

**BRIEF IN OPPOSITION OF MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION**

THE MATTER BEFORE THE COURT

The matter before the Court is Defendant Robin Bone's (Bone) motion to dismiss the complaint for lack of personal jurisdiction. While not properly identified as such, even though this motion is word-for-word the same as defendant Koehler's motion, and the Defendant had access to Plaintiff's Answer to Koehler's prior filed motion, Plaintiff is approaching the motion as one to dismiss under Fed. R. Civ. P. 12(b)(2).

Plaintiff is an LLC with its place of business in Kansas. Robin Bone Toys is a sole proprietorship with its place of business in Wisconsin. Jurisdiction and venue are based on the federal question of trademark infringement under the Lanham Act.

Plaintiff states that specific personal jurisdiction is proper under K.S.A. 308(b), in that Bone's activities demonstrate that he deliberately established minimum contacts with Kansas. He also purposefully availed herself of the privilege of conducting activities here in such a way as to reasonably anticipate being haled into court in Kansas.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case is an outgrowth of another District of Kansas case, to-wit: 2:07-cv-02253-DJW. Bone is a self-proclaimed licensee of American Plastic Equipment, Inc., the plaintiff in this case. In that case, in August 2007, Judge Waxse issued a order stating the American had no protected or actionable interest in the disputed trademarks.[Ex. 1] Despite the ruling, Bone continued to use the trademarks on his commercial website. Bone also engaged in defamatory and tortious behavior on internet venues. Hence, the present case. Because of the commonality of facts and issues, Plaintiff respectfully requests this court to take judicial notice of the District of Kansas case 2:07-cv-02253.

QUESTIONS PRESENTED

I. WHETHER BONE’S ACTIVITIES ARE SUFFICIENT TO SUPPORT PERSONAL JURISDICTION IN THE STATE OF KANSAS.

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ARGUMENTS AND AUTHORITIES

I. WHETHER BONE'S ACTIVITIES ARE SUFFICIENT TO SUPPORT PERSONAL JURISDICTION IN THE STATE OF KANSAS.

A. Personal jurisdiction over Bone is proper under the Kansas long-arm statute.

Bone's motion correctly states that the plaintiff bears the burden of establishing personal jurisdiction. "In the preliminary stages of the litigation, however, that burden is light." *Behagen v. Amateur Basketball Ass'n of the United States*. 744 F.2d 731, 733 (10th Cir. 1984).

"When the court rules on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction . . . plaintiff need only make a *prima facie* showing of personal jurisdiction to defeat the motion. A plaintiff may make the *prima facie* showing by demonstrating by affidavit or other written materials, facts, that, if true, would support the exercise of personal jurisdiction over the defendant." *Rainy Day Books, Inc. v. Rainy Day Books & Café LLC*, 186 F.Supp.2d 1158, 1160 (Kan. 2002), *citing OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1090 (10th Cir. 1998).

"The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's *prima facie* showing is sufficient notwithstanding the contrary presentation by the moving party. *Behagen*, at 733. *Internal citations omitted*. Plaintiff can make such a *prima facie* showing of specific personal jurisdiction over Bone, therefore, the court must deny this motion to dismiss.

B. Bone has had the necessary 'minimum contacts' with the forum to support personal jurisdiction.

“The first step in the minimum contacts analysis requires a determination of whether Plaintiff [can make] a showing of some act by which the defendant purposefully availed itself of the privilege of conducting business in the jurisdiction of this court, thus invoking the benefits and protections of its laws. A defendant need not be physically present or have physical contacts with the forum, as long as its efforts are ‘purposefully directed’ toward forum residents.” *Rainy Day*, at 1163, *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Purposeful availment may occur by actions or even a single act for which the defendant should reasonably anticipate being haled into court into the forum jurisdiction. *Id.*

