IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM R. HAGUE, INC.,

Plaintiff,

Case No. 2:09-cv-00160
Judge Edmund A. Sargus, Jr.
Magistrate Judge Mark R. Abel

v.

PURETECH WATER SYSTEMS, INC.,

Defendant.

OPINION AND ORDER

Plaintiff William R. Hague, Inc. brings this action against Defendant Puretech Water Systems, Inc., alleging trademark infringement and unfair competition under the Lanham Act, 15 U.S.C. § 1001 *et. seq*., as well as trademark infringement and unfair competition under the common law of the State of Ohio. Defendant has filed a Motion to Dismiss (Doc. 7) for lack of personal jurisdiction. For the reasons that follow, the Court concludes that it lacks *in personam* jurisdiction over Defendant. Accordingly, Defendant's Motion to Dismiss is **GRANTED**.

I.

Plaintiff is an Ohio corporation doing business as Hague Quality Water International. Its principal place of business is located in Groveport, Ohio. Plaintiff is in the business of manufacturing, engineering, developing, and marketing water treatment systems, softeners, and filtration units. (Compl. ¶1.) Plaintiff has manufactured and marketed water softeners under the "PURA-TECH" trademark since as early as August 10, 1987 and has owned "PURA-TECH" as an

incontestable federally registered trademark since August 16, 1988. (Hague Aff. ¶¶6, 7.)

Defendant is a California corporation. Its principal place of business is located in Irvine, California. Defendant is in the business of selling and distributing water treatment systems and does so under the "PURETECH" trademark. (Hatamkhani Decl. ¶1.)

From the beginning of 2008 to at least May 1, 2009, Defendant maintained a website at www.puretechwatersystems.com. (Def's. Disc. Resp., Int. 3; Hague Aff. ¶14.) The website, which was accessible in Ohio, listed information regarding Defendant's products, along with a toll-free telephone number that customers could call to make inquiries or place orders. (Def's Mot. to Dismiss, p. 8.) According to Defendant, at no time were customers able to directly purchase its products through the website. (Hatamkhani Decl. ¶11.) Defendant further asserts that it has never sold any products or services to Ohio residents. (*Id.* ¶10.) Moreover, Defendant contends that it has no record of receiving any communications from Ohio residents through its website while it was operational. (Def's. Disc. Resp., Int. 3.)

During 2008, Defendant placed advertisements in several issues of *Water Technology* and *Water Conditioning & Purification Magazine*. (Def's. Disc. Resp., Int. 6.) In addition, Defendant placed advertisements in the January, February, and March 2009 issues of *Water Technology*. (*Id.*) *Water Technology* and *Water Conditioning & Purification Magazine* are national trade publications serving the water treatment industry. At least one copy of the March 2009 issue of *Water Technology* was delivered to an address in Ohio. (Hague Aff., Exh. 3.) The issue contained two advertisements for Defendant's products, one of which publicized the "Nation-wide expansion" of Defendant's operations. (*Id.* ¶12, Exh. 3.)

In the instant matter, Plaintiff's complaint alleges that Defendant offered for sale in Ohio and

in interstate commerce water softeners and other products under the "PURETECH" trademark. Plaintiff further maintains that Defendant's continued use of the "PURETECH" trademark constitutes trademark infringement and unfair competition under the Lanham Act and the common law of Ohio.

Defendant responded to Plaintiff's complaint by filing a Motion to Dismiss under Fed. R. Civ. P. 12(b)(2), contending that the Court lacks personal jurisdiction over it. This matter is now ripe for resolution.

II.

Plaintiff, as the party seeking to assert personal jurisdiction, "bears the burden of showing that such jurisdiction exists." *CompuServe. Inc v. Patterson*, 89 F.3d 1257, 1261-62 (6th Cir. 1996). Because Defendant's 12(b)(2) Motion is "properly supported," Plaintiff may not simply "stand on [its] pleadings." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Rather, Plaintiff must "set forth specific facts showing that the court has jurisdiction." *Id.* Because the Court addresses this issue without the aid of an evidentiary hearing and based solely on the current record, Plaintiff is required to make only a *prima facie* showing of jurisdiction. *Id.* at 1458-59. Plaintiff can meet this burden by "'establishing with reasonable particularity sufficient contacts between [Defendant] and the forum state to support jurisdiction.'" *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir. 2002) (quoting *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987)).

In ruling on Defendant's Motion, the Court will consider the current record in the light most favorable to Plaintiff. *Theunissen*, 935 F.2d at 1459. In addition, the Court "will not consider facts

profferred by [Defendant] that conflict with those offered by [Plaintiff]." *Neogen*, 282 F.3d at 887.

