

NORMAN K. MOON, District Judge.

\*1 Defendants seek dismissal of this patent infringement case for lack of personal jurisdiction under Rule 12(b)(2) and improper venue under Rule 12(b)(3). In the alternative, Defendants seek transfer to the Western District of Washington under 28 U.S.C. §§ 1404(a) or 1406. Defendants filed their Motion to Dismiss or Transfer on July 25, 2012 (docket no. 17), and Plaintiff filed a response on August 17, 2012, which contained a request for jurisdictional discovery. A telephonic hearing on the issues briefed by both parties took place on September 5, 2012, at which time I requested additional information from Defendants regarding their methods for charging customers and the number of Virginia residents that donated money to their company. Defendants provided that information on September 17, 2012, prompting Plaintiff to file an additional opposition to Defendants' Motion to Dismiss or Transfer, which was considered for the purposes of this memorandum opinion. For the reasons that follow, I deny Defendants' motion to dismiss for lack of personal jurisdiction and improper venue as to the Defendant JoeyBra LLC, and I will grant Plaintiff's request for jurisdictional discovery as to the individual Defendants Kyle Bartlow, Mariah Gentry, and Does 1–5.

## I. FACTUAL BACKGROUND

Plaintiff Charles Robinson, a citizen of Great Britain, filed a design patent application with the United States Patent and Trademark Office (“PTO”) on November 5, 1999. On October 2, 2001, after its examination of Plaintiff's application, the PTO issued U.S. Patent D448–541 (the “541 Patent”), entitled “Brassiere” and featuring the design for a pocketed bra. Mr. Robinson is bringing this patent suit against Defendants Gentry, Bartlow, Joeybra LLC, and other unnamed individuals, referred to as Does 1–5, due to the marketing and selling of their allegedly infringing “JoeyBra” product.

The named Defendants in this case, Ms. Gentry and Mr. Bartlow, are based in Seattle, WA. Their business entity JoeyBra LLC was organized in Washington state, and has its principle place of business in Bothell, WA. According to Defendant Gentry, she and Bartlow conceived of and developed the JoeyBra design<sup>1</sup> while they were college students at the University of Washington. In early 2012, Mr. Bartlow and Ms. Gentry formed JoeyBra LLC in order to bring their idea to the market, and in April 2012, Bartlow and Gentry entered their JoeyBra concept into a business plan competition that was held in Washington. Defendants' entry was one of sixteen selected to advance, and their product received coverage from several news outlets. The competition ended in May 2012.

Around that time, on May 22, 2012, Plaintiff filed its Complaint with this Court. Plaintiff alleges that Defendants have been knowingly, willfully, and intentionally infringing on his patent, both directly and indirectly, by making, importing, and selling the JoeyBra product (the “Product”) in the United States. In its Complaint, Plaintiff states that the JoeyBra features a pocketed design that is covered by his '541 Patent. Soon after filing the Complaint, on June 14, 2012, Plaintiff filed a Motion for a Preliminary Injunction (docket no. 7) in an effort to stop Defendants from making further sales of the JoeyBra.<sup>2</sup> After holding a hearing on Plaintiff's Motion for a Preliminary Injunction on July 10, 2012, this Court declined to rule, since Defendants disclosed their intention to move for dismissal or transfer. I stated that I intended to resolve the jurisdictional issues before considering the merits of Plaintiff's injunction request.

\*2 As mentioned, on July 25, 2012, Defendants filed a motion to dismiss for lack of personal jurisdiction and improper venue, pursuant to Fed.R.Civ.P. 12(b)(2) and 12(b)(3), or in the alternative, for a dismissal, transfer, or change of venue to the Western District of Washington, pursuant to 28 U.S.C. §§ 1404(a) or 1406. Plaintiff filed an opposition on August 7, 2012, in which it requested jurisdictional discovery if this Court decided not to deny Defendants' Motion to Dismiss or Transfer outright. Upon the Court's request, Defendants submitted additional factual information on September 17, 2012, regarding their business connections with Virginia residents. Most recently, on September 26, 2012, Plaintiff filed an additional opposition to Defendants' Motion to Dismiss or Transfer, in which it incorporated the newly disclosed information into its earlier arguments.

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### A. Personal Jurisdiction over Defendant JoeyBra LLC

The Defendants' most recent filing, a supplemental declaration in support of its Motion to Dismiss or Transfer, discloses that JoeyBra LLC received twenty-seven orders from Virginia residents using its website, and it shipped its Product to eight of those customers.<sup>4</sup> To date, six out of those eight customers have returned the Product, and all Virginia residents who placed an order have been refunded.<sup>5</sup> On or around September 17, 2012, nearly four months after Plaintiff filed its Complaint, Defendants disabled the option to ship any future Products to Virginia.

In addition to the orders that were placed by and fulfilled for Virginia customers using the JoeyBra website, Defendant Gentry states that three Virginia residents were shipped Products due to their contributions to the JoeyBra LLC through the Kickstarter fundraising website. Defendant Gentry describes Kickstarter as "a crowd funding website where supporters can pay money in exchange for the release of a future product or donate to the development of a product." Those three Virginia residents donated \$30.00 each, and in return were shipped the JoeyBra Product. At this point, Defendants have been unable to provide refunds for its Virginia donors, or recall the Products that were shipped.

These transactions with Virginia residents and shipments into the Commonwealth indicate that JoeyBra LLC purposefully availed itself of the privilege of conducting business in Virginia. See *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1359 (Fed.Cir.1998) ("Even a single act can support jurisdiction, so long as it creates a substantial connection with the forum, as opposed to an attenuated affiliation.") (citations and internal quotation marks omitted). To illustrate, in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed.Cir.1994), the Federal Circuit considered personal jurisdiction in a case brought in the Eastern District of Virginia by the holder of a design patent against the manufacturer and importer of an allegedly infringing ceiling fan. There the Federal Circuit found personal jurisdiction to exist, observing that "[t]he allegations are that defendants purposefully shipped the accused fan into Virginia through an established distribution channel," and "[n]o more is usually required to establish specific jurisdiction" when "[t]he cause of action for patent infringement is alleged to arise out of these activities." *Id.* at 1565. While JoeyBra LLC used a third-party shipping center, its managers understood and were aware of the processes and channels through which orders were placed and fulfilled.<sup>6</sup> The subsequent business transactions conducted in and for Virginia residents give rise to this present action. Given the orders and shipments into Virginia that have already occurred, even if the Defendants provide refunds for and obtain returns from all its customers and donors, specific personal jurisdiction over JoeyBra LLC will still exist.

\*5 The active nature of the JoeyBra LLC website provides an additional basis for this Court's exercise of specific personal jurisdiction over the Defendant LLC. In contrast to a "passive" website, through which a defendant can only display information to potential customers, an "active" website allows a defendant to enter into contracts, make transactions, and presents a much stronger case for the exercise of specific jurisdiction. See 4A Charles Alan Wright, et al., *Federal Practice & Procedure* § 1073 .1 (3d ed.2002) (discussing a sliding scale for websites' levels of user-interactivity established by *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D.Pa.1997)). 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). For this case in particular, infringement occurs when a defendant "offers to sell ... any patented invention," 35 U.S.C. § 271(a) (emphasis added), and Defendants' website can be fairly said to have offered to sell the allegedly infringing JoeyBras to Virginians.<sup>7</sup> Given its website and the sales and shipments that were actually made in Virginia, through an established stream of commerce, this Court may exercise specific jurisdiction over Defendant JoeyBra LLC, subject to the final "reasonableness and fairness" prong of the test.

In its inquiry into the reasonableness and fairness of jurisdiction, the Federal Circuit considers the five *Burger King* factors: "(1) the burden on the defendant, (2) the forum's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the states in furthering fundamental substantive social policies." *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1299 (Fed.Cir.2009) (citing *Burger King*, 471 U.S. at 477). Together, these factors may establish a "compelling case" that would "render jurisdiction unreasonable" despite the presence of minimum contacts. *Id.* However, "these cases are limited to the rare situation in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum." *Beverly Hills*, 21 F.3d at 1568.

This Court's exercise of personal jurisdiction over JoeyBra LLC is reasonable and fair. Despite a potential travel burden on the Defendant LLC's officers and agents based in Washington, this case does not qualify as one of the rare instances in which dismissal would be proper based on reasonableness and fairness considerations. See *Synthes*, 563 F.3d at 1299 (held that requiring a Brazilian defendant to travel to the United States from Brazil in order to defend against a patent infringement suit was "not unduly burdensome."); see also *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found.*, 297 F.3d 1343, 1356 (Fed.Cir.2002) (finding burden on Canadian corporation subject to litigation in Kansas to be "relatively minimal."). Further, Plaintiff is the co-owner and co-manager of the Mirage Apparel, LLC licensee, which is located in Virginia. In regards to the second and fifth factors, the Commonwealth "has an interest in discouraging injuries that occur within the state," and "[t]hat interest extends to ... patent infringement actions such as the one here." *Beverly Hills*, 21 F.3d at 1568 (citation omitted). As for the fourth factor, the Western District of Virginia, at this point, does not appear to be any less efficient than an alternative forum to adjudicate this dispute. Thus, distance alone between JoeyBra LLC's principal place of business and the forum state, the home of Plaintiff's licensee, is not "compelling" enough to "render jurisdiction unreasonable" against the LLC. See *Burger King*, 471 U.S. at 477.