

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**WHITE WAVE INTERNATIONAL
LABS, INC., a Florida Corporation,**

Plaintiff,

vs.

Case No. 8:09-cv-01260-VMC-TGW

LINDSAY LOHAN, et al.,

Defendants.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT LOHAN'S MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

Plaintiff, White Wave International Labs, Inc., herein responds in opposition to the Motion to Dismiss filed by Defendant Lohan.

MEMORANDUM OF LAW

I. LOHAN COMMITTED AN INTENTIONAL TORT IN FLORIDA BASED ON HER CONSPIRACY TO PIRATE A SUNLESS TANNING MIST AND MARKET THE INFRINGING PRODUCT TO FLORIDA CITIZENS

Florida's Long-Arm Statute provides:

(1) Any person, whether or not a citizen or resident of that state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

- (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state;
- (b) Committing a tortious act within this state; . . . [or]

- (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

“Soon after the termination of Plaintiff and Lorit's business relationship, Lorit, Simon, and Lohan introduced a self-tanning mist, called Sevin Nyne. Allegedly, Sevin Nyne contains the same or nearly identical ingredients as the formula highlighted in the CABF, which Lorit had offered to purchase from Plaintiff. . . .On April 30, 2009, Sephora.com launched the sale of Sevin Nyne by Lindsay Lohan on its website.” White Wave Int'l Labs, Inc. v. Lohan, 2010 U.S. Dist. LEXIS 108622 (M.D. Fla. Sept. 29, 2010).

“Developed for more than three years by fashion icon Lindsay Lohan and celebrity airbrush tanner Lorit Simon, Sevin Nyne provides a gorgeous, streak-free golden tan while nourishing your skin with goji berry extract known for its powerful antioxidant properties and moisturizing chardonnay extract to keep the skin hydrated.” <http://www.sevinnyne.com>. Lohan is not a mere paid spokesperson. She owns stock in a corporation, Crossheart Productions, which is a member and part-owner of Lorit, LLC. Lohan is a managing agent or perhaps a controlling person of Lorit, LLC, a signatory to the CABF.

In *White Wave Int'l Labs, Inc. v. Lohan*, 2010 U.S. Dist. LEXIS 108622 (M.D. Fla. Sept. 29, 2010), this Court found that the tortious conduct was committed in Texas where the reverse engineering took place. However, the activities in Florida, including execution of the CABF, “were essential to the success of the tort” and subject Lohan to jurisdiction in Florida. *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 857 (11th Cir. Fla. 1990).

Lohan directs communications to Florida citizens through the internet which are calculated to cause those citizens to purchase Sevin-Nyne rather than the product which

Plaintiff invented. This is a continuing tort. Defendants' Internet website is a means of conducting or carrying on business in the state of Florida under Section 48.193(1)(a). Moreover, in *Precision Software Servs., Inc. v. Fortune Fin. Sys., Inc.*, 1998 U.S. Dist. LEXIS 22068 (M.D. Fla. Oct. 13, 1998), the court held that where the software creator and manufacturer made the allegedly infringing computer software in Oregon, but it then shipped it to Florida knowing that the material would be distributed or passed on to consumers in Florida, the alleged tort of the software manufacturer occurred in Florida under Florida's long-arm statute, Fla. Stat. § 48.193. As the court stated:

The issue is whether by selling the allegedly infringing materials to Fortune which distributed them in Florida, Telecomm has committed a tort in Florida. It is uncontroverted that Telecomm does not have a place of business or directly sell its products in Florida. Rather, Telecomm's only connection with Florida is that it sells its products to a Florida corporation and ships its products to Florida at the direction of Fortune and that it does advertise on the Internet which is accessible in Florida. **The tort of copyright infringement occurs at the place of "passing off" the allegedly infringing item, which is typically the place of sale, rather than the location where the infringing item was copied or created.**

In the instant case, **although Telecomm manufactured the allegedly infringing computer software in Oregon, it then shipped it to Florida (albeit at the direction of Fortune) knowing that this material would be distributed or passed on to consumers in Florida.** Telecomm argues that the mere telephone connections between Fortune and Telecomm is not enough to maintain personal jurisdiction in Florida. However, Telecomm knew that the place of "passing off" these materials to the consumers was Florida. Therefore, Telecomm's actions were more than a mere telephone call to Fortune, and the Court finds that if Telecomm did commit a tort, the tort occurred in Florida within the meaning of the long-arm statute.

Id. (bolding added).

In *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 663 (2d Cir. 1956), the court held that the infringement takes place not where deceptive materials are created, but rather where the goods are attempted to be passed off. The Eleventh Circuit essentially followed this rule and cited *Vanity Fair* favorably in *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. Fla. 2008) (“Therefore, although the website was created in Tennessee, the Florida long-arm statute is satisfied if the alleged trademark infringement on the website caused injury in Florida”). An alternative rule, demonstrated in *Horne v. Adolph Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982), is that the infringement is deemed to have its fictional situs at the residence of the owner. Jurisdiction exists in Florida under either rule. See *Dakota Indus. v. Dakota Sportswear*, 946 F.2d 1384, 1388 (8th Cir. S.D. 1991) (“We need not decide this issue because in this case some of Sportswear's garments were “pass[ed] off” in the forum state, and Dakota Industries has its principal place of business in the forum state and thus suffered the economic injury there”).

In *Alpine Plastics, Inc. v. Erlstedt*, 2003 U.S. Dist. LEXIS 16549, (E.D. La. 2003), the court asserted personal jurisdiction over the defendants with respect to the plaintiff's claim for misappropriation of trade secrets where (1) the defendants, customers of the plaintiff, traveled to Louisiana, (2) the plaintiff shared trade secrets with the defendants while they were in Louisiana, and (3) the defendants used the trade secrets to open a competitive business in North Carolina.

Here, Plaintiff sent Defendant samples which were required to be returned to Florida under the CABF. The lowball offer shows that Defendants never intended to purchase the

formula but only to obtain samples under false pretenses. A prima facie case has been shown. *Stelax Indus. v. Donahue*, 2004 U.S. Dist. LEXIS 29026 (N.D. Tex. 2004).

The Eleventh Circuit has held that "a motion to dismiss a tort claim for lack of personal jurisdiction under Florida's Long-Arm Statute does not require a full-scale inquiry into whether the defendant committed a tort. Instead, when a plaintiff alleges a claim, and the record is in dispute as to the accuracy of the claim, we can construe the facts in the light most favorable to the plaintiff and hold that the alleged claim satisfies Florida's Long-Arm Statute." *Future Technology Today, Inc. v. OSF Healthcare Systems*, 218 F.3d 1247, 1250 (11th Cir. 2000).

Section 48.193(1)(b) permits jurisdiction over the nonresident defendant who commits a tort **outside** of the state that causes injury **inside** the state. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1216 (11th Cir. 1999). The defendant's physical presence is not required if the tort causes an injury in Florida. *Wendt v. Horowitz*, 822 So.2d at 1260 (Fla. 2002). Telephonic, electronic, or written communications into Florida provide a basis for jurisdiction if the tort arises from the communications and depends upon proof of either the existence or the content of any of the communications." *Horizon Aggressive Growth, L.P.*, 421 F.3d at 1168.

Defendants replicated Plaintiff's product and sold it in Florida to Florida citizens through a retailer when the low-ball offer was rejected by Plaintiff in Florida.

The tort was not committed in Texas. Lohan caused damage in Florida by informing Florida citizens that she invented what was in substance Plaintiff's invention. A defendant can commit a tortious act within Florida via her "telephonic, electronic, or written

communications into Florida” so long as the cause of action arose from those communications. *Internet Solutions Corp. v. Marshall*, 557 F.3d 1293, 1296 (11th Cir. 2009), citing *Wendt*.

The product “Sevin Nyne” alleged to have been created by Defendants Lohan and Simon was advertised on the website of Sephora.com, and numerous interviews given by Defendants Lohan and Simon to their creation of the disputed formula. Such statements were posted on the internet, such electronic communications were seen in Florida as well as other locations around the world. In a case from this Court, jurisdiction was found proper because the defendants, who ran an Arizona-based consumer protection website, permitted users to request information on companies from any state, including Florida. These activities meant that the defendants ran more than just a “passive website” and thus made them subject to the court’s jurisdiction. *Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, 347 F. Supp. 2d 1242, 1244-45 (M.D. Fla. 2004).

The Complaint in this case contains a Count for civil conspiracy against all Defendants. In Florida, a civil conspiracy is actionable where the plaintiff alleges: “(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.” *Charles v. Fla. Foreclosure Placement Ctr.*, 988 So.2d 1157, 1159-60 (Fla. 3d DCA 2008).

The 11th Circuit Court of Appeals has held that “the state’s long-arm statute can support personal jurisdiction over any alleged conspirator where any other co-conspirator commits an act in Florida in furtherance of the conspiracy, even if the defendant over

whom personal jurisdiction is sought individually committed no act in, or had no relevant contact with Florida." *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1281-82 (11th Cir. 2009), citing *Machtinger v. Inertial Airline Servs., Inc.*, 937 So.2d 730, 734-36 (Fla. 3d DCA 2006). The *United Technologies* court explained that if the plaintiff has successfully alleged that any member of that conspiracy committed tortious acts in Florida in furtherance of that conspiracy, then all of the conspirators are subject to the jurisdiction of the state of Florida through its long-arm statute. *United Technologies*, 556 F.3d at 1282. See also, *Execu-Tech Bus. Sys., Inc.*, 752 So.2d 582, 584-85 (Fla. 2000) (finding personal jurisdiction in Florida over participant in a nationwide price-fixing conspiracy in which some co-conspirators, but not the defendant at issue, made sales into Florida). Sales of the product "Sevin Nyne" were made in Florida through Sephora.com and at the local Sephora store in International Plaza in Tampa.

I. THE EXERCISE OF PERSONAL JURISDICTION OVER DEFENDANT LOHAN WILL NOT OFFEND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

The "effects" test governs when the plaintiff's claim involves an intentional tort. *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 (11th Cir. Fla. 2008). Where the plaintiff is an individual, the injury is suffered where the plaintiff resides. Here, Plaintiff is not a national corporation but a one-employee firm. Merely posting an infringing product for sale on a website directed to Florida consumers is enough under the "effects" test. *Id.*

"Recently the Middle District of Florida recognized that "a number of courts" have held that "where a defendant's tortuous conduct is intentionally and purposefully directed at a resident of the forum, the minimum contacts requirement is met, and the defendant

should anticipate being haled into court in that forum.” *Id.* (citing, New Lennox Industries v. Fenton, 510 F. Supp. 2d 893, 904 (M.D. Fla. 2007)).

Defendant Lohan, as a knowing infringer of Plaintiff’s intellectual property, could have reasonably have anticipated the possibility of a lawsuit in the Florida courts in connection with her intentional activities knowingly directed at Florida residents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). It is interesting that Defendant Lohan now concedes she did not develop Sevin-Nynne in attempting to label herself a mere spokesperson. That Lohan knows she did not develop the product raises an inference that she knew that infringement of someone else’s product had taken place. Obviously, Lorit Simon, her co-conspirator, knew and knowledge of one is imputed to all other actors in the conspiracy. Lohan owns part of the company and has a pecuniary interest in sales of Sevin-Nynne.

Under Due Process analysis, “jurisdiction is proper where the defendant’s contacts with the forum proximately result from actions by the defendant himself that create a ‘substantial connection’ with the forum state.” *Madura v. Hall*, 916 F.2d 1510, 1516 (11th Cir. 1990). “Intentional torts are such acts and may support the exercise of personal jurisdiction over the non-resident defendant who has no other contacts with the forum.” *Licciardo*, 544 F.3d at 1285.

“Due process is satisfied when the plaintiff brings suit in the forum where the ‘effects’ or ‘brunt of the harm’ caused by the defendant’s intentional tortious activity was suffered.” *Id.* at 1285-87. Therefore, personal jurisdiction is proper over a defendant who commits an intentional and allegedly tortious act expressly aimed at the plaintiff in the

forum state. *Id.* at 1288. “Florida has a very strong interest in affording its residents a forum to obtain relief from intentional misconduct of nonresidents causing injury in Florida.” *Licciardo*, 544 F.3d at 1288.

CONCLUSION

Therefore, the Motion to Dismiss filed by Defendant Lohan should be denied in its entirety. It is irrelevant where Sevin-Nyne is bottled. Sevin-Nynne infringes Plaintiff’s rights as established in the CABF, rights created under Florida law. Creating an infringing product constitutes intentional interference and civil conspiracy. Under Eleventh Circuit and Middle District of Florida case law, an intentional tort was committed in Florida and had effects on a Florida resident and Florida citizens in general through sales resulting from Internet websites in which Lohan actively promotes sale of Sevin-Nynne utilizing her fame and status as an inventor, user, and part-owner. Sevin-Nyne was passed off in Florida and damaged the Florida-based owner of the rights in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 14, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to: Gregory P. Korn, Esq., Jonathan P. Steinsapir, Esq., and Ronnie J Bitman , Esq.

/s/ Craig L. Berman
Craig L. Berman

A large, light gray watermark logo for "Radar online.com" is centered on the page. The word "Radar" is in a large, rounded, sans-serif font, and "online.com" is in a smaller, similar font below it. To the left of the word "Radar" are three curved lines that resemble a signal or radar waves.