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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**PRO FIT MANAGEMENT, INC.,
d/b/a/ Draft Increase Solutions,**

Plaintiff,

v.

**LADY OF AMERICA FRANCHISE
CORPORATION, et al.,**

Defendants.

Case No. 08-CV-2662-JAR-DJW

MEMORANDUM AND ORDER

Plaintiff Pro Fit Management, Inc., d/b/a Draft Increase Solutions (“Pro Fit”) brings this action against Lady of America Franchise Corporation, alleging claims for copyright infringement in violation 17 U.S.C. § 101 *et seq.*, violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.*, trademark infringement in violation of 15 U.S.C. § 1114 and 1125(a), unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125, as well as common law claims for breach of contract, tortious interference with contract, and unfair competition. Plaintiff’s Third Amended Complaint alleges nine claims for copyright infringement in violation of 17 U.S.C. § 101 *et seq.* against nine other defendants.

Pending before the Court is defendants KLP Fitness Enterprises, Inc., Beverly A. Simonds and Sarita L. Evans’ Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 130). Plaintiff asserts a single claim for copyright infringement against these defendants.¹ For the

¹(Doc. 128.)

reasons stated in detail below, defendants' motion to dismiss is granted as to KLP Fitness Enterprises, Inc. and Beverly Simonds, and denied as to Sarita Evans.

I. Rule 12(b)(2) Standards

Plaintiff has the burden of establishing personal jurisdiction over the defendants.² In the absence of an evidentiary hearing, plaintiff must make only a prima facie showing of jurisdiction to defeat a motion to dismiss.³ “The plaintiff may make this prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant.”⁴ Allegations in a complaint are accepted as true to the extent that they are uncontroverted by submitted affidavits.⁵ When a defendant has produced evidence to support a challenge to personal jurisdiction, a plaintiff has a duty to come forward with competent proof in support of the jurisdictional allegations of the complaint.⁶ The court “must resolve all factual disputes in favor of the plaintiff.”⁷ “In order to defeat a plaintiff’s prima facie showing of jurisdiction, a defendant must present a compelling case demonstrating ‘that the presence of some other considerations would render jurisdiction unreasonable.’”⁸

II. Factual Background

²*Bell Helicopter Textron, Inc. v. Heliquest Int’l, Ltd.*, 385 F.3d 1291, 1295 (10th Cir. 2004).

³*Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

⁴*OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1091 (10th Cir. 1998).

⁵*Pytlik v. Prof’l Res., Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989); *Behagen v. Amateur Basketball Ass’n*, 744 F.2d 731, 733 (10th Cir. 1984) *cert. denied*, 471 U.S. 1010 (1985).

⁶*Pytlik*, 887 F.2d at 1376.

⁷*Bell Helicopter Textron*, 385 F.3d at 1295.

⁸*OMI Holdings*, 149 F.3d at 1091 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

Drawing all inferences in favor of plaintiff, the following facts are taken from plaintiff's Third Amended Complaint, the affidavits and exhibits attached to plaintiff's response, and defendants' declarations. The Court does not consider any general or conclusory allegations unsupported by affidavit or other evidence.

Pro Fit is a Missouri corporation with its principal place of business in Overland Park, Kansas. It was formed in 2001 by Mike Murphy. Pro Fit specializes in providing advertising and marketing programs and materials for health clubs to be used in their business development. Pro Fit has created, marketed, sold, and distributed FOREVER FIT proprietary materials to health clubs since 2006. Pro Fit has a federally registered trademark and copyrights for its FOREVER FIT program and materials. The materials, developed and printed in Kansas, include customized postcards, postal maps, program manuals, promotional posters, and a CD-ROM that includes telephone scripts, telephone inquiry logs, health and fitness profiles, sales presentation sheets, member assessment forms, and nutritional workshop outline. The United States Patent and Trademark and Copyright Offices maintain online search databases providing access to information about registered trademarks and copyrights, including the FOREVER FIT mark.