III.

"Where a federal court's subject matter jurisdiction over a case stems from the existence of a federal question, personal jurisdiction over a defendant exists 'if the defendant is amenable to service of process under the [forum] state's long-arm statute and if the exercise of personal jurisdiction would not deny the defendant[ ] due process.' " *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002) (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir. 1992)).[1] Accordingly, in order to make a *prima facie* showing of jurisdiction, Plaintiff must establish that: (1) Ohio's long-arm statute confers personal jurisdiction over Defendant and (2) the Court's exercise of personal jurisdiction over Defendant would not offend the Due Process Clause of the United States Constitution.

A. Due Process

The Court will first address whether the exercise of personal jurisdiction over Defendant would comport with the constitutional requirements of due process. For personal jurisdiction to be permissible under the Due Process Clause, Defendant must have sufficient minimum contacts with Ohio such that the exercise of personal jurisdiction and "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

A court may exercise two types of personal jurisdiction over a nonresident defendant: specific

[1] The Court has subject matter jurisdiction over Plaintiff's federal claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. It has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

jurisdiction and general jurisdiction. General jurisdiction exists where "'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.'" *Bird*, 289 F.3d at 873 (quoting *Third National Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989)). Meanwhile, specific jurisdiction "occurs where 'a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.'" *Id.* at 874 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Plaintiff does not contend that Defendant's contacts with Ohio are of such a continuous and systematic nature that general jurisdiction exists. Instead, Plaintiff maintains that the Court may properly exercise specific jurisdiction over Defendant in the context of this case based on its contacts with Ohio. The Sixth Circuit applies a three-part test, established in *Southern Machine Co. v. Mohasco Industries, Inc.*, to ensure compliance with due process in the exercise of specific personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

401 F.2d 374, 381 (6th Cir. 1968).

1. Purposeful Availment

The first *Mohasco* factor requires the Court to determine whether Defendant purposely availed itself of the privilege of acting in Ohio so as to invoke the benefits and protections of the

State's laws. "[P]urposeful availment is something akin to a deliberate undertaking to do or cause an act or thing to be done in [the forum state] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [the forum state], something more than a passive availment of [the forum state's] opportunities." *Neogen*, 282 F.3d at 891 (internal quotations and citation omitted). Purposeful availment is deemed to exist when "the defendant's contacts with the forum state 'proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State,' and when the defendant's conduct and connection with the forum are such that he 'should reasonably anticipate being haled into court there.'" *CompuServe*, 89 F.3d at 1263 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)). The defendant's "substantial connection" with the forum state "must come about by *an action of the defendant purposefully directed toward the forum State*." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (citing *Burger King*, 471 U.S. at 476; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)) (emphasis in original). The purposeful availment requirement guards against defendants being subject to personal jurisdiction on the basis of "random," "fortuitous," or "attenuated" contacts with the forum state. *Burger King*, 471 U.S. at 475 (quoting *Keeton*, 465 U.S. at 774; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

Plaintiff contends that Defendant purposefully availed itself of the privilege of doing business in Ohio. It bases this contention on two alleged contacts between Defendant and Ohio: (1) Defendant's maintenance of its website, which solicited business and was accessible in Ohio, and (2) Defendant's advertising in national trade publications circulated in Ohio.

a. Website

As noted by the Sixth Circuit, "maintenance of [a] website, in and of itself, does not constitute

the purposeful availment of the privilege of acting in [the forum state]." *Neogen*, 282 F.3d at 890. "The level of contact with a state that occurs simply from the fact of a website's availability on the Internet is . . . an 'attenuated' contact that falls short of purposeful availment." *Id.* In determining whether personal jurisdiction exists over a nonresident defendant where the alleged minimum contacts with the forum state are based on the maintenance of a website, the Sixth Circuit employs a sliding scale approach that "distinguishes between interactive websites, where the defendant establishes repeated online contacts with residents of the forum state, and websites that are passive, where the defendant merely posts information on the site." *Cadle Co. v. Schlichtmann*, 123 Fed.Appx. 675, 678 (6th Cir. 2005) (citing *Neogen*, 282 F.3d at 890). A defendant purposefully avails itself of the privilege of acting in a forum state by virtue of maintaining a website only if the website is "interactive to a degree that reveals specifically intended interaction with residents of the state." *Neogen*, 282 F.3d at 890 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

As this Court has described, under the sliding scale approach, internet use is divided into a spectrum of three areas:

> At the one end of the spectrum, personal jurisdiction is proper because the defendant clearly does business over the internet by entering into contracts with residents of other states which "involve the knowing and repeated transmission of computer files" over the internet. At the other end of the spectrum, personal jurisdiction is not proper because the defendant merely establishes a passive website that does nothing more than provide information to users. In the middle of the spectrum, the defendant has a website that allows a user to exchange information with a host computer. In this middle ground, "the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information" that occurs on the website.

Bath & Body Works, Inc. v. Wal-Mart Stores, Inc., No. C2-99-1190, 2000 WL 1810478 (S.D. Ohio Sept. 12, 2000) (quoting *Zippo,* 952 F. Supp. at 1124).

Construing the current record in the light most favorable to Plaintiff, the Court concludes that

Defendant's website possessed some degree of interactivity. According to Defendant, visitors to the website could not purchase its water treatment systems directly from the website. Plaintiff does not refute this assertion. Defendant contends that its website simply listed information regarding its water treatment systems, as well as a toll-free telephone number that individuals could call to obtain additional information or place product orders. Again, Plaintiff does not set forth any facts to the contrary.[2] At the same time, however, Defendant admits that its website had some measure of interactivity. (Def's Mot. to Dismiss, p. 8.)

Taken together, these facts indicate that Defendant's website falls within the middle of the interactivity spectrum. Thus, the Court must assess "'the level of interactivity and commercial nature of the exchange of information that occur[ed].'" *Cadle*, 123 Fed.Appx. at 678 (quoting *Zippo*, 952 F.Supp. at 1124). The Court concludes that Defendant's website consisted "primarily of passively posted information," *Neogen*, 282 F.3d at 890, and was not "interactive to a degree that reveals specifically intended interaction" with Ohio residents. *Id.* Plaintiff "has not alleged that any interaction or exchange of information occurred between [Defendant] and Ohio residents via the website." *Cadle*,123 Fed.Appx. at 678. Moreover, Plaintiff has not alleged that any of the passive information contained on the website was purposefully directed at Ohio residents. *Cf. Neogen*, 282 F.3d at 891 (noting that the defendant's website, even if passive, supported a finding of purposeful availment because, through the website, the defendant "[held] itself out as welcoming Michigan business"). As a result, the Court concludes that Defendant's maintenance of the website did not

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[2] Plaintiff contends that it is difficult to accurately assess the interactivity of Defendant's website because the website is no longer operational. (Pl's Resp. in Opp. to Def's Mot. to Dismiss, p. 14-15.) This assertion may very well be true at this point in the litigation but carries little weight in the Court's analysis. Plaintiff admits that it was aware of Defendant's alleged infringing activities as early as 2008. (*Id.* at 4.) Moreover, Plaintiff attached to its complaint a screenshot of Plaintiff's website. (Compl., Exh. 2.)

amount to purposeful availment.

b. Advertisements

The Sixth Circuit deems advertising to be an activity that can give rise to a finding of purposeful availment. *See Creech v. Roberts*, 908 F.2d 75, 79 (6th Cir.1990) ("Advertising is among the activities that constitute 'reaching out' to forum state residents."). In *Bridgeport Music, Inc. v. Still N the Water Pub.*, however, the Sixth Circuit expressly declined to take a position "as to whether . . . evidence of nationwide advertising is sufficient for a finding of purposeful availment." 327 F.3d 472, 481 n.10 (6th Cir. 2003). Nevertheless, the court has made clear that maintaining a publicly accessible website is not, in and of itself, sufficient to constitute purposeful availment. *Neogen*, 282 F.3d at 890; *Bird*, 289 F.3d at 874 (citing *Cybersell Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997)). By implication, merely advertising in a national publication is not sufficient either. *Cf. Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994) ("evidence of mere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum required by the Constitution in order to exercise personal jurisdiction over the advertiser"); *Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136 (5th Cir. 1987) ("advertising in national publications is not in itself sufficient to subject a defendant to personal jurisdiction"). As is the case with advertisements in publications with a national circulation, the information contained on publicly accessible websites is capable of reaching any forum. Yet, as discussed above, the Sixth Circuit has concluded that this feature of publicly accessible websites, standing alone, is not enough to establish purposeful availment. *Neogen*, 282 F.3d at 890; *Bird*, 289 F.3d at 874.

In arguing that Defendant purposefully availed itself of the privilege of doing business in

Ohio, Plaintiff relies heavily on the fact that Defendant advertised in *Water Technology* and *Water Conditioning & Purification Magazine*. Yet, the simple fact that Defendant advertised in national trade publications that are circulated in Ohio does not permit a finding that such activity amounted to purposeful availment. Rather, the issue remains whether Defendant's advertising efforts were "purposefully directed" at Ohio residents. *Asahi* 480 U.S. at 112; *see Bridgeport*, 327 F.3d at 481 (finding no purposeful availment by defendant where the record "[did] not contain any evidence of advertising *directly targeting* or even actually reaching [the forum state]'" (emphasis added)).

