

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION

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Our client [REDACTED],  
Plaintiff,  
v.  
Acme Company [REDACTED] INC.,  
Defendant,

Civil Action No. [REDACTED]  
The Hon. [REDACTED]  
Electronically Filed

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**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, TO TRANSFER VENUE**

**INTRODUCTION**

This is a suit by Our client [REDACTED] (“Client”), a Kentucky corporation and a leading supplier of tents and tent components to the United States military, against Acme Company [REDACTED], Inc. (“Acme”), a New Jersey Corporation, for breach of contract.\* The suit stems from Acme sale to Client of 44,000 yards of a specialty coated fabric which Acme warranted was in compliance with relevant military specifications. Client relied on these warranties and incorporated the fabric as a component in Client products that were supplied to Third Party [REDACTED] (“3rd”) who, in turn incorporated the Client products into Airbeam supported shelters and enclosures supplied to the U.S. Army. The Acme fabric did not perform as required and Client has honored its contracts with 3rd and has agreed to replace the defective components at an expected cost of at least \$1,750,000.

Acme now claims that this Court does not have jurisdiction in this case, despite Acme extensive contacts with the Commonwealth of Kentucky through the business relationship it

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\* Client filed this action on December 4, 2012, in [REDACTED] Circuit Court (not on December 10, as Acme stated in its Notice of Removal). Acme apparently filed suit in New Jersey on December 10, 2012. Client has not been served in the New Jersey action.

initiated with Client Acme has admitted that it supplied goods which cost in excess of four million dollars to a Kentucky corporation. Its contention that this Court has no personal jurisdiction over it is incorrect and misconstrues both Kentucky and 6<sup>th</sup> Circuit precedent on personal jurisdiction.

### FACTUAL BACKGROUND

Acme began a long-running business relationship with Client on June 9, 2003 when it sent a sales representative named Salesman (Mr. Salesman) to Client headquarters in , Kentucky. By Acme own admission, it knew that Mr. Salesman had in his previous employment developed a business relationship with Client ( Declaration at Par. 6), so Acme sent Mr. Salesman to Client facilities to meet with its officers and extoll the virtues of Acme products. On this first visit, Mr. Salesman offered a number of Acme products to Client even quoting prices for specific Acme products as a representative of that company. (Client Affidavit at ¶(3).

In September 2009, Acme began supplying a tent fabric to Client in both green and tan colors, which was to be a major component in products to be supplied to 3rd . The contracts for this fabric between Acme and Client required, among other things, that the product meet military Acme specifications for fabric to be used in military tents. Once the tents with the Acme fabric entered service, 3rd received numerous reports from the military of the tan Acme fabric failing in combat zones. This eventually caused 3rd to stop all orders from Client for a period of four months. Client contacted Acme about these failures on several occasions. Multiple times, Acme sent personnel to Client facilities in Kentucky to inspect the failed products to improve Acme quality control. (Client Affidavit at ¶(7).

## STANDARD OF REVIEW

To counter a motion to dismiss, a non-moving party such as Client

“need only make a prima facie showing of jurisdiction.” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir.1992). To meet this burden, they must establish “with reasonable particularity sufficient contacts between [the defendants] and the forum state to support jurisdiction. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir.2002) (citation omitted). This Court, when reviewing the defendants' motion to dismiss pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, relies on the pleadings and affidavits of the parties and construes the facts in the light most favorable to the nonmoving party. *See Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir.1989).

*Fortune Hi-Tech Marketing, Inc. v. Isaacs*, CIV.A.10-123-KSF, 2010 WL 1872873 (E.D. Ky. May 10, 2010).

As shown below, there is no real doubt about this Court's jurisdiction in this case. Moreover, there is no real doubt that this Court is the most convenient forum for resolution of the issues raised in this case.

## ARGUMENT

### **I. This Court Has Specific Personal Jurisdiction Over Acme and Should Deny its Motion to Dismiss.**

In this diversity case, this Court can exercise personal jurisdiction over Acme to the same extent as can Kentucky state courts. *Aristech Chemical Intern. Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 627 (6th Cir. 1998).

All of Client claims arise from Acme contacts with Kentucky, creating specific (if not general) personal jurisdiction in this Court.

The proper analysis of long-arm jurisdiction over a nonresident defendant consists of a two-step process. First, review must proceed under KRS 454.210 to determine if the cause of action arises from conduct or activity of the defendant that fits into one of the statute's enumerated categories. If not, then *in personam* jurisdiction may not be exercised. When that initial step results in a determination that the statute is applicable, a second step of analysis must be taken to determine if exercising personal jurisdiction over the non-resident defendant offends his federal due process rights.

*Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 57 (Ky. 2011).

**A. Client Cause of Action Arises From Conduct Enumerated in KRS 454.210.**

Kentucky's Long-Arm Statute, KRS 454.210, allows Kentucky courts to exercise personal jurisdiction over nonresident defendants within the confines of due process, if the cause of action arises from any one of nine enumerated activities in which a defendant engaged. It is the second of these nine activities -- "Contracting to supply services or goods in this Commonwealth," KRS 454.210(2)(a)(2) -- which gives this Court personal jurisdiction over

Acme

If there is a reasonable and direct nexus between the wrongful acts alleged in the complaint and the statutory predicate for long-arm-jurisdiction, then jurisdiction is properly exercised. Whether such a connection exists will often be self-evident, especially when the claim is based upon tortious injury that occurs in this state **or upon contracts to supply goods in this state.**

*Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 59 (Ky. 2011) (Emphasis added).

Client suit involves claims for breach of express and implied warranties contained in its contracts with Acme all of which involved Acme "contracting to supply services or goods in this Commonwealth." Client contracted with Acme to supply it with 44,000 yards of fabric, all of which was warranted to meet military tent fabric Acme specifications.

**B. Exercising Specific Personal Jurisdiction Over Acme Does Not Offend its Federal Due Process Rights.**

Once a party asserting jurisdiction has established that its cause of action arises from conduct of the Defendant enumerated in Kentucky's Long-Arm Statute, the statute "extends to the outer limits permitted by federal due process." *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 57 (Ky. 2011).

The Sixth Circuit has established a three-part test to determine if the exercise of specific jurisdiction is proper. First, the defendants must have purposefully

availed themselves of the privilege of acting in Kentucky or purposefully caused a consequence in the state. Next, the cause of action must arise from the defendants' actions in Kentucky. Finally, the exercise of jurisdiction must be reasonable.

*Fortune Hi-Tech Marketing, Inc. v. Isaacs*, CIV.A.10-123-KSF, 2010 WL 1872873 (E.D. Ky.

May 10, 2010). Each of these three elements exists in this case and, consequently, it is clear that this Court may exercise specific jurisdiction over **Acme** without offending its due process rights.

(i.) **Acme Purposefully Availed Itself of the Privilege of Acting In Kentucky.**

As the Sixth Circuit stated in *Southern Mach. Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 382-83 (6th Cir. 1968);

We are applying a constitutional standard defined in the broadest terms of 'general fairness' to the defendant...For the purposes of that standard, business is transacted in a state when **obligations created by the defendant** or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state.

*Southern Mach. Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 382-83 (6th Cir. 1968).

Sixth Circuit precedent is clear that conduct such as that of **Acme** in this case constitutes purposeful availment for due process purposes. "If, as here, a nonresident defendant transacts business by negotiating and executing a contract via telephone calls and letters to an Ohio resident, then the defendant has purposefully availed himself of the forum by creating a continuing obligation in Ohio." *Cole v. Mileti*, 133 F.3d 433, 436 (6<sup>th</sup> Cir. 1998).

"The making of a substantial business contract with a corporation based in another jurisdiction has been held to be adequate to satisfy the requirements of the "purposeful" test of *Southern Machine*." See *Simpson Timber Co. v. Great Salt Lake Minerals and Chemicals Corp.*, 296 F.Supp. 243 (D.Or.1969). *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220,

227 (6th Cir. 1972).<sup>†</sup> The wisdom of such a holding is even clearer where a defendant, as here, reaches out to a company it knows to be in the forum state. **Acme** clearly knew it was dealing with a Kentucky corporation, in fact directed its sales representative to Kentucky in an effort to supply the military tent business, and happily accepted the profits from purchase orders which came from Kentucky. **Acme** even tailored its marketing by sending someone **Client** was familiar with as its sales representative to establish a business relationship. Regardless of **Acme** assertions that it did not deliver the material to Kentucky, it knew or should have known where the material was going, because it reached out to a known Kentucky company.<sup>‡</sup>

Thus, we believe that the facts which CompuServe has alleged, viewed in the light most favorable to CompuServe, support a finding that Patterson purposefully availed himself of the privilege of doing business in Ohio. **He knowingly reached out to CompuServe's Ohio home, and he benefitted from CompuServe's handling of his software and the fees that it generated.**

*CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1266-67 (6th Cir. 1996) (Emphasis added).

**Acme** repeatedly highlights its lack of physical presence in Kentucky in an attempt to show that it has not purposefully availed itself of the privilege of doing business in Kentucky, saying:

It does not own, possess, or use any property in Kentucky. It has never had any officers, employees, or agents stationed in Kentucky, and its employees traveled[sic] Kentucky on only four occasions in ten years and each time at the request of Outdoor... It has never sought authority from the Kentucky Secretary of State to conduct business in Kentucky.

(**Acme** Memorandum in Support at 11). “The Supreme Court has stated that “[s]o long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal

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<sup>†</sup> Subsequent to *In-Flight Devices*, Ohio's Long-Arm Statute, unlike Kentucky’s Long-Arm Statute, has been determined not to extend to the limits of the due process clause.

<sup>‡</sup> The issue of who paid the truckers who picked up the fabric at **Acme** facilities and delivered it to **Client** factory is too thin a reed to support **Acme** jurisdictional arguments.

jurisdiction there.” *Burger King*, 471 U.S. at 476 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984)). *Dierig v. Lees Leisure Industries, Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012).

Finally, on the question of purposeful availment, Acme also acknowledges, that despite the fact its other sale in Kentucky is nowhere near as profitable to it as Client Acme has had sales in Kentucky other than those to Client (Riotto Declaration at 5).

**(ii.) Client Cause of Action Arises From Acme Actions in Kentucky.**

The Eastern District of Kentucky has declared that “The ‘arising from’ requirement under the second prong is satisfied when the operative facts of the controversy arise from the defendant's contacts with the state.” *Fortune Hi-Tech Marketing, Inc. v. Isaacs*, CIV.A.10-123-KSF, 2010 WL 1872873 (E.D. Ky. May 10, 2010). That Court has stated that where the cause of action is for breach of contract, the cause of action arises from the Defendants’ contacts with the forum state:

In the context of claims arising from contractual disputes, the Sixth Circuit has stated that “[o]nly when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contract.” *Southern Machine*, 401 F.2d at 384 n. 29.<sup>9</sup> “The activities do not have to directly result in the cause of action, they must only ‘have a substantial connection with the defendant's in-state activities.’ “ *United Radio*, 448 F.Supp.2d at 842 (citing *Southern Machine*, 401 F.2d at 384 n. 27). “For example, in an action for breach of contract, it necessarily follows that the cause of action arises directly out of the contract entered into by the plaintiff and the nonresident defendant.” *Auto Channel, Inc. v. Speedvision Network*, 995 F.Supp. 761, 766 (W.D.Ky.1997) (citing *In-Flight Devices*, 466 F.2d at 229 (concluding that contract entered into by nonresident defendant “is necessarily the very soil from which the action for breach grew”)).

*Krauss-Maffei Corp. v. Donovan*, CIV.A. 07-99-DLB, 2008 WL 108757 (E.D. Ky. Jan. 9, 2008).

This is consistent with Sixth Circuit precedent: “Furthermore, if the cause of action is for breach of that contract, as it is here, then the cause of action naturally arises from the defendant's

activities in Ohio. See *CompuServe*, 89 F.3d at 1267; *In-Flight Devices*, 466 F.2d at 229.” *Cole v. Mileti*, 133 F.3d 433, 436 (6th Cir. 1998).

In speaking to the “arising from” prong, this Court has previously held that the site where the harm occurred was also useful in making a determination. “The alleged harm to Fortune has occurred at Fortune's headquarters in Kentucky. Thus, Fortune has satisfied this element of the personal jurisdiction analysis.” *Fortune Hi-Tech Marketing, Inc. v. Isaacs*, CIV.A.10-123-KSF, 2010 WL 1872873 (E.D. Ky. May 10, 2010). In the case at bar, Client was harmed, in lost business opportunities, damage to its business reputation, being forced to lay off employees and make restitution to its customer, 3rd. These harms occurred in ██████████ County, Kentucky, the location of Client headquarters an area that can ill afford the negative effects of this breach of contract.

**(iii.) Exercise of Specific Jurisdiction over Acme by Kentucky Courts is Reasonable.**

Whether the exercise of jurisdiction is reasonable ultimately depends on whether Kentucky has an interest in resolving the dispute...” *Aristech Chemical Intern. Ltd. V. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6<sup>th</sup> Cir. 1998). The Sixth Circuit has stated that reasonableness of exercising jurisdiction can also be interpreted as “whether it would comport with traditional notions of fair play and substantial justice.” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267-68 (6<sup>th</sup> Cir. 1996) (Internal Citations Omitted).

A court must consider several factors in this context, including “the burden on the defendant, the interest of the forum state, the plaintiff’s interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies.” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6<sup>th</sup> Cir. 1996) (Citing *American Greetings Corp.*, 839 F.2d at 1169-70. (citing *Asahi Metal Indus.*, 480 U.S. at 113, 107 S.Ct. at 1032-33).



Client interest in obtaining relief is strong and self-evident; it has purchased - by Acme own admission- \$4,619,253 worth of material which was warranted to meet a particular specification. The breach of that warranty by Acme caused Client to lose business, injured its reputation, caused it to lose a number of skilled employees, and has required Client to make restitution to its customer, 3rd. The interests of Kentucky in adjudicating the claims of Client are strong as well:

It cannot be disputed that a state has an interest in resolving a suit brought by one of its residents.” *In-Flight Devices*, 466 F.2d at 232; *see also Mohasco*, 401 F.2d at 385 (“when the contract is with a resident of Tennessee, the State’s interest in resolving a suit based on the contract and brought by that resident cannot be doubted.”); *First Nat’l Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6<sup>th</sup> Cir.1982) (“Kentucky has a substantial interest in seeing that its residents get the benefit of their bargain.”). In the present case, Kentucky has an interest in adjudicating a breach of contract claim by one of its corporate residents and, relatedly, ensuring that Tri-State receives its contractual remedy where appropriate. Kentucky’s interest is justified due to the effect of contractual breaches on a corporation’s finances and effect that has on the State’s economy.

*Tri-State Equipment Rentals, LLC v. Chevalier*, CIV.A. 05-210-DLB, 2007 WL 2571672 (E.D. Ky. Aug. 31, 2007).

During the relationship between the parties, Acme was doing business in New Jersey, and at least some of its personnel communicated with Client from Rhode Island. Throughout the eight year relationship of the parties, the one geographic constant has been Kentucky. No other forum state will have an interest in adjudicating this claim which exceeds the interest of Kentucky.

### C. **Policy Considerations Support Exercising Jurisdiction Over Acme**

In addition to the clear legal arguments in favor of supporting jurisdiction, the Sixth Circuit has noted that while protecting a defendant’s due process right regarding personal jurisdiction is still important, the modern world we live in does not make litigation in a place outside a defendant’s home state nearly as inconvenient as was previously true. When a

defendant has undertaken the acts that Acme took in reaching out to Kentucky, the Court should not be overly moved by its claims of inconvenience.

The Supreme Court has noted, on more than one occasion, the confluence of the “increasing nationalization of commerce” and “modern transportation and communication,” and the resulting relaxation of the limits that the Due Process Clause imposes on courts' jurisdiction. Simply stated, there is less perceived need today for the federal constitution to protect defendants from “inconvenient litigation,” because all but the most remote forums are easily accessible for the pursuit of both business and litigation.

*CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996) (Internal citations omitted).

In summary, if a Defendant such as Acme can send a salesman, it can send a lawyer, and if Acme can reap the benefits of a \$4 Million+ Kentucky contract, it can face the repercussions of a Kentucky suit for the breach of that contract.

## **II. The Court Should Deny Acme Motion for a Change of Venue, as Kentucky is a More Convenient Forum.**

Having already established that this Court should exercise jurisdiction over Acme Client turns to the remaining argument in Acme motion, that the Court should transfer venue in this case to the District Court for the District of New Jersey.

As a general rule, “unless the balance [of convenience] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). Since Plaintiff has chosen Kentucky courts as her forum, Defendants must present strong evidence that a change of venue is appropriate.

*Rutherford v. Goodyear Tire and Rubber Co.*, 943 F. Supp. 789, 791 (W.D. Ky. 1996)  
*aff'd sub nom. Rutherford v. Goodyear Tire & Rubber Co.*, 142 F.3d 436 (6th Cir. 1998).

There is a two-step process for determining whether a 28 USC 1404(a) change of venue is proper. “First, [the Court] must determine whether the action “might have been brought” in the [alternative forum]. Second, the Court must determine whether change of venue would facilitate the “convenience of the parties and witnesses” and serve “the interests of justice.”” *Rutherford v.*

*Goodyear Tire and Rubber Co.*, 943 F. Supp. 789, 791 (W.D. Ky. 1996) *aff'd sub nom. Rutherford v. Goodyear Tire & Rubber Co.*, 142 F.3d 436 (6th Cir. 1998). There is no dispute here as to the first step (Client could have brought this lawsuit in New Jersey), but Acme is mistaken in its conclusion that New Jersey is a more convenient forum than Kentucky. Clearly it would be more convenient for Acme to litigate there, but any burden on Acme to litigate in Kentucky would weigh equally or greater on Client to litigate in New Jersey.

All of Client records of transactions with Acme are housed in Kentucky, and most of the employees and officers who dealt with Acme are Kentucky residents. (See, attached affidavit of Client Client own customer, 3rd which purchased the Tent covers which incorporated the faulty fabric from Acme is located primarily in Ohio, and the personnel with knowledge about the Client 3rd relationship are predominately in Ohio and Virginia. (See Client Affidavit at ¶13) Acme acknowledges that “Convenience of non-party witnesses has been found to be the most important factor...” (Memorandum in Support at page 19). That factor indicates that Kentucky is the more convenient forum. In addition, physical evidence can be found in Kentucky from the Tents that were returned to Client for example: Client has a Tent set up at its facilities in , Kentucky to test weathering effects on the Acme tent fabric. It is obviously much more reasonable to bring such physical evidence to Court in Kentucky than to try to take this physical evidence to New Jersey.

Kentucky is overwhelmingly the more convenient forum for the reasons listed above, the balance of convenience is “strongly in favor of the plaintiff,” and Client choice of forum should not be disturbed in this case.

## CONCLUSION

For these reasons, **Acme** motion should be denied and this case should proceed in this Court.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this the 22 day of February, 2013, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/S/ D. Duane Cook  
Counsel for **Our client**