The FOREVER FIT proprietary materials are distributed with a limited license agreement that restricts authorized use of the materials to a single use and indicates in bold lettering that the FOREVER FIT program originated from Draft Increase Solutions in Overland Park, Kansas. It also contains a forum selection clause, which provides that all disputes are to be resolved under the laws and jurisdiction of the State of Kansas.

Defendant Lady of America Franchise Corporation ("LOAFC") is a Florida corporation with its principal place of business in Fort Lauderdale, Florida. LOAFC owns and operates

health clubs across the country and is a franchisor with over 300 franchised and corporate-owned clubs worldwide. As a franchisor, LOAFC authorizes preferred vendors with whom franchisees can conduct business. In March 2007, as part of its preferred vendor process and in association with LOAFC's purchase of the FOREVER FIT program, Pro Fit provided a copy of the FOREVER FIT program to LOAFC, including the license agreement. On November 14, 2007, LOAFC posted an announcement on the franchisee health club's website stating that Pro Fit d/b/a Draft Increase Solutions was an authorized vendor and indicating the FOREVER FIT program belonged to Draft Increase Solutions. The announcement included plaintiff's email address and telephone number.

Pro Fit asserts that, on December 2008, LOAFC unlawfully copied Pro Fit's FOREVER FIT proprietary materials, removed Pro Fit's FOREVER FIT mark and affixed LOAFC's "Waist Away" indicia, but otherwise maintained the content of the documents. LOAFC then sold and/or distributed copies of the "Waist Away" materials by publishing them on the LOAFC website. Franchisees were able to access the "Waist Away" materials through a LOAFC website hosted by Saepio Technologies, Inc. ("Saepio"), a company with offices in Overland Park, Kansas and Kansas City, Missouri. It is unknown whether Saepio's Kansas or Missouri office hosted the LOAFC website and/or fulfilled orders made through the website.⁹ In response to the promotion, a few franchisees posted comments on the LOAFC website, noting that the new materials appeared identical to plaintiff's FOREVER FIT promotion.

Defendants KLP, Beverly Simonds, and Sarita Evans are franchisees of LOAFC and own a Ladies Workout Express in their states of residence. Defendant KLP is a Georgia corporation

⁹See Doc. 142 at 5 nn.2-3, 10 n.5.

with its principal place of business in Statesboro, Georgia. Defendant Beverly Simonds' principal place of business is in Battlecreek, Michigan, and defendant Sarita Evans' principal place of business is in Pinole, California. Pro Fit alleges that KLP, Simonds, and Evans have engaged in copyright infringement by downloading or otherwise obtaining and using LOAFC's "Waist Away" materials for their own profit, without Pro Fit's permission, in violation of Pro Fit's copyright.

On December 12, 2008, Kathy Powell (the president of KLP) contacted Murphy via telephone to obtain information about the "Waist Away" program. On July 10, 2007, Sarita Evans purchased the FOREVER FIT program from Pro Fit, and purchased additional products on March 7, 2008 and August 28, 2008. In connection with these purchases, Evans placed orders over the phone to plaintiff in Kansas and sent payments to Kansas. The invoices indicated that plaintiff's place of business was in Overland Park, Kansas. All three defendants allegedly downloaded the "Waist Away" products via the website hosted by Saepio.¹⁰ However, defendants contend they have never had any business dealings in Kansas, do not solicit business, transact business, or engage in any other persistent course of conduct in Kansas. They do not maintain a presence in Kansas via office, telephone number, facsimile number, bank account, residence, driver's license, or possession of other real or personal property.

