

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

THE MATTER BEFORE THE COURT

The matter before the Court is Defendant Michael Kosowski's motion to dismiss the complaint for lack of personal jurisdiction. While not properly identified as such, even though it is identical to both Koehler and Bone's motions, and Kosowski had Plaintiffs' Answers to those motions, Plaintiff considers this motion as one to dismiss under Fed. R. Civ. P. 12(b)(2).

Plaintiff is an LLC with its primary place of business in Kansas. Michael Kosowski, dba 'Friends of Johnny' is a business founded, organized, and managed out of Kosowski's residential state of New York. Jurisdiction and venue are based on the federal question of trademark infringement and cybersquatting under the Lanham Act. Plaintiff states that specific personal jurisdiction is proper under the Kansas Long-Arm Statute, K.S.A. 308(b), in that Kosowski's activities demonstrate that he deliberately established minimum contacts with Kansas. He also purposefully availed himself 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 District of Kansas case: 2:07-cv-02253-DJW. Kosowski is a self-proclaimed 'friend,' licensee, and agent of American Plastic Equipment, Inc., the plaintiff in that case. In March 2008, Judge Waxse issued a order the American had no protected or actionable interest in the disputed trademarks.[Ex. 1] Despite the ruling Kosowski continues to use the trademarks on his commercial website, conspires with defendants Koehler and Bone, as well as maintains his cybersquatting websites. 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 KOSOWSKI’S ACTIVITIES ARE SUFFICIENT TO SUPPORT PERSONAL JURISDICTION IN THE STATE OF KANSAS.

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ARGUMENTS AND AUTHORITIES

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

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

Kosowski'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 Kosowski, therefore, the court must deny this motion to dismiss.

B. Kosowski has had the necessary 'minimum contacts' with the forum to support specific 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*. Kosowski operates a commercial website under the domain name ‘www.friendsofjohnny.com’ On that website, Kosowski openly advertises and offers for sale items bearing the infringing trademarks “Johnny West”, “Marx”, “Fort Apache Fighters”, and “Jed Gibson.” [Ex. 2] Kosowski claims to derive his authority to use the trademarks from a license with American Plastic Equipment, Inc. by stating on the website:

ALL Marx Toys™ and RELATED trademarks, copyrights and intellectual property are the property of American Plastic Equipment, Inc., and used with permission. Fort Apache® is a registered trademark of A.P.E. Inc. Marx Toys™, Johnny West™, Jane West™, Jed Gibson™, Bill Buck™, Sam Cobra™, Sheriff Garrett™, Captain Maddox™, Zeb Zachary™, Fighting Eagle™, Princess Wildflower™, Thunderbolt™, Flame™, Comanche™, Thundercolt™, Mike Hazard™, Stony Smith™, Johnny Apollo™, Johnny West™, Buddy Charlie™, Cowboy Kid™, Dangerous Dan™, Sheriff Goode™, and all other Marx Toys action figures, their design, names, logos, trade dress, accessories, etc. are ™ and/or © American Plastic Equipment, Inc., All rights reserved. Infringing is sleazy, so don't! [Ex. 2, pg 9].

Kosowski also states,

HERE IS A PICTURE SHOWING BOTH VERSIONS OF FoJ PROJECT 2B: THE OFFICIAL FORT APACHE® FIGHTERS WILDERNESS SCOUT GEAR LIMITED EDITION ACCESSORY SET! ANOTHER FANTASTIC SUPER-EXCLUSIVE PROJECT BROUGHT TO YOU ONLY BY THE NEW FOJ

TEAM... ROBIN BONE TOYS AND THE MARX FILES™! AS ALWAYS, MADE FROM THE ORIGINAL GENUINE MARX TOYS™ MOLDS, AND A MUST HAVE! REAL Marx™ ... ACCEPT NO IMITATIONS! CLICK HERE To E-Mail Robin Bone Toys To Purchase Your FoJ Sets! [Ex. 2, pg 3]
Finally, Kosowski ties it all together with these statements,

(Tack sets are currently listed on eBay from FoJ members), and it's a must have! Get yours before it's gone, and they're going fast! Your purchases will enable the next top-secret knock-your-socks-off project to happen, and we thank everyone for their support!

