THE COURT: All right. Thank you.

22 \* \* \* \* \*