III. Discussion

"In a federal question case where a defendant resides outside the forum state, a federal

¹⁰Plaintiff also attached a "Check Request Form" signed by Beverly Simonds and a "Waist Away" flyer, marked Exhibit J. Plaintiff indicates these materials were obtained from the Saepio Website, but there is no evidence supporting this conclusion.

court applies the forum state’s personal jurisdiction rules.”¹¹ To establish personal jurisdiction over a defendant, plaintiff must show that jurisdiction is proper under the laws of the forum state, Kansas, and that the exercise of jurisdiction would not offend due process.¹² The Kansas long-arm statute is construed liberally so as to allow jurisdiction to the full extent permitted by due process, therefore the Court proceeds directly to the constitutional analysis.¹³

For the court’s exercise of jurisdiction to comport with due process, defendant must have “minimum contacts” with the State of Kansas.¹⁴ “Minimum contacts” can be established in one of two ways: specific jurisdiction or general jurisdiction. Plaintiff argues this Court has specific jurisdiction over defendants, so this Court will only consider the specific jurisdiction analysis. Specific jurisdiction exists over a nonresident defendant “if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.”¹⁵ In evaluating whether conduct was “purposefully directed,” the Tenth Circuit explained:

In the tort context, we often ask whether the nonresident defendant “purposefully directed” its activities at the forum state; in contract cases, meanwhile, we sometimes ask whether the defendant “purposefully availed” itself of the privilege of conducting activities or consummating a transaction in the forum state. . . . In

¹¹*PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997) (quoting *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990)). The federal Copyright Act, 17 U.S.C. § 101 *et seq.*, does not provide for nationwide service of process, therefore the court applies the law of the state in which it sits. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008).

¹²*Intercon, Inc., v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000).

¹³*Fed. Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994) (citing *Volt Delta Res., Inc. v. Devine*, 241 Kan. 775, 740 P.2d 1089, 1092 (1987)).

¹⁴*Dudnikov*, 514 F.3d at 1070 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹⁵*OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1091 (10th Cir. 1998) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

all events, the shared aim of “purposeful direction” doctrine has been said by the Supreme Court to ensure that an out-of-state defendant is not bound to appear to account for merely random, fortuitous, or attenuated contacts with the forum state.¹⁶

In determining whether specific jurisdiction has been established, the court conducts a two-part inquiry: (1) whether “‘the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there,’”¹⁷ and if so, (2) “whether the exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice.”¹⁸ The parties target the “minimum contacts” prong of the specific jurisdiction analysis.

A. Minimum Contacts

Defendants contend plaintiff has not demonstrated that they (1) purposely directed their activities at plaintiff in Kansas nor (2) that plaintiff’s copyright infringement claims arose out of defendants’ attenuated contacts with Kansas. Plaintiff, on the other hand, argues that defendants conducted business in Kansas that directly related to the infringing materials, knew the copyright was held by plaintiff in Kansas, and knew that any economic harm caused by copyright infringement would be felt in Kansas.

First, the Court notes that plaintiff has made numerous allegations about “defendants” collectively engaging in conduct, without distinction for their individual contacts. In evaluating a defendant’s contacts with the forum State, however, “[e]ach defendant’s contacts . . . must be

¹⁶*Dudnikov*, 514 F.3d at 1071.

¹⁷*Benton v. Cameco Corp.*, 375 F.3d 1070, 1076 (10th Cir. 2004) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)), *cert. denied*, 544 U.S. 974 (2005); *see also, e.g., Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1276–77 (10th Cir. 2005).

¹⁸*Benton*, 375 F.3d at 1076 (quotations omitted).

assessed individually.”¹⁹ Therefore, to the extent plaintiff attempts to establish personal jurisdiction over individual defendants on the basis of conclusory allegations regarding collective conduct or attempts to establish personal jurisdiction over franchisees on the basis of LOAFC’s activities, the Court will not consider these allegations.²⁰