~Mike (The Marx Files™)
(Organizer and Founder, The Friends of Johnny)

Members of the first Friends of Johnny™ team (Thunderbolt tack in leather or gunpowder gray color, and only available from them) included:

The Marx Files™
Robin Bone Toys
Koehler Customs (also producer of the ONLY OFFICIALLY LICENSED Marx Toys action figure reproduction and fantasy boxes!) [Ex. 2, pg 7]

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 in *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 commercialism or 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.

Kosowski has made no changes to his websites since the instant action was filed. A screen capture taken on November 10, 2008, well after the filing and service of the complaint, shows the following:

1. Kosowski's site proclaims: "CLICK HERE To E-Mail Robin Bone Toys To Purchase Your FoJ Sets!." [Ex. 2, pg 3] Kosowski identifies Robin Bone and himself as the Friends of Johnny team. [Ex. 2, pg 3]
2. Kosowski's site offers for sale items bearing the infringing trademarks "Johnny West", "Fort Apache Fighters", "Marx" and "Jed Gibson." [Ex. 2] The customer can click to either email Robin Bone, or go to 'www.robinbonetoys.com' to make their purchase. [Ex. 2, pg 4] Robin Bone is also a defendant in this case.
3. Kosowski's site claims that the infringing trademarks are the property of American Plastic Equipment, Inc. and used with permission. American Plastic Equipment is also a defendant in this case. [Ex. 2, pg 9]
4. The internet domain names, 'www.friendsofjohnny.com' and 'robinbonetoys.com' are both registered to Kosowski. [Ex. 3]. Both websites are hosted at the same IP address. [Ex. 4]. Both websites share graphics, theme, and style. [Ex. 2 & Ex. 5]
5. Kosowski's website, 'www.friendsofjohnny.com' shows several different accessory sets that are available from the Friends of Johnny via Robin Bone Toys and claims that several of the sets are 'SOLD OUT' and that the accessories are manufactured and distributed by the Friends of Johnny. This is a direct contradiction to Kosowski's blatantly self-serving statement in his affidavit that states he 'occasionally sells and distributes collectable toys that I played with as a child.' [Ex. 6]

In fact, like the defendant in *Rainy Day Books*, Kosowski's website, as it appears in November 2008, falls into the category of "clearly doing business over the Internet." *Rainy Day at* 1163.

Kosowski's website also shows a clear and distinct link between the organizations 'Friends of Johnny' and 'Robin Bone Toys.' Kosowski, on his website states he is the 'Organizer and Founder - The Friends of Johnny.' [Ex. 2, pg 7] Kosowski also clearly that he considers himself, and holds himself out to be, a licensee of American Plastic. [Ex. 2, pg 9]

Like the defendant In *Rainy Day Books*, the court must conclude that Kosowski 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, [Kosowski'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. The fact that he directs customers to the website 'www.robinbonetoy.com' and directs them to contact Bone to complete the purchase is irrelevant. The *Rainy Day* defendant also directed customers to a third-party website to execute their purchase. Kosowski makes it very clear that Bone is his partner and that if you are dealing with either Kosowski or Bone, you are dealing with the 'Friends of Johnny.'

Consequently, under the standard of this court set in *Rainy Day Books*, Kosowski 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 [Kosowski], 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 [Kosowski'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 protected 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. 7]. Kosowski, who holds himself out to be a licensee of American Plastic Equipment, Inc., was well aware of the findings of this court. He does not deny that in his motion or affidavit.

Also, on July 2, 2008, plaintiff sent Kosowski 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. [Ex. 8] Kosowski had ample opportunity to step back from his infringing activities, but chose not to.

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. 9] Kosowski and Bone were unfazed. On June 11, 2008, Kosowski, under the

screen name/email 'arkive5@yahoo.com,' posted the following on the Yahoo chat group

"JWCorral2" owned by co-defendant Jill Koehler:

From: "Mike K." <arkive5@...>
Date: Wed Jun 11, 2008 11:35 pm
Subject: Re: Special FoJ Thank You! arkive5

Yes! Apparently there is a small group of devious degenerates out there that are extremely jealous over FoJ's most excellent products, and will do anything including filing false claims with eBay to try and annoy us and get our stuff pulled LOL (remember, eBay will blindly follow through on a complaint whether true or fraudulent, as we have seen with the many Johnny West weapon auctions that get "removed" for firearms violations) Not to worry, though... Friends of Johnny is here to STAY, and we will continue to make really cool REAL Marx stuff available to our friends and fellow collectors, and stuff that the "haters" ridiculous [sic] products can't compare with.