The instant case is very similar to the situation presented in *Rainy Day Books*. Bone operates a commercial website under the domain name www.robinbonetoys.com. On that website, Bone openly advertises and offers for sale items bearing the infringing trademarks “Johnny West”, “Marx”, “Fort Apache Fighters”, and “Jed Gibson.” [Ex. 2] Bone claims to derive his authority to use the trademarks from a license with American Plastic Equipment, Inc. by stating “Marx Toys, Johnny West, Bill Buck, Jed Gibson and all related characters, names trade dress, designs, etc. are TM & (c) American Plastic Equipment, Inc., Fort Apache is a registered trademark of A.P.E. Inc. All rights reserved.” [Ex. 2, pg. 5-6]. Bone also states, “Robin Bone Toys is proud to be one of only TWO sources to carry the Special 2006 Exclusive Limited Edition Official Fort Apache Fighters Wilderness Scout Gear advance preview set!” [Ex. 2, pg. 4] and “CLICK HERE To E-Mail Robin Bone Toys To Purchase Your FoJ Sets!” [Ex. 2, pg. 2]

In *Rainy Day Books*, the court stated that the Tenth Circuit endorses the ‘sliding scale’ analysis for Internet websites as set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,

952 F.Supp. 1119 (W.D. Pa. 1997). Judge Waxse found that the decision on *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d, 1292 (10th Cir. 1999) accepted and endorsed the *Zippo* analysis and the court applied it in *Rainy Day Books* to find specific personal jurisdiction.

The *Zippo* analysis has three benchmarks. At one end, are sites that allow the upload, download, and free exchange of files via the internet. At the other end, are sites that are purely passive in nature. Information only, with no interactivity. In the middle, are the other sites, those that are commercial in nature with some degree of interactivity. “Whether the exercise of jurisdiction is appropriate depends upon ‘level of interactivity and commercial nature of the exchange of information that occurs on the Web site’.” *Rainy Day* at 1163, *Soma* at 1196, quoting *Zippo* at 1123.

Bone has made no changes to his website since the instant action was filed. A screen capture taken on October 23, 2008, well after the filing and service of the complaint, shows the following:

1. Bone’s site proclaims: “CLICK HERE To E-Mail Robin Bone Toys To Purchase Your FoJ Sets!” [Ex. 2, pg. 2]
2. Bone’s site offers for sale items bearing the infringing trademarks “Johnny West”, “Fort Apache Fighters”, “Marx” and “Jed Gibson.” [Ex. 2] The purchaser can click a large button marked “Click Here! Items For Sale” to go directly to a fixed price webstore and could select the items they wished to purchase. [Ex. 2, pg. 6]
3. Bone’s site claims that “Marx Toys, Fort Apache ®, Thunderbolt, Comanche, Johnny West, Bill Buck, Jed Gibson, and all related characters, trade dress, logos and designs, are TM and/or (c) A.P.E., Inc. and used with permission. All

rights reserved. All other content of this site (c) 2006 RobinBoneToys.com and The Friends of Johnny. Site maintained by MFM.” [Ex. 2, pg. 6]

Like the defendant in *Rainy Day Books*, Bone’s website, as it appears in October 2008, falls into the category of “clearly doing business over the Internet.” *Rainy Day at* 1163. Bone’s website also shows a clear and distinct link to the organization ‘Friends of Johnny’ and that Bone considers himself, and holds himself out to be, a licensee of American Plastic. Like the defendant In *Rainy Day Books*, the court must conclude that Bone has “purposefully and deliberately set up and operated a website with a high level of interactivity, which encourages customers accessing its website to order [merchandise]. . . . As such, [Bone’s] website falls within the sliding scale category of websites that allows a defendant to ‘do business’ and ‘enter into contracts with residents of foreign jurisdictions over the Internet’.” *Id.* at 1164. Consequently, under the standard of this court set in *Rainy Day Books*, Bone has purposefully availed himself of the privilege of doing business in this jurisdiction.

As pointed out in *Rainy Day Books*, “the pertinent inquiry in the personal jurisdiction analysis is whether [Bone], by [his] own actions, has purposefully availed [himself] of the privilege of conducting business in this jurisdiction so that [he] should reason[ably] anticipate being haled into this forum. . . . In this case, it was [Bone's] own actions of maintaining a commercial website with the knowledge that it allegedly infringed upon Plaintiff's [trademark] and that Plaintiff's primary [business] operated in Kansas that created the minimum contacts with the forum.” *Rainy Day* at 1165.