Plaintiff argues there is personal jurisdiction over defendants under both a contract and a tort analysis. The contract analysis, however, does not apply to KLP (acting through Powell) or Simonds because neither defendant entered into a contract with plaintiff for the purchase of FOREVER FIT materials. Assuming Evans’ recurring purchases of FOREVER FIT materials demonstrated purposeful availment,²¹ these contracts are insufficient to establish minimum contacts because plaintiff’s injury did not arise out of those contracts.²² Plaintiff does not allege Evans signed a license agreement, nor that she misused the FOREVER FIT materials she purchased. Rather, plaintiff alleges Evans infringed its copyright by subsequently downloading LOAFC’s “Waist Away” materials from LOAFC’s website. Therefore, under a contract analysis, plaintiff’s copyright infringement claim did not arise out of Evans’ purchase of FOREVER FIT materials.

Alternatively, plaintiff argues this Court has specific jurisdiction over defendants because

¹⁹*Calder v. Jones*, 465 U.S. 783, 790 (1984).

²⁰*See OMI Holdings*, 149 F.3d at 1093. Plaintiff makes much of LOAFC’s creation of “Waist Away” and the LOAFC website that made it accessible to franchisees. However, the Court will not attribute LOAFC’s conduct to Evans, Simonds, or KLP.

²¹*AST Sports Science, Inc. v. CLF Distribution Ltd.*, 514 F.3d 1054, 1058 (10th Cir. 2008) (quoting *Burger King*, 471 U.S. at 479). To determine whether a defendant has purposefully availed itself of the privilege of conducting activities or consummating a transaction in the forum state, courts often look at “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing.” *Id.*

²²*See id.* at 1060.

they committed tortious acts directed at Kansas. To satisfy the “purposeful direction” requirement, plaintiff applies the “effects test” set forth by the United States Supreme Court in *Calder v. Jones*.²³

1. Purposeful Direction

The minimum contacts analysis under the “effects test” allows the exercise of jurisdiction when there is a prima facie showing that defendant (1) intentionally acted (2) in a manner expressly aimed at Kansas with (3) knowledge that the brunt of the injury would be felt in Kansas.²⁴ Plaintiff cites to Ninth Circuit cases, but in the Tenth Circuit, “[t]he mere allegation that an out-of-state defendant has . . . committed [] business torts that have allegedly injured a forum resident does not necessarily establish that the defendant possesses the constitutionally required minimum contacts.”²⁵ The Court evaluates both the quantity and quality of defendants’ contacts with the State of Kansas.²⁶

The Tenth Circuit, as well as other courts, require a plaintiff to present “something more” than the injuries a plaintiff allegedly suffered in order to show that a defendant aimed or targeted its conduct at the forum state.²⁷ In *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*,²⁸ where the

²³465 U.S. 783, 789–90 (1984).

²⁴*Dudnikov*, 514 F.3d at 1072 (analyzing *Calder v. Jones*, 465 U.S. 783 (1984)).

²⁵*Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1079 (10th Cir. 1995).

²⁶*Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1278 n.5 (10th Cir. 2005); *OMI Holdings*, 149 F.3d at 1092.

²⁷*See, e.g., Dudnikov*, 514 F.3d at 1077; *Allison v. Wise*, 621 F. Supp. 2d 1114, 1120 (D. Colo. 2007); *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1011, 1021 (D. Kan. 2006) (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)); *Gage, Inc. v. BioConversion Tech., LLC*, No. 2:08-CV-57 DB, 2009 WL 3181940, at *10 (D. Utah Sept. 30, 2009); *Toytrackerz LLC v. Koehler*, No. 08-2297-GLR, 2009 WL 1505705, at *13, *16 (D. Kan. May 28, 2009).

²⁸514 F.3d 1063 (10th Cir. 2008).

plaintiff sought a declaratory judgment of copyright noninfringement, the Tenth Circuit held that the “something more” was undisputed evidence that defendant acted to cancel plaintiff’s eBay auction in Colorado.²⁹ In *Toytrackerz LLC v. Koehler*,³⁰ which involved a claim of trademark infringement, websites which posted misleading and negative comments about the Kansas plaintiff company provided the additional contact—the “something more”—to make a prima facie showing of personal jurisdiction for two defendants, while a third defendant was dismissed because of the absence of additional evidence focusing on Kansas.³¹ In *Regional Airline Management Systems, Inc. v. Airports USA, Inc.*,³² another trademark infringement case, there was no additional evidence of intentional conduct aimed at the forum state, so the motion to dismiss for lack of personal jurisdiction was granted.³³ In *System Designs, Inc. v. New Customware Co.*,³⁴ the long-term pattern of trademark infringement and a website intended to reach potential customers in the forum state counted as additional evidence of conduct expressly aimed at the forum state.³⁵

Defendants argue that any act of downloading materials from LOAFC’s website was not an “intentional” act aimed at Kansas.³⁶ Because the parties’ arguments focus on the second and

²⁹*Id.* at 1077.

³⁰No. 08-2297-GLR, 2009 WL 1505705 (D. Kan. May 28, 2009).

³¹*Id.* at *14.

³²No. 06-cv-01758-WYD-CBS, 2007 WL 1059012 (D. Colo. Apr. 4, 2007).

³³*Id.* at *6-*7.

³⁴248 F. Supp. 2d 1093, 1099-1100 (D. Utah 2003).

³⁵*Id.*

³⁶*See* Doc. 144 at 4–5.

third elements of the “effects test,” the Court addresses defendants’ “intent” argument under the second and third elements as well. Defendants contend there is no evidence (1) defendants “expressly aimed” their conduct at Kansas nor (2) that they knew their conduct would cause harm in Kansas. Plaintiff collapses these two elements and argues that defendants knew that plaintiff owned the FOREVER FIT copyright and knew that plaintiff’s principal place of business was in Kansas; therefore, defendants’ intentional act of downloading the infringing “Waist Away” materials was “expressly aimed” at Kansas where the economic injury would inevitably occur. While there is some overlap between these two elements, “expressly aiming” conduct is not the same as an awareness of its foreseeable consequences. “[T]he ‘express aiming’ test focuses more on a defendant’s intentions—where was the ‘focal point’ of its purposive efforts—while the latter requirement concentrates on the consequences of the defendant’s actions—where was the alleged harm actually felt by the plaintiff.”³⁷ To “expressly aim” conduct, the forum state must be the “focal point of the tort.”³⁸

Under this test, there is evidence that Evans purposefully directed her activities at plaintiff in Kansas. Evans repeatedly contacted plaintiff in Kansas regarding its FOREVER FIT materials and placed orders for the copyrighted materials. The invoices included plaintiff’s Kansas address, and Evans sent her payments to plaintiff’s Overland Park address. Moreover, the Register of Copyrights listed relevant marks owned by plaintiff at Overland Park, Kansas on March 24, 2006,³⁹ and the United States Patent and Trademark Office listed relevant marks

³⁷*Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 (10th Cir. 2008).

³⁸*Id.* at 1074 n.9 (quoting *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995)).

³⁹(Doc. 128, Ex. C.)

owned by plaintiff on November 18, 2008.⁴⁰ Evans' negotiations for the purchase of FOREVER FIT products put her on notice that the FOREVER FIT copyright originated in Kansas, she was interacting with the copyright owner in Kansas, and accessing any products infringing that copyright would directly impact a Kansas-based business. Any decision by Evans to avoid the expense of FOREVER FIT products by obtaining identical but infringing products formed the basis for plaintiff's copyright infringement claim. As alleged by plaintiff, Evans' conduct demonstrated an intent to circumvent plaintiff's copyright. Evans should have reasonably foreseen that conduct infringing plaintiff's copyright would cause harm to plaintiff in Kansas, and would require her to defend herself in a Kansas forum.