Matter of fact, our next project, which I'm sure everyone will love, is not too far off! Yee-Hah! And it will surely make the "haters" boil with envy ;o) FoJ Project 3 is selling VERY well (won't be around long!) so be sure to contact Robin to get yours before it's too late! FoJ... REAL Marx done the RIGHT way... and Here to Stay! :o)

-Mike

In jwcorral2@yahoogroups.com. [JWCorral2, 'http://groups.yahoo.com/group/jwcorral2/' post #4071]

From: "Mike K." <arkive5@...>
Date: Thu Jun 12, 2008 2:34 am
Subject: Re: Special FoJ Thank You! arkive5

Hey, Buddy!

Basically the way eBay works in that case is someone makes a claim that they own a trademark or copyright and fills out a form and faxes it back to eBay swearing that they are the rightful legal owner. eBay expects such claims to be filed by ethical and honest people legitimately protecting their interests. When a claimed "rights owner" files a report against someone selling on eBay, eBay basically shoots first and answers no questions; they care neither if the complaint is true or false, they don't want to take any chances legally, so they end the auction and issue the seller a warning. eBay takes the word of the person filing the complaint.

Certain individuals are claiming certain trademarks belong to them (this is currently in dispute in the court system), and they have registered (for now) those trademarks. The auctions in question violated none of those "registered" trademarks, so the complaints to eBay are falsely filed.

Someone could file a rights owner claim for say, Sam Cobra. They then could file a complaint with eBay against someone selling Daniel Boone hats, lying that it violates their Sam Cobra trademark. eBay basically trusts the claimed owner, and ends the auction. Is that right? I don't think so, but ask anyone who has been wrongly zapped by eBay what their experience was in TRYING to right the wrong. (I think Stevo got zapped for firearms violations for selling Johnny West size guns!) Rarely does a seller successfully defend his position. By the way, there are certain individuals out there who really do have nothing better to do than to try and report all kinds of "infractions" to eBay to try and get their competitors (or perceived "enemies") auctions pulled. Some of the members here have been at the receiving end of this activity, and some have even "seen it in the works".

Basically, FoJ is making real nice stuff from original Marx molds here in the USA for our friends and fellow collectors. We're doing it because we are collectors ourselves, and money and "fame" have nothing to do with it. We just want to make some good stuff that we'd all like to have, and do it the right way. No, we're not perfect, and we'll never be as good as Louis Marx was, but we're trying hard to do something nice.

Certain people are jealous and threatened by this (our own Robin was actually threatened and warned, and more, to stop being involved with Friends of Johnny!), which I find kind of twistedly funny and ironic as these people in question can only copy others' items, yet we have the good stuff made with real Marx Toys molds. In a way, I take the ending of the recent eBay auctions as a compliment to our very cool FoJ stuff! Certain people must indeed be writhing with jealousy and rage over our quality products!

But, hey... whatever turns them on! We all must answer for our deeds some day. In any case, FoJ is here to stay... we'll keep making good stuff as long as people want it. All real, no copies, and done as good as we can. We are learning all the time, and like with this newest project, we tried something different with the material used and it came out pretty cool (in my opinion). I'm looking forward to all feedback, criticism, complaints and compliments that our buyers care to share! We all like toys here, and toys should be fun. And fun is what FoJ is all about ;o) Let some other people try and get rich off their "friends" and followers... The friendships we forge, and the fun we can help create is our reward at FoJ. :o)

-Mike
FoJ Fearless Leader

In jwcorral2@yahoogroups.com. [JWCorral2, 'http://groups.yahoo.com/group/jwcorral2/' post #4076]

These communications infer that Kosowski knew exactly who terminated the infringing sales and why. He goes so far as to refer to Toytrackerz' claims to "annoy us and get our stuff pulled." It also shows that he didn't care. Additionally, in his long-winded holding forth in this internet forum, it is clear that Kosowski continued to operate his website in concert with Bone, despite having knowledge of the state court decision which stripped his licensor, and by privity Kosowski, of all rights to the trademarks. In his statement, Kosowski admits knowledge that the trademarks are registered to plaintiffs. Kosowski also makes it clear that he considers himself and the 'Friends of Johnny' to be above all of Plaintiffs' actions to enforce their protected trademarks. Finally, Kosowski also clearly identifies himself as a manufacturer and seller of goods. This directly controverts his self-serving affidavit that he 'occasionally sells childhood toys.' This situation is analogous to, and even more egregious, than the defendant's actions in *Rainy Day Books*.

In Kosowski'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).

C. Kosowski, 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 privity, Kosowski, of all rights to the disputed trademarks, Kosowski did not step back from the trademarks. He ignored the removal of items from his partner's webstore, ignored the state court decision, and declared 'Friends of Johnny' to be above plaintiffs' enforcement actions, and continued with his infringing activities on his website. On his website, Kosowski advertises 'Friends of Johnny' (run by defendants Kosowski and Bone) as well as 'Robin Bone Toys' and 'Koehler Customs'. [Ex. 2, pg. 8]

Kosowski follows Koehler and Bone by citing general business tort cases in his 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.

Kosowski 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 his company Cobalt were independent contractors and did not participate in the infringing and defamatory activities of the other defendants.

The court 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. This is distinguishable from the case at hand. Kosowski operates a commercial website that is engaged in trademark infringement as well as four cybersquatting websites.

The balance of the *Sunlight* 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 Kosowski. 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 Kosowski’s activities of:

- a) Creating and maintain a website that sells infringing goods, [Ex. 2]
- b) Actively participating and contributing to public discussions impugning and defaming plaintiffs, [see above, page 10 - 11]
- c) Refusal to stop these activities when Kosowski was well informed of the court actions regarding these registered and common law trademarks.
- d) Cybersquatting through registration of infringing domain names and maintaining two cybersquatting websites. [Ex. 3, 13, 14, & 15]

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. 10] Kosowski admits knowledge of these registrations. Therefore, he 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 Kosowski on notice that he might be subject to suit in the state of Kansas.

Couple that with Kosowski’s knowledge of the decision from the Kansas federal court stripping the purported licensor, and by privity Kosowski, of all rights to these trademarks and there is no basis for Kosowski, as a privy to American, to say he could not anticipate being haled into court in Kansas if he continued to infringe on plaintiffs’ trademarks.

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 Kosowski’s admitted knowledge of the plaintiff’s claims to the trademarks and of the court case involving the licensor and the trademarks.

Kosowski’s statements in his affidavit of being an innocent hobbyist who sells the vintage toys of his 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) Apparently there is a small group of devious degenerates out there that are extremely jealous over FoJ's most excellent products

[JWCorral2, ‘<http://groups.yahoo.com/group/jwcorral2/>’ post # 4071]

- b) Certain people must indeed be writhing with jealousy and rage over our quality products!

[JWCorral2, ‘<http://groups.yahoo.com/group/jwcorral2/>’, post # 4176]

Kosowski had ample opportunity to step aside. However, Kosowski ignored the warnings. Kosowski ignored the notices. Kosowski ignored the actions of the eBay VeRO trademark protection department against his partner Bone, Kosowski ignored the findings of Judge Smith of Bourbon County and Judge Waxse of the District of Kansas. Kosowski ignored the facts. Kosowski continued to infringe on the trademarks of a Kansas company.

Consequently, Kosowski has no excuse and no reason to now say he is not subject to the jurisdiction of this court. Kosowski has no one to blame but himself for being named a defendant before the District of Kansas.

D. Defendant Kosowski has done sufficient business with Plaintiffs in Kansas to establish minimum contacts with the forum state.

