

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

FIRECLEAN, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:16-cv-00294-JCC-MSN
	)	
ANDREW TUOHY	)	
	)	
and	)	
	)	
EVERETT BAKER	)	
	)	
Defendants.	)	
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**PLAINTIFF FIRECLEAN, LLC’S RULE 72 OBJECTION TO  
MAGISTRATE JUDGE NACHMANOFF’S DENIAL  
OF FIRECLEAN’S MOTION FOR JURISDICTIONAL DISCOVERY**

The Plaintiff, FireClean LLC (“FireClean”), by counsel and pursuant to Rule 72 of the Federal Rules of Civil Procedure, objects to the Magistrate Judge’s denial of FireClean’s Motion for Leave to Conduct Jurisdictional Discovery, as set forth in its Memorandum Opinion & Order (the “Opinion”) (Dkt. No. 34) and in support thereof, states as follows:

1. The Defendants, Andrew Tuohy and Everett Baker, have moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(2), for lack of personal jurisdiction, and Fed. R. Civ. P. 12(b)(6), for failure to state a claim. (Dkt. Nos. 12 and 14.) Although FireClean maintains that it has sufficiently alleged personal jurisdiction, out of an abundance of caution, FireClean sought jurisdictional discover in order to buttress its claims, and filed a Motion for Leave to Conduct Jurisdictional Discovery. (The “Motion for Jurisdictional Discovery”) (Dkt. Nos. 21

and 22). On June 10, this Court, per Magistrate Judge Nachmanoff, heard argument and, on June 14, 2016, issued its Opinion denying the motion.

2. FireClean subsequently opposed both Defendants' Motions to Dismiss on June 23, 2016. (Dkt. Nos 36 and 37.) At this stage, FireClean is willing to proceed on the Motions to Dismiss under the prima facie standard of review applicable at the 12(b)(2) posture by relying solely on the pleadings and attached affidavits (and without discovery or an evidentiary hearing). To any extent, however, that the Court may, in ruling on Defendants' Motion to Dismiss, find that, without additional evidence, FireClean has failed to make a prima facie case for personal jurisdiction, and further find that the jurisdictional discovery sought by FireClean in its Motion for Jurisdictional Discovery could possibly change the outcome of its decision, FireClean interposes this objection to the Opinion. In other words, FireClean only seeks to pursue jurisdictional discovery to the extent the Court finds that it would lose the 12(b)(2) motion and favorable evidence from jurisdictional discovery would not be futile.<sup>1</sup>

3. Plaintiff objects to the holding that "virtually all of Plaintiff's proposed discovery requests appear relevant only to general, as opposed to specific, jurisdiction." (Opinion at 5.) The Court acknowledges, in its Opinion, that contacts that would be relevant to *specific* jurisdiction include "proof that the out-of-state defendant's Internet activity is expressly targeted

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<sup>1</sup> In the event that FireClean successfully opposes Defendants' 12(b)(2) and 12(b)(6) motions to dismiss, FireClean does not interpret the Opinion to preclude jurisdictional discovery during the standard period of open discovery. To any extent that the Opinion is construed to the contrary, FireClean lodges its objection here. The Motion for Jurisdictional Discovery, and the Opinion, only addressed the permissibility of jurisdictional discovery for purposes "of ruling on the Motion to Dismiss." (Opinion at 18.)

at or directed to the forum state.” (Opinion at 6.) Defendants sought precisely that, including information regarding the identity of Defendant’s blog and Facebook page subscribers who reside in Virginia. (Motion for Jurisdictional Discovery at 8-9.) Yet, the Court held that those contacts would not establish *general* jurisdiction as they would not “render Defendants ‘essentially at home’” in Virginia. (Opinion at 5.) FireClean did not seek that discovery to establish general jurisdiction, as the Court appears to wrongly conclude. To the contrary, as in *KMLLC Media, LLC v. Telemetry, Inc.*, 2015 WL 6506308 at \* 10-12 (E.D. Va. Oct. 27, 2015) (Cacheris, J.), where jurisdictional discovery was permitted, these types of contacts were examined with respect to *specific* jurisdiction.

4. In that regard, Plaintiff objects to the Opinion on the grounds that the Court committed manifest errors of law in interpreting *KMLLC*, and Plaintiff incorporates by reference its discussion of this case in its Opposition to Defendant Andrew Tuohy’s Motion to Dismiss (“FireClean’s Opposition to Tuohy’s Motion to Dismiss” at 5-13.) (Dkt. No. 36.) Specifically, the Magistrate Judge’s conclusion that the contacts examined in *KMLLC* were irrelevant to specific jurisdiction (Opinion at 8) is incorrect.

5. Indeed, in *KMLLC*, this Court considered facts that were relevant to personal jurisdiction *other* than the “thrust and content” of the defamatory posting itself. Specifically, the Court specifically held that one investigatory email and phone call by the defendants to plaintiff, *id.*, 2015 WL 6506308 at \*10, the mailing of the report to two non-Virginia executives of companies with Virginia headquarters, *id.* at \*11, and one sales pitch meeting to a Virginia company after the conduct in question, *id.* at \*12, were not sufficient contacts, in that case, to demonstrate that the Defendant had manifested an intent to aim his conduct towards Virginia. The Court did not hold that these facts were *irrelevant* to the specific jurisdiction analysis, but

rather held that they were not *sufficient* to establish specific jurisdiction. *Id.* at \*10 (“these alleged contacts are minimal in quantity, and are not of the quality which would justify subjecting Defendants to specific jurisdiction for this claim on their account.”) Thus, even under the most prominent case upon which the Magistrate Judge relies in his Opinion, it is incorrect that the sole consideration in establishing specific jurisdiction is the “thrust and content” of the defamatory piece.

6. To be clear, Plaintiff does not dispute the proposition that the “thrust and content” of the defamatory postings or statements themselves may demonstrate Defendants’ intent to target the forum state and create contacts with the forum state, thus triggering jurisdiction. (Opinion at 6.) Indeed, as FireClean pointed out in its Opposition to Tuohy’s Motion to Dismiss, Tuohy’s statements do just this, as they explicitly “single out” a Virginia company that operates and sells its product from Virginia, and target its members, Virginia residents, individually and by name. (FireClean’s Opposition to Tuohy’s Motion to Dismiss at 6) (Dkt. No. 36.) Plaintiff does not, however, agree that the law precludes examination of other factors in determining whether the exercise of specific jurisdiction over the Defendant is proper, and *KMLLC* illustrates this fact.

7. Finally, as Counsel urged to the Court at the hearing on the Motion for Jurisdictional Discovery, in any event the instant case stands in stark contrast to *KMLLC* because in that case, it was not the Defendant who disseminated the defamatory content online. In *KMLLC*, this Court utilized that very fact in distinguishing *KMLLC* from a case cited by the plaintiff. (“Plaintiff’s offered case of *Alahverdian v. Nemelka*, 2015 WL 5004886 (S. D. Ohio Aug. 24, 2015) is inapposite, as in that case the defendant emailed the damaging communication *itself* directly to the plaintiff as well as a number of other people within the forum state.)

(Emphasis added.) *Id.*, 2015 WL 6506308 at \*10, n. 5. In *Alahverdian*, as discussed in FireClean's Opposition to Tuohy's Motion to Dismiss, the court found specific jurisdiction over the defendant was proper. 2015 WL 5004886 at \* 5-7. The fact that here, unlike the defendant in *KMLLC*, Defendant Tuohy is the online disseminator, creates the potential for significant contacts in Virginia to be established by Tuohy's online activities.

8. In consideration of the foregoing, FireClean submits that, should this Court find it necessary, appropriate and relevant to determining the pending 12(b)(2) motions, discovery as to: (1) Defendants' online readers and subscribers in Virginia; (2) communications with Virginians; (3) use of Virginia servers; and (4) contacts with Plaintiff and its managers, should be permitted to advance the specific jurisdiction analysis. FireClean agrees that discovery as to Defendant's T-shirt sales is no longer necessary.

Dated: June 28, 2016

Respectfully submitted,  
FIRECLEAN LLC

By: \_\_\_\_\_ /s/  
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**CERTIFICATE OF SERVICE**

I certify that on June 28, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing to all counsel of record.

/s/  
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