On the other hand, Powell, acting on behalf of KLP, made a single phone call to plaintiff in Kansas to inquire about "Waist Away" products. No purchase of FOREVER FIT materials was made. Plaintiff contends that, because Powell's communication related to the infringing materials, Powell's conduct was "expressly aimed" at Kansas. However, there is no evidence Powell had notice of plaintiff's location or of its copyright ownership. The announcement to LOAFC franchisees that plaintiff was an authorized vendor only provided plaintiff's email address and phone number, not its place of business. Furthermore, plaintiff does not allege that it informed Powell that "Waist Away" products infringed plaintiff's FOREVER FIT copyright.⁴¹ A single, informational communication that does not result in copyright infringement or give

⁴⁰(Doc. 128, Ex. D.)

⁴¹*See Intercon, Inc. v. Bell Atl. Internet Solutions*, 205 F.3d 1244, 1248 (10th Cir. 2000) (holding that there was personal jurisdiction over defendant, in part, because "defendant purposefully availed itself of the Oklahoma server [run by plaintiff] for almost four months after being notified of the erroneous address").

notice of ongoing copyright infringement, is insufficient to establish minimum contacts.⁴² Based on the facts alleged, Powell could not have reasonably foreseen when the phone call was made that she would be haled into a Kansas court to answer for that communication. The purposeful availment/expressly aimed requirement “ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts” such as this.⁴³

With regard to Simonds, plaintiff fails to offer any specific facts relating to her conduct that would support the exercise of personal jurisdiction over her. To the extent plaintiff argues that Simonds (along with all other defendants) downloaded the infringing “Waist Away” material by accessing a website hosted by Saepio Technologies, Inc., plaintiff provides no evidence that Simonds (or others) knew the web page that gave access to the infringing materials was powered by a Kansas-based company. Perhaps most instructive is the fact that, after careful review, plaintiff itself was also unable to determine whether the website was powered from Saepio’s Missouri or Kansas office. Therefore, use of the website does not constitute conduct “expressly aimed” at Kansas.

Even assuming the entity that powered the LOAFC web page was based in Kansas, there is no evidence this was apparent to website users. The only evidence plaintiff provides is a screen shot of a web page prominently captioned “LADYOFAMERICA FRANCHISE CORPORATION.” In small letters at the bottom, it states “Copyright 1996-2010 Powered by

⁴²See *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1011, 1021 (D. Kan. 2006) (noting that “a general posting to an Internet website is not sufficient to establish minimum contacts”); *Fed. Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 812 F. Supp. 1139, 1146 (D. Kan. 1993) (noting that “inquiries to an insurance company in a different state is not a sufficient ‘minimum contact’ to warrant the exercise of personal jurisdiction”).

⁴³*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal citations and quotation marks omitted).

Saepio Technologies.” Furthermore, the screen shot was printed on May 24, 2010, making it unclear whether Saepio actually powered the web page at the time Simonds accessed it. In fact, plaintiff gives no indication when Simonds allegedly used the site.

In addition, plaintiff has not shown that Simonds knew infringing the FOREVER FIT copyright would cause economic injury in Kansas. To show defendants’ knowledge of plaintiff’s location, plaintiff attaches three comments posted on LOAFC’s website by other franchisees who noted similarities between FOREVER FIT and “Waist Away.” However, plaintiff gives no indication where these three postings were located or which franchisees can be assumed to have read them.⁴⁴ The postings do not even suggest that plaintiff’s business is located in Kansas. Therefore, they do not establish that Simonds saw the postings or, as a result of the postings, knew plaintiff was located in Kansas.

Plaintiff relies on *Dudnikov*,⁴⁵ to argue that the “expressly aimed” element of the “effects test” is met if the defendant intentionally undertook actions that damaged plaintiff in the forum state. In *Dudnikov*, the defendant sent a complaint to eBay’s headquarters in California, alleging a violation of its intellectual property rights by an online auction run by plaintiffs out of Colorado (plaintiffs’ location was identified on their auction page).⁴⁶ Plaintiffs’ auction was suspended and plaintiffs brought a declaratory judgment action against defendant in federal district court in Colorado.⁴⁷ Although the District Court in Colorado found that it lacked

⁴⁴The four web posts appear to be excerpted from a longer conversation chain.

⁴⁵514 F.3d 1063 (10th Cir. 2008).

⁴⁶*Id.* at 1067.

⁴⁷*Id.*

personal jurisdiction over defendant, the Tenth Circuit reversed because defendant's conduct in contacting eBay in California was "expressly aimed" at achieving its effects in Colorado.⁴⁸ These facts are inapplicable to Powell or Simonds. Speculative allegations that Powell and Simonds knew where the injury might result is not the same as an intent to focus one's conduct on a particular person.⁴⁹ Plaintiff has not alleged that either defendant was personally familiar with FOREVER FIT materials. By downloading "Waist Away" from the LOAFC website, they cannot be said to have "expressly aimed" their conduct at or intended injury in the forum state of an unknown copyright holder.

There is no evidence Simonds purposely availed herself of the privilege of conducting activities in Kansas, or that she invoked the benefits and protections of its laws such that she should reasonably have anticipated being haled into court in Kansas.⁵⁰ Because plaintiff fails to show Simonds' conduct was expressly aimed at Kansas or that she knew economic injury would result in Kansas, this Court cannot exercise personal jurisdiction over her.

2. Nexus

Although plaintiff has not shown sufficient contacts for this Court to exercise personal jurisdiction over KLP or Simonds, the Court proceeds to consider each defendants' individual contacts under the second prong. The Court must determine whether there is a nexus between defendants' contacts with Kansas and plaintiff's cause of action.⁵¹ Although the Tenth Circuit

⁴⁸*Id.* at 1067–68, 1075.

⁴⁹*See id.* at 1075.

⁵⁰*Benton v. Cameco Corp.*, 375 F.3d 1070, 1076 (10th Cir. 2004) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)) *cert. denied*, 544 U.S. 974 (2005); *see also, e.g., Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1276–77 (10th Cir. 2005).

⁵¹*Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1160 (10th Cir. 2010).

has not identified the appropriate test to be applied, it generally applies one of two tests: (1) “but-for” causation; or (2) proximate cause.⁵²

Proximate cause is the most restrictive approach and requires courts to analyze “whether any of the defendant’s contacts with the forum are relevant to the merits of plaintiff’s claim.” “But-for” causation is less restrictive and supports the exercise of personal jurisdiction based on “any event in the causal chain leading to plaintiff’s injury.”⁵³

The Tenth Circuit further explained: “Specific jurisdiction . . . is premised on something of a *quid pro quo*: in exchange for ‘benefitting’ from some purposive conduct directed at the forum state, a party is deemed to consent to the exercise of jurisdiction for claims related to those contacts.”⁵⁴

Defendants contend that their attenuated contacts with Kansas were not the basis for plaintiff’s copyright infringement claims because: Evans’ contracts with plaintiff to lawfully purchase FOREVER FIT products more than two years before the present litigation had nothing to do with the “Waist Away” program allegedly acquired from LOAFC; Powell’s singular telephone call for information did not contribute to or relate to copyright infringement; and any allegation that defendants *may* have used a website that *may* be based in Kansas to obtain the infringing materials is speculation.

Here, Evans engaged in legitimate business dealings with plaintiff in Kansas. However, lawful conduct does not constitute copyright infringement. The Third Amended Complaint alleges Evans committed copyright infringement when she “created unauthorized derivative

⁵²*Id.* at 1161.

⁵³*Id.* (internal citations omitted).