Kosowski, in his affidavit, states, “I do not . . . conduct any business . . . in the state of Kansas . . . The only Kansans who I have ever had contact with, in regards to the trademarks in question, were Plaintiff’s counsel and Defendant Noah Coop. [Ex. 6]

What Kosowski neglects to mention is the style and nature of those contacts with Noah Coop. In 2005, Kosowski acted as a go-between in negotiating a purchase of 1:6 scale action figures and accessories from original Marx molds, between Noah Coop, American Plastic Equipment and a defunct company called ‘Marx Toys and Entertainment.’ Emails between Coop and Kosowski show a clear agreement that Kosowski would arrange introductions between the parties and act as a middleman in negotiating a deal. Kosowski’s own words are:

“Cash will speak well, but again, seems like no bargain considering the possible damaged figures. I could probably get 500 black and 500 tan Stonies (as we spoke of: no heads, no hands, no rivets and no springs) for the neighborhood of \$4. per fig., + shipping. I got 13 of 16 boxes today UPS, but the boxes with the handful of black Stonys and wagon wheels and seats have still yet to arrive (I'm guessing tomorrow). I'd suggest waiting until I get them and send you samples as we spoke of, and then go from there. . . . Again, please keep the above under your hat. I'll be happy to scout for you, but just remember what you're paying for. If you have actual liquid cash in hand, that would be best, and I could try and negotiate something.” [Ex. 11]

Kosowski then emailed Noah Coop that he had negotiated the introduction, the meeting time and the tentative price for the goods, to-wit:

“Hey Noah, Hope you're feeling better. Called Bob, 10 AM Thursday is fine. He will be sending me a confirmation of the details by e-mail later today, just for re-assurance (\$8. per figure for 1,000 or more figures in salable like new complete condition, they won't be sold elsewhere for less than \$8., knights and vikings won't be made again for at least 5 years, etc.) I had sent you a box last week by Priority with the black Stony body and 50 prs. of hands, hope you get it in time to see before you leave. Talk again soon; glad everything is on track so far. Best; -Mike” [Ex. 12]

These emails, with many more that can be produced for purposes of trial, show that Kosowski clearly conducted business with Noah Coop, a Kansas resident, and that this contact is relevant to the question before the court which is plaintiffs’ actions to enforce their rights in the trademarks.

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

Defendant Kosowski’s affidavit contains several untrue statements. However, one is particularly material and telling on the jurisdictional analysis. In paragraph 3 of his affidavit, Kosowski states, “I operate a home-based business that occasionally sells and distributes collectable toys that I played with as a child.”[Ex. 6]

This self-serving statement is directly contradicted by the following:

1. Kosowski’s own statements that he is responsible for the manufacture of goods under the name ‘Friends of Johnny.’
2. Kosowski is the registered owner of the two domain names under which the infringing goods are advertised and sold, to-wit: ‘www.robinbonetoys.com’ and ‘friendsofjohnny.com’ [Ex. 3]
3. Both domains are hosted at IP address 205.178.190.115 which is the same IP address as the other domain names registered to Mr. Kosowski, ‘www.marxfiles.com.’ [Ex. 4]

4. During the pendency of the state court case, Kosowski also registered the following domain names: ‘www.fortapachefighters.com’, ‘www.magicmarxie.net’, ‘www.marxtoys.net’ and ‘www.marxtoys.org.’ [Ex. 3]
5. Kosowski developed websites on ‘www.fortapachefighters.com’ [Ex. 14] and ‘www.magicmarxie.net’. [Ex. 15] The IP addresses for both of these websites is 205.178.190.115, the same as Kosowski’s other websites. [Ex. 13] Both of these websites display infringing trademarks and claim the trademarks are the property of American Plastic Equipment, Inc. [Ex. 14 - 15] On ‘www.fortapachefighters.com,’ the website references defendant Koehler. [Ex. 14]

These sites share common graphics, design, layout and style. Bone, Koehler and American Plastic are also defendants in this case. This registration and IP hosting shows that Kosowski was not being honest in his affidavit. Kosowski has not created a one-man-do-it-yourself innocuous fan website which ‘occasionally sells and distributes collectable toys that I played with as a child.’ [Ex. 6] Kosowski has created an interlocked network of websites and partners, with one objective, to advertise and sell items bearing trademarks which Kosowski has admitted are registered to plaintiffs. Kosowski has also reinforced his privity relationship with American Plastic by acting as an alter-ego for American in creating websites that state the trademarks belong to American Plastic. Kosowski, working in concert with Koehler and Bone, on behalf of American Plastic have created this network 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 Kosowski’s actions in concert with Bone and Koehler, on behalf of American Plastic. To review the basic elements and match them to the facts to date in this case.

- 1) Kosowski, the self-professed organizer and creator of ‘The Friends of Johnny’ acted in concert with defendants Bone and Koehler, on behalf of American Plastic Equipment, Inc. This is explicitly shown on Kosowski’s website 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. 9] 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 Kosowski’s website, it 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. 5 & 2] Both of these domain names are registered to Michael Kosowski and both are

hosted at the IP address 205.178.190.115. [Ex. 3 - 4] Both have email hot links that allow customers to communicate directly with Robin Bone. [Ex. 5, pg 2 & Ex. 2, pg 3]

- 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. 5], 'www.friendsofjohnny.com,' [Ex. 2] and 'www.koehlercustoms.com' [Ex. 16] contain *prima facie* evidence of the unlawful overt acts. Through these websites, 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. 16, pg 2]

5. The damages from the unlawful and tortious actions of defendant Kosowski, in concert with Koehler and Bone, on behalf of American Plastic, 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 and Bone's motions to dismiss showing how jurisdiction is proper under *Rainy Day* and *New Systems*. Kosowski is clearly acting in concert with Koehler and Bone. His memorandum is identical to Koehler's and likely prepared by Koehler. [PACER Doc. # 9 & #15] Consequently, as both are part of the civil conspiracy, jurisdiction over Kosowski imputes jurisdiction over Kosowski and Kosowski.

F. There is a clear nexus between Plaintiff's claims and Kosowski'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 Kosowski's actions.

But for Kosowski;

- a) creating the organization 'Friends of Johnny' for the purpose of manufacturing goods and acting in concert with Koehler to create infringing packaging for those goods,
- b) registering website domain names, hosting websites, and creating websites that offer the manufactured goods under infringing trademarks,
- c) acting in concert with Bone to offer the infringing goods through the websites owned by Kosowski,
- d) acting in concert with Koehler to post defamatory material about plaintiffs on a forum owned by Koehler,
- e) when Kosowski had knowledge of the registration of those trademarks,
- f) when Kosowski had knowledge of Kansas litigation concerning those trademarks,
- g) transacting business with Noah Coop regarding 1:6 scale action figures,

There would be no cause of action against Kosowski. Specific personal jurisdiction over Kosowski is proper based on his purposeful availment of the forum of Kansas using his internet websites as a vehicle for infringement and transacting business with a Kansas resident.

G. Specific Personal Jurisdiction over Kosowski is reasonable pursuant to due process.

Kosowski 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, defamation, and Kosowski's actions through his website and his participation in the civil conspiracy.

The final determination is whether the "exercise of personal jurisdiction over [Kosowski] 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 Kosowski 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 Kosowski in this case is not unconstitutionally unreasonable.

CONCLUSION

As a *pro se* defendant, Kosowski put forward a motion to dismiss for lack of personal jurisdiction that is word-for-word identical to the memorandum submitted by Koehler and Bone. However, Kosowski, 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 and through personal business contacts. He also put forth an affidavit with blatantly self-serving statements that are contravened by plaintiffs’ exhibits and affidavits. Physical contact with, or sales into, the forum state are not required if the defendant’s actions in operating his websites 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 Kosowski. Kosowski registered a series of domain names and operated, in concert with other defendants, commercial websites selling items bearing the

registered trademarks of a Kansas company. Kosowski did this even though a quick review of the trademark database would have informed him that the trademarks belong to a Kansas company. Kosowski did this even though he had actual knowledge of the registered trademarks. Kosowski did this even though he had actual knowledge that a Kansas federal court had stripped his purported licensor, and by privity all licensees, of all rights to the trademarks. Kosowski continued even though his partner's sales were removed from his fixed-price webstore for trademark infringement. Kosowski 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, Kosowski barreled ahead with his activities. In short, Kosowski acted with the type of purposeful and reckless abandonment that has led to this point. Kosowski is a 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 Bone and Koehler, this court has specific personal jurisdiction over Michael Kosowski.

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 12th day of November 2008, I served, by first class mail, the following Response to Defendant Kosowski'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
4305 Nakoma Road
Madison WI 53711

As this action was filed via CM/ECF on November 10th, 2008 after 5:00 PM and that November 11th, 2008 is a holiday for the United States Postal Service, the three defendants listed above were sent courtesy copies via email on November 10th, 2008.

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 10th day of November 2008.

David E. Herron II
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/s/ Terri Lynn Coop

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