The record in the instant matter indicates that Defendant published several advertisements in *Water Technology* and *Water Conditioning & Purification Magazine* throughout 2008 and 2009 and that at least one copy of a single issue of *Water Technology* – in which two of Defendant's advertisements appeared – reached Ohio. However, there is no evidence that any of Defendant's advertising efforts were purposefully directed at Ohio residents. Plaintiff directs the Court's attention to an advertisement soliciting dealers and distributors for Defendant's water treatment systems, which appeared in the March 2009 issue of *Water Technology* and advertised the "Nation-wide expansion" of Defendant's operations. The Court concludes that such a general statement, standing alone, does not amount to an attempt to directly target Ohio residents. Plaintiff has not set forth any additional facts that could lead the Court to conclude that Defendant's advertising efforts were purposefully directed at Ohio residents. *Cf. Quality Solutions, Inc. v. Zupanc*, 993 F. Supp. 621, 623 (N.D. Ohio 1997) (finding the act of advertising in an internationally circulated trade journal to be "an attempt to solicit business in Ohio" where almost 90 percent of the circulation was domestic and "[w]ithin the domestic circulation figures, Ohio *had the third largest circulation*" (emphasis in original)). Consequently, the Court concludes that Defendant's advertising activity

does not serve as a basis for finding that Defendant purposefully availed itself of the privilege of doing business in Ohio.

c. Website and Advertisements

While Plaintiff maintains that either of the aforementioned contacts is sufficient to establish purposeful availment, it also urges the Court, in its analysis of the first prong of the *Mohasco* test, to view the two contacts in the aggregate. Plaintiff contends that, taken together, Defendant's website and print advertisements support a finding of purposeful availment. The Court finds Plaintiff's argument unpersuasive. Viewing the contacts together, the Court sees nothing more than brand and product promotion unrestricted by locale. None of the facts alleged by Plaintiff suggest that Defendant's conduct in this regard was in any way purposefully directed at Ohio residents.

d. Discovery Sanction

Lastly, Plaintiff argues that Defendant constructively waived any objections to personal jurisdiction by "refusing" to produce documents in response to its discovery requests. Plaintiff asked Defendant to produce all documents relating to "all contacts or communications between [Defendant], its officer and employees, and any and all persons in the State of Ohio." (Def's. Disc. Resp., 1st Req. for Prod.) Plaintiff also sought all documents relating to "communications made by any persons or businesses contacting [Defendant] through the use of [its] website." (*Id.*, 2d Req. for Prod.) Defendant responded to Plaintiff's discovery requests by stating that it had "no responsive documents." (*Id.*, 1st Req. for Prod; 2d Req. for Prod.)

Relying on *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), Plaintiff contends that the Court may assume that the documents that Defendant "refused" to produce establish personal jurisdiction. In *Ins. Corp. of Ireland*, the Supreme Court held that, pursuant to

Fed. R. Civ. P. 37(b)(2)(A), a district court may, "as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, proceed on the basis that personal jurisdiction . . . has been established." *Id.* at 695.

Plaintiff's reliance on *Ins. Corp. of Ireland* is misplaced. Defendant provided sufficient responses to Plaintiff's discovery requests. Such responses were verified and signed by Defendant's owner. A sworn statement that no responsive documents exist differs markedly from a party's willful refusal to comply with a discovery order. Plaintiff has adduced no evidence of discovery misconduct by Defendant. Thus, the Court finds no basis for assuming that Plaintiff has established the jurisdictional facts that it sought to elicit through its discovery requests.

2. Remaining *Mohasco* Factors

Plaintiff has failed to make a *prima facie* showing that Defendant purposely availed itself of the privilege of acting in Ohio. As a result, the Court need not consider the remaining *Mohasco* factors – whether Plaintiff's causes of action arise from Defendant's alleged contacts with Ohio and whether the exercise of personal jurisdiction over Defendant would be reasonable.

B. Ohio Long-Arm Statute

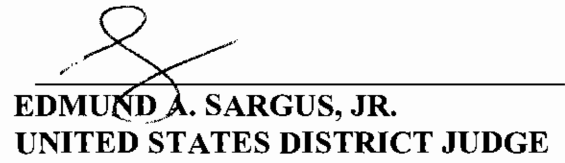
Similarly, the Court need not inquire into whether Ohio's long-arm statute confers personal jurisdiction over Defendant.

IV.

In accordance with the foregoing, Defendant's Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED.

3-9-2010
DATE



EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE