

UMS Solutions, Inc. v Biosound Esaote, Inc.

2010 NY Slip Op 34039(U)

December 13, 2010

Supreme Court, Westchester County

Docket Number: 11590/10

Judge: Alan D. Scheinkman

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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON DECEMBER 13, 2010
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,
Justice.**

-----X
UMS SOLUTIONS, INC., d/b/a UNIVERSAL
ULTRASOUND and UNIVERSAL MEDICAL SYSTEMS,
INC.,

Plaintiffs,

-against-

BIOSOUND ESAOTE, INC., JEFF FISHEL, MICHAEL
COLLINS, KEVIN GOUVIN and VETEL DIAGNOSTICS,
INC.,

Defendants,
-----X

Scheinkman, J:

Defendant Vetel Diagnostics, Inc. ("Defendant" or "Vetel") moves, pursuant to CPLR 3211(a)(8) to dismiss the Complaint based on the lack of personal jurisdiction. Plaintiffs UMS Solutions, Inc. d/b/a Universal Ultrasound and Universal Medical Systems, Inc. ("Plaintiffs") oppose the motion.

FACTUAL AND PROCEDURAL HISTORY

Based on the allegations of the Amended Complaint, this action arises out of the termination of Plaintiffs as the exclusive United States distributor of veterinary ultrasound diagnostic and radiography equipment made by Defendant Biosound Esaote, Inc. ("Biosound"). Defendant Vetel is alleged to have wrongfully hired Defendants Jeff Fishel and Michael Collins in contravention of certain restrictive covenants contained in Plaintiffs' employment agreements with Fishel and Collins.

In a Decision & Order dated July 15, 2010 (the "July 2010 Decision"), this Court granted in part, and denied in part, Plaintiffs' motion for a preliminary injunction against all Defendants. Familiarity with the July 2010 Decision is assumed for the purposes of this determination. While the Court granted a preliminary injunction against solicitation by Fishel

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and Collins of customers they serviced while employed by UMS, the Court denied injunctive relief as against Vetel because Plaintiffs had not shown a likelihood of success in being able to establish a basis for the exercise of personal jurisdiction over Vetel.¹

A. Vetel's Contentions in Support of Motion

In support of its motion, Vetel submits an affidavit from its President, James K. Waldsmith, DVM and affidavits from Collins and Fishel. In his affidavit, Waldsmith avers that Vetel was incorporated in California in 1999 and is engaged in the business of manufacturing digital radiography systems and distributing veterinary ultrasound systems, thermal imaging systems, and diagnostic imaging software (Affidavit of James K. Waldsmith, DVM, sworn to August 5, 2010 ["Waldsmith Aff."]).

Waldsmith avers that Vetel is not authorized to conduct business in New York, maintains no offices, employees, or bank accounts in New York, has no employees, property or telephone listing in the State of New York, does not regularly conduct or solicit business in New York, and does not derive substantial revenue from goods used or consumed or services rendered in New York (Waldsmith Aff. at ¶¶ 8-16). He further asserts that

[t]he sum and total of Vetel's business and contact within the State of New York for the last ten (10) years are as follows:

- a. In the past ten (10) years, Vetel has sold equipment to only three (3) end users in New York² and
- b. In 2008, Vetel entered into a 90 day contract with Plaintiff Universal Medial Systems, Inc. As evidence of Vetel's intention not to submit itself to the jurisdiction of the State of New York, the contract provides that any dispute be submitted to arbitration in the

¹On the motion for a preliminary injunction against Vetel and in reply to Vetel's claims that it was not authorized to do business in New York and transacted no business in New York, Plaintiffs contended "(1) that 'for several years, until 2008, Vetel purchased and serviced large animal digital radiology equipment from a company known as AFP Imaging, Inc. located in Elmsford, NY' ...; and (2) for the last 5 years Vetel engaged a sales representative by the name of Steve Garner who solicited business in New York and competed with Universal for sales from veterinarians in New York" (July 2010 Decision at 23-24). Because these alleged facts did not satisfy Plaintiffs' burden that there was a reasonable probability of ultimate success on the question of jurisdiction over Vetel, the Court declined to issue a preliminary injunction against Vetel. Of course, Plaintiffs' burden in opposition to Vetel's motion to dismiss is much lower – they need only allege legally sufficient facts to establish a *prima facie* case for the exercise of jurisdiction.

²These sales were apparently consummated at trade shows or other events that occurred outside of New York.

State of Texas. This contract resulted in zero business being conducted in New York (*id.* at ¶ 5).

According to Waldsmith, neither Vetel's website nor its Facebook page allows customers to purchase goods or services over the internet.

With regard to the sales people mentioned in Plaintiffs' Complaint and their Order to Show Cause, Vetel asserts that any communications with the co-defendants occurred outside New York and none of the sales people mentioned sells equipment in New York. While Waldsmith concedes that Vetel uses the services of one independent sales representative in New York (Waldsmith Aff. at ¶ 22), Waldsmith asserts that the sales representative's territory encompasses New England, New York, New Jersey, Pennsylvania, Delaware, Maryland and Washington, D.C., the sales representative is not a Vetel employee, has no authority to bind Vetel to any agreements, and has brought in only one transaction to Vetel since 2005, which involved a shipment of equipment from California to New York (Waldsmith Aff. at ¶¶ 23-27).

The affidavits from Collins and Fishel are the affidavits they submitted in opposition to Plaintiffs' preliminary injunction motion and do not appear relevant to the issues involved in this motion to dismiss other than to state that they are sales representatives for Vetel; there is no additional information concerning Vetel in their affidavits.

In its memorandum of law, Vetel argues that given the facts asserted by Waldsmith, there is no basis for this Court's exercise of jurisdiction under CPLR 301 since Vetel is not doing business in New York. Vetel also contends that there is no basis for the assertion of jurisdiction over it pursuant to CPLR 302(a)(1) – *i.e.*, where the cause of action arises from the transaction of business in New York – since the contacts set forth by Waldsmith have no "relationship whatsoever to Plaintiffs' causes of action" (Vetel's Mem. of Law at 5). Vetel also argues that this Court has already decided in the July 2010 Decision at p. 24 that there is no basis for the assertion of CPLR 302(a)(1) jurisdiction.

With regard to jurisdiction pursuant to CPLR 302(a)(2), Vetel argues that the basis for jurisdiction under CPLR 302(a)(2) – where a defendant commits a tortious act within New York – "is narrowly construed to apply only when the defendant's alleged wrongful acts are performed in New York" and there are no facts showing that Vetel was ever in New York, let alone that it was present in New York to commit a tortious act.

Vetel contends that there is no basis for the assertion of jurisdiction pursuant to CPLR 302(a)(3) – tortious act committed outside of New York causing injury inside New York and Defendant either (1) "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (CPLR 302[a][3]).

Vetel points out that “none of the sales representatives [who] formerly worked for Plaintiff and now work for Vetel ever have made a sale in New York while working for Universal or Vetel” and “an overall reduction or diminution in the net worth of a company domiciled or incorporated in New York will not suffice in the analysis of whether the injury occurred in New York” (Vetel’s Mem. of Law at 7). Vetel also relies on this Court’s July 2010 Decision which made clear that “in cases where there has been no showing that the critical events took place in New York, New York case law compels a dismissal of the action” (*id.* at 8, *quoting* July 2010 Decision at 24, n. 10). Based on the facts attested to by Waldsmith, Vetel argues that, since Vetel had only had three sales to New York end users, and Vetel neither conducts any business in New York nor solicits any business in New York, there is no basis for a finding that any tortious conduct occurring outside New York had any effect on Plaintiffs’ New York sales. Vetel urges that its contacts with New York fail to satisfy either of the requirements pursuant to CPLR § 302(a)(3)(i) or (ii) (*id.* at 8).

B. Plaintiffs’ Contentions in Opposition

In opposition to Vetel’s motion, Plaintiffs submit an affirmation from counsel, an affidavit from Plaintiffs’ President, Peter Brunelli, and an affidavit from R. Scott Jones, the Chief Executive Officer of AFP Imaging Corporation d/b/a ImageWorks (“AFP”).

The purpose of the affirmation of Plaintiffs’ counsel, Michael P. Regan, Esq. is to submit evidence that Vetel not only has a website that is accessible by potential customers in New York, but that it also maintains an interactive Facebook page that Plaintiffs contend “either partially or fully satisfies the solicitation requirement of the ‘solicitation plus’ test for establishing personal jurisdiction in New York under CPLR 301” (Affirmation of Michael P. Regan dated September 3, 2010 at ¶ 3) because it is highly interactive and commercial in nature given the many links to product information and sales representatives.

Regan describes the Google searches he performed on his work computer on August 25, 2010 and August 31, 2010 concerning Vetel Diagnostics and he submits copies of the various searches he performed as exhibits to his affirmation. According to Regan, the Facebook page contains a “Wall” which is “an online forum for Vetel to solicit and answer questions to individuals visiting the site, as well as to provide information regarding its new products and product lines to potential customers” and which lists Events that Vetel intends on attending such as conferences and trade shows. Regan also describes other links such as photos and a link for users to sign up to receive e-mail news from Vetel. Regan also describes Vetel’s official website page that contains a products tab which provides links to detailed descriptions of Vetel’s products and contact information for Vetel sales people. The website also contains a tab to allow potential customers to provide their contact information, and a tab that provides customers with information concerning Vetel’s Seminars & Training.

In his affidavit, Jones avers that AFP is a corporation located in Elmsford, New York and that Vetel, during the period February 2006 to July 2009, “transacted business with

AFP by purchasing products and services from AFP in the aggregate sum of \$1,448,662.00" (Affidavit of R. Scott Jones, sworn to September 1, 2010 at ¶ 4). He submits a spreadsheet that he says was prepared in the ordinary course of AFP's business and which he says shows that the sales involved products that were shipped from AFP's New York location to Vetel's customers across the country and in many cases directly to Vetel in California. He claims that "[t]he orders for services (such as product repair) were placed with AFP in New York and the services were provided by AFP in its facility in New York" (*id.* at ¶ 5).

Brunelli asserts, in his affidavit, that AFP and Plaintiffs were in the final stages of negotiations over AFP's purchase of Plaintiffs in early 2010 before Plaintiffs were terminated as Biosound's exclusive distributor. He contends that, based on the spreadsheet annexed to Jones' Affidavit, Vetel "used AFP as its supplier, service depot and de facto warehouse in New York for at least three years" (Affidavit of Peter Brunelli, sworn to August 31, 2010 ["Brunelli Aff.,"] at ¶ 10). Brunelli responds to Vetel's claim that its one New York sales representative, Steve Garner, has only brought in one sale over the past five years by contending such assertion "is highly doubtful" given that sales representatives are expected to be far more productive. He avers, on information and belief, that "at least for the last five years, Garner has been soliciting digital radiography business in New York exclusively on behalf of Vetel by doing demonstrations, sales meetings and trade shows ... [and] quite often Garner competed directly with Universal for sales from veterinary customers in New York" (Brunelli Aff. at ¶ 16). Brunelli asserts that given Vetel's failure to mention AFP and its rendition of Garner's sales which Plaintiffs find "preposterous," Plaintiffs should have the opportunity to pursue discovery with respect to the true state of facts concerning these two New York contacts.

Brunelli further relies on the fact that in December 2008, Vetel and Plaintiffs negotiated in New York State an exclusive distributorship agreement for Plaintiffs to act as Vetel's exclusive distributor for ninety days. He further avers that in 2009, the parties had merger discussions whereby Vetel's National Sales Manager, Bert Bossardet, visited Plaintiffs' New York office on 1/7/09 "to review the bundling and distribution of ultrasound and digital radiography products" (*id.* at ¶ 24).

Brunelli also asserts the following sales of Vetel products to New York customers:

On or about May 11, 2010, Dr. George Kramer, located in Bohemia New York, cancelled an order for Biosound products worth \$105,000 that he previously placed with Universal and, upon information and belief, then purchased the same products through Vetel ... Discovery may very well demonstrate that Vetel learned of this Universal customer through defendants Mike Collins and/or Jeff Fishel, both of whom had access to Universal's New York customer information.

Upon information and belief, approximately two years ago, Dr. Ron Vin, who has offices in both Manhattan and Millbrook, New York,

purchased a digital radiography unit from Vetel (through its sales agent, Steve Garner) ... Discovery may very well demonstrate that Vetel learned of this Universal customer through defendants Mike Collins and/or Jeff Fishel, both of whom had access to Universal's New York customer information.

Upon information and belief, approximately three to four months ago, Dr. Amy Todd, located in Canadagua, New York, purchased a Biosound MyLab 5 unit from Vetel (through its sales agent, Steve Garner) Discovery may very well demonstrate that Vetel learned of this Universal customer through defendants Mike Collins and/or Jeff Fishel, both of whom had access to Universal's New York customer information (Brunelli Aff. at ¶¶ 26-31).

In support of Plaintiff's claim of jurisdiction based on Vetel's tortious acts, Brunelli discusses (and submits as exhibits) allegedly improper e-mails sent between Fishel and Vetel and Collins and Vetel while Fishel and Collins were still Plaintiffs' sales representatives and which were sent through Universal's New York server. Brunelli contends that "[i]t was totally improper for Vetel to communicate with [Plaintiffs'] sales representatives, by way of Universal's server in New York, in order to obtain Universal's proprietary information" (Brunelli Aff. at ¶ 48). He asserts that discovery would permit Plaintiffs to explore Vetel's improper contacts with Plaintiffs' representatives to establish further injury and/or wrongdoing (*id.* at ¶ 49).

As their legal argument, Plaintiffs contend that the foregoing facts (*e.g.*, (1) a New York sales representative soliciting sales for Vetel for the past five years, (2) an agreement in December 2008 between Vetel and Plaintiffs for Plaintiffs to act as Vetel's exclusive distributor which was negotiated in New York and merger negotiations between Vetel and Plaintiffs in 2009, (3) six New York sales, with several to Plaintiffs' New York customers based on confidential information Vetel allegedly received from Defendants Fishel and Collins, (4) an interactive Facebook page and commercial website, and (5) Vetel's business transactions with a New York company (AFP) for its products and services during 2006 to 2009) are sufficient to show that the "solicitation plus" test of doing business under CPLR 301 has been satisfied (Pltf's Opp. Mem. at 1). Plaintiffs argue that "[t]he aggregate of Vetel's business activities in the State of New York, as well as their regularity and significance ... are more than sufficient 'plus' factors to warrant the exercise of jurisdiction" (*id.*). Thus, Plaintiffs contend that "the New York Supreme Court has held that soliciting New York business through an interactive website, together with other factors, constitutes a basis for jurisdiction under CPLR 301, even where the defendant is not physically present in the State of New York" (*id.* at 4-5).

In addition to CPLR 301 doing business jurisdiction, Plaintiffs also invoke CPLR 302(a)(3) to confer jurisdiction – *i.e.*, "Vetel tortiously interfered with Universal's contracts with its sales representatives. Plaintiffs have alleged direct injuries in New York resulting from Vetel's tortious conduct, including loss of customers and sales in New York, believed to have been caused by Fishel and Collins improperly sharing Universal's proprietary information with

Vetel” (*id.* at 1-2). Plaintiffs contend that Vetel concedes that Plaintiffs have alleged tort claims against Vetel. On the issue of injury in New York State, Plaintiffs rely on Vetel’s alleged improper solicitation of Fishel and Collins “by way of Universal’s server in New York, in order to obtain Universal’s proprietary information and usurp its business opportunities. [Plaintiffs argue] [t]hese acts alone constitute an injury to Universal in New York” (*id.* at 13). Plaintiffs also argue that “discovery will enable Plaintiffs to find out whether Vetel’s recent sales to Universal’s customers in New York (as well as any other sales in New York that Universal is unaware of) were obtained by means of Collins and Fishel improperly sharing Universal’s customer information with Vetel. And discovery will enable Plaintiffs to determine Vetel’s revenue from products sold and services rendered in the State of New York, as well as Vetel’s revenues derived from interstate or international commerce” (*id.* at 14).

At a minimum, Plaintiffs assert that they have met the minimal standard that entitles them to conduct discovery on jurisdiction – *i.e.*, plaintiff need only show that facts may exist to exercise personal jurisdiction over the defendant (*id.* at 3).

C. Vetel’s Reply

Waldsmith provides another affidavit in reply. In it, Waldsmith contends Plaintiff’s opposition is full of inaccuracies. Waldsmith argues that Vetel’s failure to discuss AFP in its moving papers was entirely proper because Vetel has had no relationship with AFP for over three years (Reply Affidavit of James K. Waldsmith, acknowledged September 8, 2010 [“Waldsmith Reply Aff.”] at ¶ 4). According to Waldsmith, from December 2005 to June 2007, “Vetel did do business with AFP whereby AFP acted as a product developer which products were sold by Vetel to end users outside the state of New York” and that “[t]he Affidavit from Scott Jones stating that Vetel had transactions with AFP after June 8, 2007 is totally false” (Waldsmith Reply Aff. at ¶¶ 5, 8). As further evidence that the last transaction involving the agreement between Vetel and AFP occurred on June 8, 2007, Waldsmith attaches “a list of the total transactions between Vetel and AFP the last of which being June 8, 2007” (*id.* at ¶ 7). He disputes that Plaintiffs were the exclusive distributor for Vetel at any time based on the plain terms of the agreement, which was attached to the Brunelli Affidavit at Exhibit A.

He avers that Vetel never sold anything to either Dr. Ron Vin or Dr. Amy Todd, but “did sell one product to Dr. Kramer after this lawsuit was filed and only after Kramer contacted Vetel because UMS had failed to deliver the products ordered” (Waldsmith Reply Aff. at ¶¶ 11-13). Waldsmith asserts that “Equipment Outreach is not and has never been an agent of Vetel” (*id.* at ¶ 14).³ He contends that the e-mails attached to Brunelli’s affidavit are

³This is in response to Plaintiffs’ attachment of an e-mail exchange between Fred Petzold of Equipment Outreach and Fishel concerning a demonstration to be attended by Fishel of Universal and Waldsmith of Vetel, which Plaintiffs contend was highly improper. However, because the Court is not relying on these e-mails as a basis for conferring

nothing more than responses to inquiries and do constitute any malfeasance on Vetel's part. Finally, with regard to Vetel's website and Facebook page,⁴ Waldsmith emphasizes that neither allow customers to purchase goods or services over the internet, Vetel's website is not interactive, and both are simply advertising tools for Vetel.

Vetel also submits an affidavit from Steve Garner, Vetel's New York sales representative. Garner avers that he acts as a non-exclusive independent sales representative for Vetel for a territory encompassing New England, New York, Pennsylvania, Delaware, Maryland and Washington D.C. (Affidavit of Steve Garner, sworn to September 9, 2010 at ¶ 4). He claims he does not have the authority to bind Vetel to agreements and is not an employee of Vetel (*id.* at ¶¶ 4-5). He avers that as of April 29, 2010, he brought one sale to Vetel, which involved equipment shipped from Vetel's California office (*id.* at ¶¶ 6-7).

In its reply memorandum, while disputing the facts as presented by Plaintiffs, Vetel contends that even if those facts were deemed to be true, the three sales alleged by Plaintiffs "plus the three (3) sales James Waldsmith contained in his original Affidavit over the course of ten (10) years hardly meet the threshold of continuous and systematic course of doing business in New York as to warrant a finding of its presence in the jurisdiction" (Reply Mem. at 2-3). With regard to the three e-mails from Waldsmith, Vetel argues that they amount to nothing more than a response to inquiries and "do not amount to the 'purposeful invocation of the privileges of conducting business in New York'" (*id.* at 5, quoting *Executive Life Ltd. v Silverman*, 68 AD3d 715 [2d Dept 2009] [use of telephone, fax and e-mail to New York insufficient to confer jurisdiction]). With regard to the internet activities, Vetel argues that "Vetel's website does not 'offer the opportunity for greater inter-activity than an email without promise of a return communication. Therefore, it is clear that [Vetel] has not solicited any business via an interactive website' Furthermore, as Plaintiffs have alleged no facts that would permit an inference that Vetel's website specifically targets New York residents, jurisdiction over Vetel must fail ... Any interaction that might be found on Vetel's website is not 'significantly and unqualifiedly commercial in nature' and, as such, cannot confer jurisdiction" (*id.* at 4 [citations omitted]).

Vetel refutes that there is a basis to assert jurisdiction pursuant to CPLR 302(a)(3) based on this Court's statement in the July 2010 Decision to the effect that "such an assertion would likely be unsuccessful" since cases require dismissal "where there has been no showing that the critical events took place in New York" (July Decision at 24, n.10).

jurisdiction, the Court need not address this issue for purposes of this decision.

⁴Waldsmith asserts that with regard to the Facebook page, Vetel maintains it to allow "users to post comments and photos on the 'Wall.' Like many other businesses, Vetel allows its present customers to follow Vetel's business on Facebook but in no way does Vetel solicit business on Facebook let alone solicit business from New York" (Waldsmith Reply Aff. at ¶ 18). In its reply memorandum (p. 4), Vetel argues that Plaintiffs' argument that an interactive Facebook page can confer jurisdiction was rejected in a federal case (*Katiroll Co., Inc. v Kati Roll and Platters, Inc.*, 2010 WL 2911621 [SD NY 2010]).

Vetel argues that the case upon which Plaintiffs rely, *Sybron Corp. v Wetzel* (46 NY2d 197 [1978]) is distinguishable since in that case, the New York Court of Appeals addressed the idea of anticipated loss in response to an application for a preliminary injunction and “the Court specifically noted that the loses would entail ‘sales to plaintiffs’ New York customers” (Reply Mem. at 5). By contrast, Vetel points out that “it is ... uncontroverted ... none of the sales representatives that formerly worked for Vetel ever have made a sale in New York while working for Universal or Vetel. Therefore, there can simply be no argument that Plaintiffs will suffer any injury in New York” (*id.*).

LEGAL ANALYSIS

“The burden of proof rests with the party asserting jurisdiction[t]he plaintiffs need only make out a prima facie case of personal jurisdiction, and in deciding whether the plaintiffs have met their burden, the court must construe the pleadings and affidavits in the light most favorable to them and resolve all doubts in their favor” (*Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]).⁵ However, where plaintiffs oppose on the ground that discovery on the issue of personal jurisdiction is necessary pursuant to CPLR 3211(d), the Appellate Division, Second Department has established the rule that “plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth a ‘sufficient start, and show[] their position not to be frivolous’” (*Shore Pharmaceutical Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 [2d Dept 2009], quoting *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]; see also *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408 [2d Dept 2005] [“plaintiffs need only demonstrate that facts ‘may exist’ to exercise personal jurisdiction over the defendant”]; *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000] [“[t]he burden of proof rests with the party asserting jurisdiction[t]he plaintiffs need only make out a prima facie case of personal jurisdiction, and in deciding whether the plaintiffs have met their burden, the court must construe the pleadings and affidavits in the light most favorable to them and resolve all doubts in their favor”]). “New York courts have ordered discovery pursuant to CPLR 3211(d) to resolve conflicting affidavits concerning whether facts exist to establish a jurisdictional basis” (*Bankrate, Inc. v Mainline Tavistock, Inc.*, 2008 NY Slip Op 50213[U], 18 Misc 3d 1127[A] at * 3 [Sup Ct Kings County 2008]).

⁵The federal authorities are similar. “Where ...no discovery has taken place and no evidentiary hearing has been held, plaintiffs can satisfy their burden by making allegations legally sufficient to establish a prima facie case for the exercise of jurisdiction ... [t]he Court may rely on the factual allegations contained in the Complaint as well as on the affidavits submitted by the parties, and must draw all factual inferences and resolve any doubts in favor of plaintiffs notwithstanding any contrary information proffered by the moving parties” (*Katiroll Co., Inc. v Kati Roll and Platters, Inc.*, 2010 WL 2911621 at *2 [SD NY 2010]; *Walden v Lorcom Tech., Inc.*, 2009 WL 799955 at *2 [ED NY 2009] [“the plaintiff’s *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant”]).

Here, because Plaintiffs only alternatively argue that they need discovery on the issue of jurisdiction, the Court will first address whether Plaintiffs have met their *prima facie* burden of showing jurisdiction under either CPLR 301 or CPLR 302(a)(3)(ii).

To satisfy the “doing business” standard [CPLR 301], “there is no precise test of the nature or extent of the business that must be done,” *Tanza*, 220 N.Y. at 267, 115 N.E. 915 (1917). However, “New York courts have generally focused on the following indicia of jurisdiction: the existence of an office in New York; the solicitation of business in New York; the presence of bank accounts or other property in New York; and the presence of employees or agents in New York,” *Landoil Resources Corp. v. Alexander & Alexander Services, Inc.*, 918 F2d 1039, 1043 (2d Cir. 1990) (citing *Hoffritz For Cutlery, Inc. v Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985) The analysis is necessarily fact-sensitive and the court must “analyze a defendant’s connections to the forum state ‘not for the sake of contact-counting, but rather for whether such contacts show a continuous, permanent and substantial activity in New York.’” *Landoil Resources Corp.*, 918 F2d 1039 at 1043 (citation omitted) (*Walden v Lorcom Tech., Inc.*, 2009 WL 799955 at *4 [ED NY 2009]).

While Vetel is correct that the mere presence of an independent sales representative in New York, standing alone, is insufficient for a finding of doing business, the presence of sales representatives plus additional purposeful activity directed at New York will be sufficient to confer jurisdiction. For example, in *Laufer v Ostrow* (55 NY2d 305 [1982]), jurisdiction was found even though defendant had no office, telephone or bank account in New York and the only contacts were (1) that defendant employed three sales representatives whose territory included New York to solicit and service defendant’s New York accounts, and (2) the sales representatives were visited by defendant’s president 8-10 times a year to call on the accounts. Likewise, fairly *de minimus* sales in the state may still be sufficient to confer jurisdiction so long as there is evidence of an intent to carry on business within the state with continuity from a permanent locale (see, e.g., *Vincent v Davis-Grabowski, Inc.*, 638 F Supp 1171 [SD NY 1986] [presence of independent sales representative with no authority to bind defendant coupled with defendant’s lease of a 1,000 square foot showroom used to solicit orders during the 10 days when the annual Toy Fair was conducted that resulted in a very small number of sales (i.e., \$20,000 to \$30,000) was sufficient to confer jurisdiction]).

Based on Plaintiffs’ opposition, it is clear that Plaintiffs are relying on the line of cases which find doing business under the solicitation plus standard. “[U]nder the ‘solicitation plus’ test, if the solicitation ‘is substantial and continuous, and defendant engages in other activities of substance in the state, then personal jurisdiction may properly be found to exist’” (*Citigroup Inc. v City Holding Co.*, 97 F Supp 2d 549 [SD NY 2002], quoting *Landoil Resources, Corp. v Alexander & Alexander Serv., Inc.*, 918 F2d 1039, 1043-44 [2d Cir 1990]). Under this solicitation plus analysis, “New York courts have held that soliciting New York

business through an interactive website, together with other factors, constitutes a basis for jurisdiction under CPLR 301, even where defendant is not physically present in the state” (*Bankrate, Inc., supra*, 2008 NY Slip Op 50213[U], 18 Misc 3d 1127[A] at * 4, *citing Chestnut Ridge Air, Ltd. v 1260269 Ontario Inc.*, 13 Misc 3d 807 [Sup Ct NY County 2006]; *Thomas Publ. Co. v Industrial Quick Search, Inc.*, 237 F Supp 2d 489, 492 [SD NY 2002]; *Citigroup Inc. v City Holding Co.*, 97 F Supp 2d 549 [SD NY 2002]; *see also Deutsche Bank Sec. Inc. v Montana Bd. of Investments*, 7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006]; *Atlantic Veal & Lamb, Inc. v Silliker Inc.*, 2006 NY Slip Op 50527[U], 11 Misc 3d 1072[A] [NY Sup Ct 2006]).⁶

For example, in *Chestnut Ridge Air, Ltd., supra*, the court found that personal jurisdiction could be asserted based on the defendant’s doing business in New York. In that case, the doing business was based on an interactive website coupled with 4% of annual sales being attributable to sales in New York. The court found the website to be interactive based on its allowing defendant to e-mail computer drawings to potential customers and its allowing customers/users (1) to obtain a quote on aircraft maintenance services, (2) to post questions to defendant’s personnel and receive responses, and (3) to monitor their projects’ daily progress. As such, the Court found the website to be “a virtual community in New York that [met] all its clients needs. The fact that it [was] not physically present in New York [was] of no moment” (*Chestnut Ridge Air, Ltd., supra*, 13 Misc 3d at 811).

As Judge Sweet noted in one of the leading cases finding internet activities to provide a basis for the exercise of personal jurisdiction:

[i]t has long been observed that technological advances affecting the nature of commerce require the doctrine of personal jurisdiction to adapt and evolve along with those advances ... The guiding principle that has evolved from the case law is that whether the exercise of personal jurisdiction is permissible is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet” More precisely, the courts have identified a spectrum of cases involving a defendant’s use of the internet. At one end are cases where the defendant makes information available on what is essentially a “passive” web site. This use of the internet has been analogized to an advertisement in a nationally-available magazine or newspaper, and does not without more justify the exercise of jurisdiction over the defendant ... At the other end of the spectrum are cases in which the defendant clearly does business over the internet, such as where it

⁶In *Grimaldi v Guinn* (72 AD3d 37 [2d Dept 2010]), the Appellate Division, Second Department held that defendant’s passive website combined with its purposeful contacts with the automobile owner in New York through telephone, faxes, e-mails and other communications, were sufficient to confer jurisdiction given the substantial relationship between these contacts and the cause of action.

knowingly and repeatedly transmits computer files to customers in other states ... Finally, occupying the middle ground are cases in which the defendant maintains an interactive web site which permits the exchange of information between users in another state and the defendant, which depending on the level and nature of the exchange may be a basis for jurisdiction” (*Citigroup Inc., supra*, 97 F Supp 2d at 565).

At least one court has held that “[a] website that allows users to post on a message board, but from which no goods can be ordered or purchased falls in this ‘middle ground’” (*Katiroll Co., Inc.*, 2010 WL 2911621 at *4 citing *Pitbull Prods., Inc. v Universal Netmedia, Inc.*, 2008 WL 1700196 at *5 [SD NY 2010]).

In *Bankrate, Inc., supra*, Judge Pfau noted that in “determin[ing] whether soliciting business over a website confers jurisdiction in New York, Courts have looked to additional factors such as the extent of the website’s ‘interactive nature,’ whether the company has ‘substantially solicited’ New York business through its website, and whether defendant’s servicing of New York customers has been ‘systematic and continuous’” (*Bankrate, Inc., supra*, 2008 NY Slip Op 50213[U], 18 Misc 3d 1127[A] at * 4). Finding that important facts concerning defendant’s website had not been sufficiently developed in the record, and further finding that whether defendants derive substantial sales from New York customers and whether their business with New York customers was of a continuous nature were facts solely within defendant’s control, the court ordered limited discovery concerning the issue of personal jurisdiction over defendants.

Defendants rely on *Katiroll Co., Inc., supra* for the proposition that a Facebook page can never confer jurisdiction over a non-domiciliary. The Court does not read the case quite so strictly. *Katiroll* involved claims of service mark infringement, trade dress infringement and unfair competition stemming from defendant restaurant’s alleged illegal use of plaintiff’s store design, targeting of student customer base and sale of kati rolls. Defendant’s only restaurant was located in Brunswick, New Jersey. In that case, there was only one meeting in New York that did not result in any business relationship between the parties. Defendant’s internet activities consisted of “posts” attributed to Defendant’s officers on Facebook and other websites that promoted Defendant’s business and, in particular, targeted New York residents. Jurisdiction failed because Defendant was not alleged to sold goods or services in New York through a website and Plaintiff failed to allege any facts from which it could rationally inferred that Defendant’s solicitation of New York residents to its restaurants via posting in various websites was supplemented by any transactions occurring in New York or any other indicia of Defendant’s permanence or continuity in New York (*Katiroll Co., Inc., supra*, 2010 WL 2911621 at *5).

Here, Vetel’s website falls into the passive category that is insufficient, on its own, to confer jurisdiction, since it does not allow for the actual sale of Vetel’s products over the internet. However, the Facebook page has indicia of an interactive website much like the ones found to fall within the intermediate category, but because it also does not permit the actual sale of Vetel’s products over the internet, it alone cannot confer jurisdiction over Vetel. However, unlike the situation in *Katiroll*, Plaintiffs have asserted specific facts concerning

Defendants' relationship with a sales representative in New York, and six sales of Defendant's goods to New York customers, three of which Plaintiffs assert may have arisen from the alleged breaches by Fishel and Collins of their restrictive covenants and/or their fiduciary duties through their alleged funneling of customer information to Vetel. Accordingly, while the record (with its conflicting allegations) is such as not to permit the Court to determine the issue of whether jurisdiction exists, Plaintiffs have alleged sufficient facts to obtain discovery on the issue of whether personal jurisdiction may be asserted against Vetel in this action.

The Court further finds that Plaintiffs have alleged specific facts sufficient to merit discovery on the issue of jurisdiction over Vetel based on CPLR 302 long-arm jurisdiction – *i.e.*, the extent to which Vetel sold any products to Plaintiffs' New York customers based on information Vetel received as a result of breaches of the restrictive covenants and/or the breaches of fiduciary duties allegedly committed by Collins and Fishel while employed by Plaintiffs.

CLR 302 (a)(3)(ii) provides that a court may exercise personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act if he expects or reasonably should expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (CPLR 302[a][3][ii]).

The New York Court of Appeals has held that a court may obtain personal jurisdiction under CPLR 302(a)(3)(ii) if four conditions are met: (1) the non-domiciliary commits a tort outside of New York; (2) there is injury to the plaintiff in New York; (3) the non-domiciliary should reasonably have foreseen consequences in New York; and (4) the non-domiciliary derives substantial revenue from interstate or international commerce (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317 [1980]). Subsequently, the Court of Appeals added a fifth factor – that the cause of action arises from the tortious act occurring outside the State. As stated in *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]), conferral of jurisdiction under CPLR 302(a)(3)(ii)

rests on five elements. First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce (*id.*; see also *Yash Raj Films (USA) Inc. v Dishant.Com LLC*, 2009 WL 4891764 at * 8 [ED NY 2009]).

Vetel relies heavily on this Court's statement in the July 2010 Decision that Plaintiffs had not shown an injury sustained in New York since simply because Plaintiffs' business is located here – *i.e.*, "the situs of the injury is the location of the original event

which caused the injury, not where the resultant damages are subsequently felt by the plaintiff” (*Mareno v Rowe*, 910 F2d 1043, 1046 [2d Cir 1990], *cert denied* 498 US 1028 [1991], quoting *Carte v Parkoff*, 152 AD2d 615 [2d Dept 1989]; *United Bank of Kuwait, PLC v James M. Bridges, Ltd.*, 766 F Supp 113, 116 [SD NY 1991] [citation omitted] [“New York courts uniformly hold that the situs of a non-physical commercial injury is ‘where the critical events associated with the dispute took place’”]).⁷ Thus, the occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(93) where the underlying events took place outside New York” (*Katiroll Co., Inc.*, 2010 WL 2911621 at * 3). However, injury within the state includes harm to business in the New York market in the form of lost sales or customers (*Citigroup Inc.*, 97 F Supp 2d at 568).

In connection with the preliminary injunction application, Plaintiffs did not allege, as they do in opposition to Vetel’s motion to dismiss, that Vetel may have made sales to as many as three of Plaintiffs’ New York customers based on the breaches of the restrictive covenants/fiduciary duties committed by Collins and Fishel while employed by Plaintiffs. If Plaintiffs sustained a loss of New York customers based on Defendants’ allegedly wrongful acts, there may be a basis for the assertion of CPLR 302(a)(3)(ii) jurisdiction (*see, e.g., Sybron Corp. v Wetzel*, 46 NY2d 197 [1978]). While Vetel disputes that two of the three sales alleged by Plaintiffs actually occurred and/or that they were the result of Vetel’s improperly obtaining customer information from Collins and Fishel while they were still employed by Plaintiffs, the dueling affidavits just fuel the notion that discovery is necessary to resolve these factual disputes.

The Court will direct Plaintiff and Vetel to commence, immediately, discovery directed to the facts pertaining to the jurisdictional issues discussed above. The Court expects that such discovery will be completed by March 10, 2011 and the Court hereby schedules a conference to be held on March 11, 2011 at 9:30 a.m. to consider whether the motion to dismiss for lack of jurisdiction should be renewed.

CONCLUSION

The Court has considered the following papers in connection with the motion to dismiss:

- 1) Notice of Motion dated August 6, 2010; Affirmation of Jonathan B. Nelson, Esq. dated August 2, 2010; Affidavit of James K. Waldsmith, DVM, sworn to August 10, 2010; Affidavit of Jeff Fishel, sworn to May 11, 2010; Affidavit of Michael Collins, sworn to May 11, 2010;

⁷As noted by one court, “[t]his limitation on the applicability of § 302[a][3] anticipates and incorporates due process concerns: if the impact in New York is too removed from defendant’s conduct, it is unlikely that the defendant will have purposefully availed itself of the benefits and protections of the forum state law” (*National Tel. Directory Consultants, Inc. v Bellsouth Adv. & Publ. Corp.*, 25 F Supp 2d 192, 198 [SD NY 1998]).

- 2) Defendants' Memorandum of Law in Support of Defendant Vetel Diagnostics, Inc.'s Motion to Dismiss dated August 4, 2010;
- 3) Affirmation of Michael P. Regan, Esq. dated September 3, 2010, together with the exhibits annexed thereto; Affidavit of Peter Brunelli, sworn to August 31, 2010, together with the exhibits annexed thereto; Affidavit of R. Scott Jones, sworn to September 1, 2010, together with the exhibit annexed thereto;
- 4) Plaintiffs' Memorandum of Law in Opposition dated September 3, 2010;
- 5) Affirmation of Jonathan B. Nelson, Esq. dated September 9, 2010; Affidavit of James K. Waldsmith, acknowledged September 8, 2010; Affidavit of Steve Garner, sworn to September 9, 2010; and
- 6) Defendants' Memorandum of Law in Further Support of Defendant Vetel Diagnostics, Inc.'s Motion to Dismiss dated September 8, 2010.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendant Vetel Diagnostics, Inc. to dismiss for lack of personal jurisdiction is denied, without prejudice and with leave to renew, after the conclusion of discovery on the issue of jurisdiction over Vetel Diagnostics, Inc.; and it is further

ORDERED that Plaintiff and Vetel Diagnostics, Inc. shall commence, immediately, discovery directed to the facts pertaining to the jurisdictional issues discussed in this Decision and Order, with such discovery to be completed by not later than March 10, 2011; and it is further

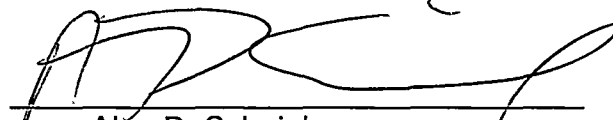
ORDERED that counsel appear before this Court on March 11, 2011 at 9:30 a.m. to consider whether the motion to dismiss for lack of jurisdiction should be renewed; and it is further

ORDERED that the conference hereinabove ordered may not be adjourned without the prior written approval of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 13, 2010

ENTER:



Alan D. Scheinkman
Justice of the Supreme Court

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