The component that ‘sealed the deal’ for the finding of specific personal jurisdiction in the *Rainy Day* case was that the defendant continued to operate their

website after receiving notice from the plaintiff that it owned the registered trademarks and considered the defendant's website to be infringing on that trademark.

In this case, this secondary information is even more on-point and telling. On March 31, 2008, the District Court in 2:07-cv-02253, issued a ruling that American Plastic Equipment, Inc. had no protectible or actionable interest in the trademarks "Johnny West Adventure", "Best of the West", "Circle X Ranch", "Fort Apache Fighters", "Marxman" and "Marxman Bros." [Ex. 1]. This ruling affirmed a consent order entered into the Bourbon County District Court on August 27, 2007. [Ex. 3]. Bone, who holds himself out to be a licensee of American Plastic Equipment, Inc. was well aware of the findings of this court.

Also, on July 2, 2008, plaintiff sent Bone a courtesy copy of this complaint along with copies of the two court decisions to ensure he had the exact information of the court's ruling. Bone had ample opportunity to step back from his infringing activities, but chose not to.[Ex. 4]

In early June 2008, Plaintiff used the eBay VeRO trademark protection system to remove a number of Bone's sales from his fixed price webstore because the ads included infringing trademarks. [Ex. 5] Mr. Bone was unfazed. On June 11, 2008, Mr. Bone, under the screen name/email 'murphyman20032003@yahoo.com,' posted the following on the Yahoo chat group "JWCorral2" owned by co-defendant Jill Koehler:

From: "Robin" <murphyman20032003@...>
Date: Wed Jun 11, 2008 11:15 pm
Subject: Re: Special FoJ Thank You!

Just must be a sad lonely little world for them that they have nothing else better to do...
Despite there [sic] efforts in having some of my auctions shut down. I'm Very Happy to report that the Boone Weapon accessorie [sic] set has done better than we were expecting. I was also

pleased that I recieved [sic] multiple orders for BLACK and GREY Bear Skin Vests and the 2 Hats. So I guess there tactics don't always work Robin aka murphyman20032003 www.robinbonetoys.com --- In jwcorral2@yahoogroups.com. [JWCorral2, 'http://groups.yahoo.com/group/jwcorral2/' post #4070]

This communication infers that Bone knew exactly who terminated his infringing sales and why. However, it also shows that he didn't care. Furthermore, Bone also joined Ms. Koehler in an email dated July 18, 2008 claims these court decisions are invalid and do not apply to them. [Ex. 7]. Consequently, it is clear that Bone continued to operate his website despite having knowledge of state and federal court decisions which stripped his licensor, and by implication Bone, of all rights to the trademarks. Furthermore, Bone, after having his sales removed from his fixed-price webstore, still continued to infringe on Plaintiff's trademarks. This is analogous to, and even more egregious, than the defendant's actions in *Rainy Day Books*.

In Bone's affidavit, he makes the self-serving statement that he has made no sales in Kansas. That statement is neither dispositive nor relevant. The court considered this same scenario in *Rainy Day Books* and said, "Because the inquiry is under specific personal jurisdiction, the individual [orders] placed by Kansas residents . . . are not determinative. Instead, the focus of the inquiry is on Defendant's actions in setting up and maintaining a commercial website, which targeted Kansas residents by its alleged use of Plaintiff's [trademarks] . . . The Court, in its specific personal jurisdiction analysis, concludes that Defendant, by its own actions, has purposefully availed itself of the privilege of conducting business in this jurisdiction so that it should reasonably anticipate being haled into this court." *Id.* The court went on to say that "the critical inquiry in determining whether there was a purposeful availment of the forum jurisdiction is the

quality, not merely the quantity, of the contacts. . . . By engaging in Internet commerce . . . through its website, with the knowledge that the website allegedly infringes upon [Kansas Plaintiff's trademark], Defendant has established the minimum contacts that are a prerequisite to the exercise of specific personal jurisdiction over it." *Id.* at 1166. (emphasis added).

Bone, after multiple actions by eBay, and the filing of the instant action, has removed the infringing items from the fixed-price webstore. However, his fixed-price webstore, remains interactive. Even though empty, his fixed-price store invites customers to subscribe to a newsletter. [Ex.8] Additionally, his website still invites people to email him directly to purchase items from the website. [Ex. 2, pg. 2] His statements on the internet site 'JWCorral2' quoted above shows that he continues to conduct business via the internet and email. These changes all occurred after Plaintiff's actions, as well as the filing and service of the instant complaint and do not cure the infringing actions which subject Bone to the specific personal jurisdiction of this court.

C. Bone, under the 'Calder Effects Test' has sufficient minimum contacts with the jurisdiction to support a finding of specific personal jurisdiction.

The Kansas long-arm statute also allows an exercise of specific personal jurisdiction over "any person, whether or not a citizen or resident of this state, who in person . . . [commits] a tortious act within this state." *See*, K.S.A. §60-308(b)(1)(B). Other states within the Tenth Circuit have examined the *Rainy Day Books* decision and its effect on establishing jurisdiction based on website activities. Like *Rainy Day*, the Utah District court in *System Designs* rejected the concept that minimum contacts should

rely only on the number of sales into the jurisdiction. Along with the now accepted *Zippo* website analysis, the Utah court expanded its inquiry to include an examination of the commission of a tortious act within the state and applied the ‘effects test’ developed by the Supreme Court in *Calder*.

Trademark infringement is a tort. *System Designs, Inv. v. New Customware Co., Inc.* 248 F.Supp.2d 1093, 1097 (Utah 2003). “In a tort case, as explained by the Supreme Court in *Calder v. Jones*, jurisdiction may attach if the defendant’s conduct is aimed at or has an effect in the forum state. Personal jurisdiction can be based upon intentional actions, expressly aimed at the forum state, causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state.” *Id.* at 1098, citing *Calder vs. Jones*, 465 U.S. 783 (1984).

The *System Designs* court applied a three-part test to determine specific jurisdiction. This test is consistent with the standards applied in Kansas:

- 1) The defendant’s acts or contacts must implicate [the forum state] under the [forum state’s] long-arm statute;
- 2) A nexus must exist between the plaintiff’s claims and the defendant’s acts or contacts; and
- 3) The application of the . . . long-arm statute must satisfy the requirements of federal due process.

System Designs at 1096. See also, *Rainy Day* at 1166.

The Utah long-arm statute is analogous to the Kansas long-arm statute in that it also recognizes that commission of a tortious act against a resident of the state satisfies the requirement for exercise of personal jurisdiction.

The *System Designs* court looked to the Ninth Circuit and compared and contrasted its decisions in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) and *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).

The Utah court found telling that the trademarks in *Cybersell* had not been registered at the time of the alleged infringement. Also dispositive is that upon being informed of the potential infringement, the defendant immediately changed their domain name and removed all trace of potentially infringing material from their website. In this case, the Ninth Circuit declined to find jurisdiction. *System Designs* at 1098. However, in *Panavision*, the Ninth Circuit coupled the registration of the domain name with defendant's on-going harassment of plaintiff as sufficient to confer jurisdiction under the *Calder* test. *Id.*

The matter before the court is more analogous to *Panavision*. Upon being notified of the court decision which stripped American Plastic, and by implication, Bone, of all rights to the disputed trademarks, Bone did not step back from the trademarks. He ignored the removal of items from his webstore, declared the court decision 'invalid' and continued with his infringing activities on his website. On his website, Bone advertises 'Friends of Johnny' (run by defendants Kosowski and Bone). [Ex. 2, pg. 3, pg. 5]

Bone cites general business tort cases in her motion. *See, for example, Far West Capital v. Towne*, 46 F.3d 1071 (10th Cir. 1995) and *Conoco, Inc. v. Agrico Chem. Co.*, 115 P.3d 829 (Okla. 2004). The first case involved tortious interference with a contract and the second examined whether jurisdiction over a parent company equated to per se jurisdiction over a subsidiary. Neither case dealt with the facts at hand of the use of a commercial website to infringe on trademarks registered to a resident of the forum state.

The proper cases are *Rainy Day Books* and *System Designs*, not those cited by the defendant. Bone also places a misdirected reliance on *Sunlight Saunas*. In that case, the plaintiff attempted to join two parties, Hall and Cobalt, as defendants.

However, the court found that Hall's only participation had been as the web designer of a passive website that allegedly infringed on plaintiff's trademarks and contained defamatory statements. Hall and Cobalt were independent contractors and did not participate in the infringing and defamatory activities of the other defendants.

The court further found that Hall's personal website, which was completely unrelated to the cause of action, insufficient to establish personal jurisdiction. Consequently, Hall and his personal business Cobalt, were dismissed from the case for want of jurisdiction. They were truly 'innocent bystanders' and noncombatants in the dispute. The balance of defendants went to trial and the plaintiff received a substantial jury award for defendant's defamatory and infringing activities on their website. Reliance on this case shows a complete lack of research and preparation by defendant Bone. Had he read the entire case, rather than the single sentence that seems to support his position, he would have seen that *Sunlight* supports Plaintiff's position on the substantive matters of defamation and unfair competition. *Sunlight Saunas*, on this particular question, is completely distinguishable from the case currently before the court. Jurisdiction is directly based on Bone's activities of:

- a) Creating and maintain a website that sells infringing goods,
- b) Actively participating and contributing to public discussions impugning and defaming plaintiffs,

- c) Refusal to stop these activities when Bone was well informed of the court actions regarding these registered and common law trademarks.

The Utah court in *System Designs* discussed the unique characteristics of registered trademarks. The court found, “[a] strong argument can be made here for finding that [defendant] is subject to personal jurisdiction in [the forum state] based on alleged infringement alone. Trademarks are registered in a national database, accessible to anyone. By registering a trademark with this database, an owner of a mark puts the world on notice – literally – that they have the rights to that mark. Not only does this establish a constructive notice as to the right to use the mark, it also establishes a constructive notice as to where the mark is registered. Therefore, to avoid suit in [the forum state], [defendant] needed only to look up the [trademark] before it chose to [use the mark]. A search would have quickly revealed that [the trademark] was a registered trademark, thereby warning [defendant] it might be subject to suit in [the forum state] if it choose to use that mark.” *Systems Design* at 1098.

This statement is directly on point with the matter before the court. Plaintiff holds federal registrations to “Johnny West Adventure”, “Best of the West” and “Jed Gibson”. [Ex. 9] Bone could have looked up these registrations in the United States Patent and Trademark Office database at <http://www.uspto.gov> and seen that those trademarks were registered to a Kansas company. That information alone would put Bone on notice that he might be subject to suit in the state of Kansas.

Couple that with Bone’s knowledge of the decision from the Kansas federal court stripping the purported licensor, and by privity Bone, of all rights to these trademarks and

there is no basis for Bone, as a privy to American, to say he could not anticipate being haled into court in Kansas.

The *System Designs* court addressed this aspect of due process by saying, “[Plaintiff], having taken the time and resources to register its trademark, should not be required to travel to distant locations where potential infringers might be located to defended its mark. . . . In light of easy nationwide accessibility of the trademark registry, an argument can be made for specific personal jurisdiction based on an allegation of trademark infringement alone. Under *Calder*, the ‘effects’ of the infringement are easy to determine: there is a national listing indicating exactly which state will feel the ‘effects’ of the infringement. No other tort . . . provides this kind of advance notice regarding location.” *Id.* at 1099.

However, the Tenth Circuit, like the Seventh and the Ninth Circuits, does not need to create a *per se* rule regarding direct trademark infringement. Like *Rainy Day* and *System Designs*, this court has the ‘something more’ needed to establish jurisdiction. The court has Bone’s knowledge of the plaintiff’s claims to the trademarks and of the court case involving the licensor and the trademarks.

Bone’s statements in his affidavit of being an innocent hobbyist who sells the vintage toys of her childhood is directly at odds with his actions in the Yahoo chat group ‘JWCorral2’. He posts a series of snarky and sarcastic comments about Plaintiff’s activities to police and enforce their trademark rights. Plaintiffs are referred to as:

- a) Having a ‘sad and lonely world’
[JWCorral2, ‘<http://groups.yahoo.com/group/jwcorral2/>’ post # 4070]
- b) “For someone who says they LOVE Johnny and the collectors I think they do a pretty F#\$%\$\$ up’d job....”

[JWCorral2, 'http://groups.yahoo.com/group/jwcorral2/', post # 4172]

Bone had ample opportunity to step aside. However, Bone ignored the warnings. Bone ignored the notices. Bone ignored the actions of the eBay VeRO trademark protection department, Bone ignored the findings of Judge Waxse. Bone ignored the facts. Bone continued to infringe on the trademarks of a Kansas company. Consequently, Bone has no excuse and no reason to now say he is not subject to the jurisdiction of this court.

D. Defendant Bone has made overt acts in furtherance of a civil conspiracy that has resulted in tortious activities damaging Plaintiffs.

Defendant Bone's affidavit contains several untrue statements. However, one is particularly material and telling on the jurisdictional analysis. In paragraph 3 of his affidavit, Robin Bone states, "In order to promote interest in these collectable items, I purchased a domain name and constructed an Internet website." [Ex. 10]

This self-serving statement is directly contradicted by the public records and Mr. Bone's own website. The WHOIS registration information for the domain name 'www.robinbonetoys.com' speaks for itself. On July 07, 2006, the domain name 'www.robinbonetoys.com' was registered to Michael Kosowski of New York. [Ex. 11] Michael Kosowski is also listed as the administrative contact for the domain name. [Ex. 11]

Furthermore, the website supposedly 'constructed' by Bone is hosted at the IP address 205.178.190.115 which is the same IP address as two other sites with domain

names registered to Mr. Kosowski, to-wit: ‘www.friendsofjohnny.com’ and ‘www.marxfiles.com.’ [Ex. 12] These two sites share common graphics, design, layout and style. [Ex. 13] Mr. Kosowski is also a defendant in this case. This registration and IP hosting shows that Bone was not being honest in his affidavit. Bone was not creating a one-man do-it-yourself innocuous fan website, but working in concert with defendant Kowsowki to create websites to advertise and sell infringing items, promote infringing items and attempt to interfere with plaintiff’s business.

Kansas recognizes the cause of action of civil conspiracy. “Elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as a proximate result thereof.” *Meyer Land & Cattle v. Lincoln Cty. Con.*, 29 Kan. App. 2d 746, 753 (Kan. 2001) *citing Stoldt v. City of Toronto*, 234 Kan. 957, 967 (Kan. 1984). Also, “in order for civil conspiracy to lie, the claim must base itself on a valid, actionable underlying tort.” *Meyer Land*, at 753. It is well established that trademark infringement is a tort. *System Designs*, at 1097.

A *prima facie* case for civil conspiracy can be made based on Bone’s actions in concert with Kosowski, Koehler, and American Plastic. To review the basic elements and match them to the facts to date in this case.

- 1) Bone, under the organizational name of ‘The Friends of Johnny’ acted in concert with defendants Kosowski and, American Plastic Equipment, Inc. This is explicitly shown on Bone’s website on page 3 and 5 that shows a ‘Friends of Johnny’ project being available exclusively from ‘Robin Bone Toys’ [defendant

Bone], and ‘The Marx Files’ [defendant Kosowski]. [Ex. 2, pg. 3] The website also claims that all trademarks are used ‘with permission’ of American Plastic Equipment, Inc. [Ex. 2, pg. 6] Additionally, in posts on the chat group ‘JWCorral2’, Kosowski clearly identifies Koehler as the ‘FoJ’er’ who created the manual that identified and accompanied the infringing items. So, two or more persons are involved.

- 2) The object of the conspiracy, as shown on Bone’s website, is to manufacture and distribute goods bearing the infringing trademarks ‘Johnny West’, ‘Marx Toys’, ‘Fort Apache Fighters’, and ‘Jed Gibson.’ This is also clearly displayed on the website ‘www.robinbonetoys.com’ and ‘www.friendsofjohnny.com’. [Ex. 2 & 13] Both of these domain names are registered to Michael Kosowski and both are hosted at the IP address 205.178.190.115. [Ex. 12] Both have email hot links that allow customers to communicate directly with Robin Bone. [Ex. 2 & 13].
- 3) The requisite ‘meeting of the minds’ can be inferred by the content of the two websites. Michael Kosowski registered the domain names and hosted the two websites at a common IP address while establishing Bone as the ‘front man’ and primary contact. This ‘meeting of the minds’ can also be inferred by the content of posts on the Yahoo group ‘JWCorral2’ which includes posts such as:

#4057

From: "Mike K." <arkive5@...>

Date: Tue Jun 10, 2008 11:20 pm

Subject: Special FoJ Thank You! arkive5

Here's a great big special Friends of Johnny THANK YOU to all of the folks who support us and have purchased (and will purchase) our newest project! The response so far is overwhelming and very positive! Our next project will be here before you know it, and once again I want to thank everyone for making it happen :o) (and thanks to FoJ'er Miss Jill for doing the current manual too!) FoJ... Here to Stay! REAL Marx all the way! -Mike (and Robin) [JWCOrral2, '<http://groups.yahoo.com/group/jwcorral2/>', post #4057]

- 4) Websites 'www.robinbonetoys.com' [Ex. 2], 'www.friendsofjohnny.com,' [Ex. 13], and 'www.koehlercustoms.com' [Ex. 14] contain *prima facie* evidence of the unlawful overt acts. Through these websites and the attendant fixed price webstore, Bone, Kosowski, and Koehler colluded to advertise and sell items bearing the trademarks registered to, and claimed by, plaintiffs. Kosowski registered the domain names and arranged web hosting at a common IP address. Bone received the emails and posted infringing listings in the fixed-price webstore. All three parties posted information about and promoted this activity on the Yahoo chat group 'JWCOrral2' owned by defendant Koehler. Furthermore, Koehler's website at 'www.koehlercustoms.com' currently states, "More F.O.J. is on the way! Keep an eye out here and on the Friends of Johnny site for updates. New items from original Marx molds are being produced and will be available for purchase very soon. Some of the items will be exclusives-available

only through Koehler Customs!” [Ex. 14, pg. 2]

- 5) The damages from the unlawful and tortious actions of defendant Bone, in concert with Koehler and Kosowski are felt in Kansas, by a Kansas business entity, Toytrackerz LLC, the plaintiff.

In *Merriman v. Crompton Corp.*, the Kansas Supreme Court held “that the theory of conspiracy jurisdiction can be used to satisfy due process considerations. Allegations of a conspiracy to commit a business tort which had foreseeable consequences in Kansas are sufficient to support a finding of personal jurisdiction over a non-resident defendant.” *Brooke Credit Corp. v. Texas American Insurers*, Civil #06-1367-JTM (D. Kan. May 31, 2007), citing *Merriman v. Crompton Corp.*, 288 Kan. 433 (Kan. 2006).

Plaintiff has already filed their response to Koehler’s motion to dismiss showing how jurisdiction is proper under *Rainy Day* and *New Systems*. Bone is clearly acting in concert with Koehler. In fact, his memorandum is word-for-word identical to Koehler’s and likely prepared by Koehler. [PACER Doc. # 9] Consequently, as both are part of the civil conspiracy, jurisdiction over Koehler imputes jurisdiction over Bone and Kosowski.

- E. There is a clear nexus between Plaintiff’s claims and Bone’s actions.

The second part of the jurisdiction test requires a nexus between plaintiff’s claims and defendant’s actions. *System Designs* at 1196.

It is a simple ‘but for’ test and easily satisfied by Bone’s actions.

But for Bone;

- a) operating a website selling products that infringe on plaintiff’s trademarks,

- b) when he had knowledge of the registration of those trademarks,
- c) when he had knowledge of Kansas litigation concerning those trademarks,
- d) when he posted snide comments to defame plaintiff and their business,
- e) participating in a conspiracy to commit the tort of trademark infringement,

There would be no cause of action against Bone. Specific personal jurisdiction over Bone is proper based on her purposeful availment of the forum of Kansas using his internet website as a vehicle for infringement.

F. Specific Personal Jurisdiction over Bone is reasonable pursuant to due process.

Bone has had the minimum contacts and purposeful availment required to establish specific personal jurisdiction and jurisdiction through the civil conspiracy.

There is also a clear nexus between the plaintiff's claims of trademark infringement, unfair competition and defamation, and defendant's actions through his website and his participation in the civil conspiracy.

The final determination is whether the "exercise of personal jurisdiction over [Bone] would offend traditional notions of 'fair play and substantial justice'." *Rainy Day* at 1196, quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985). The court must determine if the exercise of specific personal jurisdiction is reasonable under the circumstances of the case. The court must consider the following factors:

- 1) The burden on the defendant;
- 2) The forum state's interest in resolving the dispute;

- 3) The plaintiff's interest in receiving convenient and effective relief;
- 4) The interstate judicial system's interest in efficient resolution of cases;
- 5) The shared interest of the states in furthering social policies.

Rainy Day at 1166.

Like *Rainy Day*, the factors in this case show that the exercise of specific personal jurisdiction over Bone is not unconstitutionally unreasonable.

Because of electronic motions practice, defendant has easy 24-hour-a-day access to the court and can file motions by fax or mail. Defendant receives service by mail and can read and download documents from the court website. Plaintiff and defendant can communicate by email on issues outside the court. Court conferences are held by phone. Only if the case were to go to trial would defendant be required to travel to Kansas.

Also like *Rainy Day*, "this Court has a strong interest in adjudicating disputes that involve the alleged infringement of a Kansas corporation's [trademark]." *Id* at 1167.

The plaintiff filed this case against defendants located in Wisconsin, southern Ohio, northern Ohio, and New York. It is far more efficient and logical to litigate the multiple cases in the common forum and home state of the company that owns the trademarks infringed by the defendants. The multiplicity of defendants favors an efficient resolution in a single forum rather than four different federal districts. Efficiency of litigation, as well as trademark protection also favors a social policy of combining cases with common facts against multiple defendants into a single, logical forum. In this instance, the logical forum is the home state of the trademark holders -

Kansas. On the whole, the Court can conclude that exercise of jurisdiction over Bone in this case is not unconstitutionally unreasonable.

CONCLUSION

As a *pro se* defendant, Bone put forward a motion to dismiss for lack of personal jurisdiction that is word-for-word identical to the memorandum submitted by Koehler. However, Bone, in relying on this cookie-cutter memorandum, neglected to research the fundamentals of jurisdiction established through the actions of a defendant done through a website. He also put forth an affidavit with blatantly self-serving and false statements. Physical contact with, or sales into, the forum state are not required if the defendant's actions in operating their website show a purposeful availment or actions that are so willful or reckless that the defendant can reasonably anticipate being haled into court in the forum state.

That is exactly the case with Bone. He operated a commercial website selling items bearing the registered trademarks of a Kansas company. He did this even though a quick review of the trademark database would have informed him that the trademarks belong to a Kansas company. He did this even though he had actual knowledge that a Kansas federal court had stripped his purported licensor, and by implication all licensees, of all rights to the trademarks. He continued even though his sales were removed from his fixed-price webstore for trademark infringement.

Bone continued even when given a non-service copy of the complaint, complete with the legal decisions and approximately thirty days before service to discuss the matter with Plaintiff. Despite the notice and opportunity to step back, Bone barreled ahead with his activities, claiming the Kansas decisions (he called them the Kansas 'wins' in his joint

email with defendant Koehler) [Ex. 8] did not apply to him. In short, Bone acted with the type of purposeful and reckless abandonment that has led to this point. He is the defendant in a case filed in the District of Kansas and, because of his actions, and his actions in furthering the civil conspiracy with defendants Kosowski and Kowhler, this court has specific personal jurisdiction over him.

Consequently, defendant's motion for dismissal based on lack of personal jurisdiction should be denied along with whatever equitable relief to plaintiffs, including attorney's fees, that the court deems equitable and just.

Respectfully Submitted By:
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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October 2008, I served, by first class mail, the following Response to Defendant Bone's Motion to Dismiss for lack of Personal Jurisdiction.

Jill Koehler
403 Rankin Dr
Englewood, OH 45322

Michael Kosowski
11 Roydon Drive W
North Merrick NY 11566

Robin Bone
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Madison WI 53711

As pro se defendants are not registered to receive notifications via CM/ECF, all filings will be copied and sent to defendant until they register or are represented by counsel. I further certify that the attorney for Defendant American Plastic received service via the CM/ECF system on the 29th day of October 2008.

David E. Herron II
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Overland Park KS 66282

/s/ Terri Lynn Coop

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