⁵⁴*Dudnikov*, 514 F.3d at 1078.

works *by way of use* of LOA's infringing 'Waist Away' materials."⁵⁵ Nevertheless, her familiarity with the FOREVER FIT program and its prices may have influenced her decision to obtain cheaper alternatives, such as "Waist Away," which were allegedly identical. "But for" her prior use of FOREVER FIT, she might not have sought an identical product. Evans' recurring negotiations for access to FOREVER FIT materials and Evans' familiarity with plaintiff's copyrighted materials put her on notice that identical products might involve a copyright violation. Thus, her conduct in Kansas was directly related to any alleged copyright infringement subsequently committed.⁵⁶

Powell, on the other hand, made a single phone call to plaintiff in Kansas seeking information about "Waist Away." Plaintiff contends that, because Powell's communication related to the infringing materials, her conduct related to plaintiff's injury. Plaintiff has not shown this phone call was either the proximate cause or the but-for cause of KLP's alleged copyright infringement. Powell did not engage in business during the phone call and plaintiff gives no indication what Powell learned during the conversation. Rather, plaintiff uses one incident to establish that KLP's conduct was "expressly aimed" at the forum (*i.e.*, a singular phone call to Kansas) and an unrelated incident to establish a basis for its copyright infringement claim (*i.e.*, Powell's alleged downloading of materials from the LOAFC website powered by Saepio). Therefore, the conduct that was "aimed" at Kansas did not give rise to the present litigation.

Powell's use of the Saepio-powered website may have been the proximate and but-for

⁵⁵(Doc. 128 at 16) (emphasis added).

⁵⁶Plaintiff makes no allegation that Evans personally modified, copied or distributed the FOREVER FIT products she purchased.

cause of the copyright infringement, but there is no evidence anyone had notice the LOAFC web page was powered by a Kansas-based company, or that the act of downloading materials from LOAFC's web page was conduct aimed at Kansas. The Court finds Powell's attenuated contact with Saepio cannot serve as the basis for exercising personal jurisdiction over KLP in Kansas.

For these same reasons, the Court lacks personal jurisdiction over Simonds as well.

Plaintiff has made a *prima facie* showing that Sarita Evans had minimum contacts with Kansas sufficient to satisfy the due process analysis. However, in the absence of minimum contacts, KLP and Simonds are dismissed for lack of personal jurisdiction.

B. Reasonableness

Once a plaintiff has made a minimum contacts showing, a defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."⁵⁷ The considerations most often discussed are: (1) the burden on 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 obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.⁵⁸ If these factors are strong, they may serve to establish the reasonableness of jurisdiction even if plaintiff's showing of minimum contacts is weak.⁵⁹

Plaintiff notes that Kansas has an interest in providing a forum in which its residents can seek redress for intentional harm caused by out-of-state actors. Furthermore, plaintiff states it is

⁵⁷*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

⁵⁸*Employers Mut. Cas. Co.*, 618 F.3d at 1161.

⁵⁹*OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1095 (10th Cir. 1998); *Pro Axxess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1280 (10th Cir. 2005).

a small company suing a franchisor and franchisees throughout the country for infringement of its copyrights. If required to pursue these claims with limited resources against multiple defendants nationwide, plaintiff would be foreclosed from receiving meaningful relief. Plaintiff notes that all defendants are represented by the same counsel and argues that, by maintaining suit in one location over matters sharing a common nucleus of fact, both parties save litigation expenses and it spares judicial resources. Defendants do not respond to these arguments and have not otherwise presented circumstances that compel a finding that exercising personal jurisdiction over Evans would be unreasonable.

IT IS THEREFORE ORDERED BY THE COURT that Defendants KLP Fitness Enterprises, Inc., Beverly A. Simonds and Sarita L. Evans' Motion to Dismiss for Lack of Personal Jurisdiction and Incorporated Memorandum of Law in Support Thereof (Doc. 130) is **granted in part and denied in part.** The motion is granted as to defendants KLP Fitness Enterprises, Inc. and Beverly Simonds. The motion is denied as to Sarita Evans.

IT IS SO ORDERED.

Dated: November 19, 2010

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE