



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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RETIRED JUDGES

March 26, 2024

Diane E. DiBlasio
111 S. Calvert Street, Suite 1400
Baltimore, Maryland 21202

Edward L. Weiner
Weiner, Spivey & Miller, PLC
10605 Judicial Drive, Suite B
Fairfax, VA 22030

Re: *Joshua Everett Bushman, Administrator for the Estate of Calvin Van Pelt, et al. v. Salvo Technologies, Inc., d/b/a 80 P Builder, et al., CL 2023-6260*

Dear Ms. DiBlasio and Mr. Weiner:

This matter is now before the court on the *Motion For Reconsideration* of Defendant Okori, LLC, d/b/a 80P Builder (hereinafter "Okori"), requesting the court to reconsider the court's Order of February 16, 2024 denying Okori's *Motion to Dismiss for Lack of Personal Jurisdiction*. Oral argument on the original *Motion to Dismiss for Lack of Personal Jurisdiction* was heard by the court on February 16, 2024, at which time the court denied the motion. After review of Okori's *Motion For Reconsideration*, the court DENIES Okori's *Motion For Reconsideration* for the reasons set forth below.

BACKGROUND

Plaintiff is the administrator for the Estates of Calvin Van Pelt and Ersheen Elaiaiser who were killed by Zachary Burkard using a pistol which Burkard is alleged to have built from a kit allegedly sold to him by Okori. As set forth in the *Amended Complaint* (filed September 29, 2023), Plaintiff sued Okori, as well as Defendants Salvo Technologies,

Enailed + mailed 3/26/2024

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Inc., d/b/a 80P Builder (hereinafter "Salvo"),¹ BUL USA, LLC, d/b/a 80P Builder (hereinafter "BUL USA"), and Polymer80, Inc. (hereinafter "Polymer80")² on several theories of recovery: Negligence/Gross Negligence (Count 1), Negligence *Per Se* (Count 2), Negligent Entrustment (Count 3), Common Law Conspiracy (Count 5), and Public Nuisance (Count 6).³

OKORI'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

For purposes of Okori's motion to dismiss, the court may consider the existence of personal jurisdiction based upon the facts alleged in the complaint. See e.g., *Krantz v. Air Line Pilots Assoc.*, 245 Va. 202, 207 (1993) ("the facts alleged indicate that Nottke has engaged in a purposeful activity in Virginia, and has had the minimum contact necessary for Krantz to maintain his action in the Commonwealth") and *Mercer v. MacKinnon*, 297 Va. 157, 159 (2019) ("facts are drawn from the allegations in the complaint"). While the parties have filed affidavits concerning facts related to personal jurisdiction, those affidavits are consistent with the facts alleged in the *Amended Complaint*.

The following are the material facts alleged in the *Amended Complaint*:

Defendant Okori, LLC, is a North Carolina limited liability company headquartered in Charlotte, North Carolina.

Amended Complaint ¶ 20.

On or around February 1, 2021, Defendant Burkard purchased, from the 80P Builder website, all the components necessary to assemble a Polymer80 PF940C handgun, including a Polymer80 pistol frame kit and a Zaffiri Precision slide and barrel.

Amended Complaint ¶ 91.

On or around February 1, 2021, 80P Builder knowingly shipped a complete gun building kit -- including the Polymer80 pistol frame kit, the slide, and the barrel -- across state lines, from a warehouse in North Carolina directly to Defendant Burkhard's home in Springfield, Virginia.

¹ This court dismissed Salvo for lack of personal jurisdiction by order of March 20, 2024.

² Another judge of this court dismissed Polymer80 for lack of personal jurisdiction by order of February 23, 2024 and denied Plaintiff's motion for reconsideration by order of March 15, 2024.

³ Plaintiff is also suing Zachary Burkhard, but only in Count 4 (Wrongful Death) and, although a claim for punitive damages is not a cause of action, Plaintiff is suing the corporate defendants for punitive damages (Count 7). Punitive damages are also sought in the *ad damnum* clauses.

Amended Complaint ¶ 96.

From 2018 until March 1, 2021, Defendants BUL USA, LLC and Okori, LLC, together or separately, were responsible for the operation of the 80P Builder website.

Amended Complaint ¶ 21.

Polymer80 manufactured only the PF940C pistol frame kit (which included a jig, drill bits, and other parts), which was "sold to 80P Builder," not the Zaffiri Precision slide and barrel. *Amended Complaint ¶¶ 91, 92, 124, and 125.*

Additional material facts are found in the *Declaration of Dan McCalmon*:

6. In February 2017, Polymer80 entered into an agreement with Okori, LLC.

7. All sales to Okori, LLC, were processed under the "80P Builder" name and were sent to the following address: 80P Builder, 4208 South Blvd Unit J, Charlotte, North Carolina 28209.

8. No purchases by Okori, LLC, or under the 80P Builder name were sent to a Virginia address.

12. Polymer80 does not receive information back regarding the end purchaser for products sold to businesses such as Okori or Salvo Industries and has no knowledge or control over where the final sale is made.

13. Polymer80 does not engage in any marketing directed at Virginia.

14. Polymer80 does not send out mailers, flyers, or advertisements via traditional mail services such as the United States Postal Service.

15. If Virginia residents wish to receive promotional materials relating to Polymer80, the residents must request and subscribe to email correspondence. This is initiated by the Virginia resident, not by Polymer80.

THE COURT MAY EXERCISE PERSONAL JURISDICTION OVER OKORI

Plaintiff asserted that the court had personal jurisdiction over Okori pursuant to Code § 8.01-328.1(A)(1), which provides:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising

from the person's: 1. Transacting any business in this Commonwealth⁴

Because Code § 8.01-328.1(A)(1) "speaks of transacting any business, it is a single-act statute requiring only one transaction in Virginia to confer jurisdiction on our courts." *Nan Ya Plastics Corp. v. DeSantis*, 237 Va. 255, 260 (1989) (emphasis in original).

The material facts as alleged in the *Amended Complaint* are that the purchase of the kit by Burkard from the 80P Builder website took place "[o]n or around February 1, 2021." *Amended Complaint* ¶ 91. Moreover, on that same date, "80P Builder knowingly shipped a complete gun building kit . . . from a warehouse in North Carolina directly to Defendant Burkard's home in Springfield, Virginia." *Amended Complaint* ¶ 96. The *Amended Complaint* further alleges that, "[f]rom 2018 until March 1, 2021, Defendants BUL USA, LLC and Okori, LLC, together or separately, were responsible for the operation of the 80P Builder website." *Amended Complaint* ¶ 21.

It follows that, if personal jurisdiction could constitutionally be established by selling kits on a website that was accessible in Virginia and shipping the kits to individuals in Virginia, Okori was "[t]ransacting any business in this Commonwealth" and that Okori's motion to dismiss must thus be denied.

Selling kits on a website that was accessible in Virginia and shipping the kits to individuals in Virginia establishes personal jurisdiction consistent with due process. See *ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002), where the court "adopt[ed]" the "model developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)." 293 F.3d at 713.⁵ Under

⁴ Okori contends that the court does not have personal jurisdiction pursuant to Code § 8.01-328.1(A)(3), (4), or (5)-(10). As Plaintiff does not assert jurisdiction pursuant to any of those provisions, the court need not, and does not, address them.

⁵ *Zippo* recognized a "sliding scale" for defining when electronic contacts with a State are sufficient:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. 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. The middle ground is occupied by interactive Web sites where a user can exchange

the *Zippo* model:

[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

293 F.3d at 714.

In *Thousand Oaks Barrel Co. v. Deep South Barrels*, 241 F. Supp. 3d 708 (E.D. Va. 2017), the district court adhered to *ALS Scan, Inc.* and found that "Plaintiff has established a prima facie case of personal jurisdiction over Deep South Barrels under the *ALS Scan* test." The court explained that it had personal jurisdiction over the defendant because:

Deep South Barrels directed electronic activity into Virginia with the manifest intent to do business with Virginia residents when it set up an interactive e-commerce website accessible to Virginia residents and used that website to fulfill Virginia customers' Internet purchases.

241 F. Supp. 3d at 716.

The court further observed:

Deep South Barrels' purposeful course of conduct – setting up an interactive e-commerce website accessible to Virginia residents, accepting payment from Virginia residents for e-commerce purchases, and shipping multiple products to Virginia residents – is sufficient to ensure that Deep South Barrels could have "reasonably anticipate[d] being haled into court" in Virginia for claims arising from its products. (Citation omitted). As a result, plaintiff satisfies the first two prongs of the *ALS Scan* test. *ALS Scan*, 293 F.3d at 713. Plaintiff also satisfies the third prong of the *ALS Scan* test. Deep South Barrels' contacts with Virginia created a potential cause of action in the state's courts because plaintiff's claims "arise out" of Deep South Barrels' sale of allegedly infringing products to Virginia residents. *Id.* at 714.

Id. at 717.

information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

293 F.3d at 713-714 (quoting *Zippo*, 952 F. Supp. at 1124).

Similarly, in the unreported case of *Robinson v. Bartlow*, 2012 U.S. Dist. LEXIS 143323, the court explained that it had personal jurisdiction over JoeyBra LLC:

Because visitors to the JoeyBra LLC website can view products, prices, and place orders, it is best described as the "active" variety. See *Zippo*, 952 F. Supp at 1124 (describing "active" websites as ones where a defendant "clearly does business over the internet" and as typical grounds for finding personal jurisdiction).

2012 U.S. Dist. LEXIS 143323, *14-15.

In light of *ALS Scan, Inc.* and its progeny, Plaintiff's *Amended Complaint* has established a *prima facie* case of personal jurisdiction over Okori as Okori directed electronic activity into Virginia, (2) with the manifested intent of engaging in business or other interactions within Virginia, and (3) that activity creates, in a person within Virginia, a potential cause of action cognizable in Virginia's courts.

Okori's Acts Are Materially Different From Polymer80's Acts

1) Okori argues that the court erred in its Order of February 16, 2024 denying Okori's *Motion to Dismiss for Lack of Personal Jurisdiction* because Chief Judge Azcarate concluded that the court did not have personal jurisdiction over Defendant Polymer80. The facts alleged in the *Amended Complaint*, in addition to those set forth in the *Declaration of Dan McCalmon* as to Polymer80 were materially different than those alleged as to Okori.

As Chief Judge Azcarate noted:

[T]he cause of action did not arise from Polymer80's transaction of business in the Commonwealth, as it was in *Thousand Oaks* where they bought - where they - the infringement argument was that they bought directly from that website.

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

Ex. 3 at pg. 25, lines 9-18.⁶

Thus, unlike Polymer80, which did not sell the kit at issue here into Virginia, but simply sold a pistol frame kit to Okori (in North

⁶ As paragraphs 91, 92, 124, and 125 of the *Amended Complaint* makes clear, Okori not only sold and shipped Polymer80's pistol frame kit but a Zaffiri Precision slide and barrel with Polymer80's pistol frame kit.

Carolina), Okori sold Polymer80's pistol frame kit, along with a Zaffiri Precision slide and barrel (*Amended Complaint* ¶ 91), into (and shipped them to) Virginia.

2) Okori argues also that Chief Judge Azcarate reviewed the list of nonexclusive factors set forth in *Carter v. Wake Forest University Baptist Med. Center*, 76 Va. App. 756 (2023) -- drawn from *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020) -- to determine if a defendant has purposefully availed itself of the privilege of conducting business under the laws of the forum state. Those factors are:

(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. [*UMG Recordings, Inc. v. Kurbanov*, 963 F.3d at 352].

76 Va. App. at 767-768.

Those factors are not applicable to the case at bar as it involves a purchase from an interactive website, unlike in *Carter v. Wake Forest University Baptist Med. Center*, which involved an online patient portal "that acted as an in-house email server." *Id.* at 768. Thus, the fact that Okori did not maintain offices or agents in Virginia, that Okori did not own property Virginia, or that Okori did not solicit or initiate business with Burkard in Virginia is not material to whether the court has personal jurisdiction over Okori.

Indeed, the very case relied upon by *Carter v. Wake Forest University Baptist Med. Center*, *UMG Recordings, Inc. v. Kurbanov*, explained that it "recognized the need to adapt traditional notions of personal jurisdiction" for online activities and websites, stating that, in the "context of online activities and websites":

We have adopted the "sliding scale" model articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), to help determine when a defendant's online activities are sufficient to justify the exercise of personal jurisdiction. See *ALS Scan*, 293 F.3d at 707.

963 F.3d at 352.

Thus, in the "context of online activities and websites," the Fourth

Circuit has abandoned its "list of various nonexclusive factors to consider" 963 F.3d at 352. As *Carter v. Wake Forest University Baptist Med. Center* relied upon *UMG Recordings, Inc. v. Kurbanov*, it is reasonable to conclude that the Virginia Court of Appeals would also abandon the list of various nonexclusive factors in the context of online activities and websites and would adopt the "sliding scale" model articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). On that "sliding scale," this court has personal jurisdiction over Okori.

CONCLUSION

For the reasons set forth above, Defendant Okori's Motion For Reconsideration is DENIED.

An appropriate order will enter.

Sincerely yours,

A handwritten signature in blue ink that reads "Richard E. Gardiner". The signature is written in a cursive, flowing style.

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

Plaintiffs

v.

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

Defendants

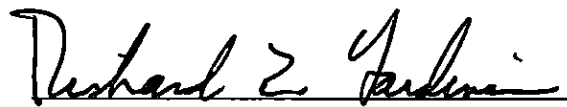
CL 2023-6260

ORDER

THIS MATTER came before the court on the *Motion For Reconsideration* of Defendant Okori, LLC, d/b/a 80P Builder, requesting the court to reconsider the court's Order of February 16, 2024 denying Okori's *Motion to Dismiss for Lack of Personal Jurisdiction*.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Defendant's *Motion For Reconsideration*.

ENTERED this 26th day of March, 2024.



Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Diane E. DiBlasio
Counsel for Defendant Okori, LLC, d/b/a 80P Builder

Edward L. Weiner
Counsel for Plaintiff