

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON

THIRD WAVE FARMS, LLC)	
)	
PLAINTIFF)	
)	
v.)	CIVIL ACTION NO. 6:20-cv-00069-REW-HAI
)	
PURE VALLEY SOLUTIONS, LLC)	
)	
DEFENDANT)	

DEFENDANT’S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER

Defendant Pure Valley Solutions, LLC (“Pure Valley”), by counsel, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(3), hereby moves the Court to dismiss this action for lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue. Alternatively, Pure Valley requests transfer to the United States District Court for the District of Oregon, Portland Division.

Diversity jurisdiction is not shown on the face of Complaint filed by Third Wave Farms, LLC (“Third Wave”). Nor do the underlying facts support diversity jurisdiction because Third Wave shares Oregon citizenship with Pure Valley. Moreover, even if the threshold issue of subject-matter jurisdiction is surmounted, Third Wave’s claims must still be dismissed for lack of personal jurisdiction and improper venue. An out-of-state defendant, like Pure Valley, cannot be haled into a Kentucky forum merely because it entered into a contract with an entity which is allegedly headquartered in Kentucky. All negotiations and performance related to the contract at issue have occurred outside Kentucky. Pure Valley lacks sufficient contacts with Kentucky to be sued here. This Court should dismiss this action or, in the alternative, transfer it to Oregon federal court.

FACTUAL BACKGROUND

Pure Valley is an Oregon limited liability company in the business of contracting industrial hemp production and processing the hemp into winterized CBD oil. (Fricker Decl. ¶¶ 2, 4, attached as **Exhibit 1**.) The sole member of Pure Valley is Bill L. Rose, L.L.C., which is also a limited liability company organized under Oregon law. (*Id.* ¶ 3.) Bill L. Rose, L.L.C.’s membership is comprised of three individual members, all of whom are Oregon citizens domiciled at the following addresses: (1) Crystal A. Fricker, 30555 S. Highway 170, Canby, OR 97017; (2) Cara R. Tuggle, 8771 S. Sconce Road, Canby, OR 97013; and (3) Ed. W. Rose, 33312 S. Needy Road, Woodburn, OR 97071. (*Id.* ¶ 3.) Because Pure Valley is a limited liability company, which draws its citizenship from the citizenship of its members, the company is solely an Oregon citizen for purposes of this Court’s diversity jurisdiction.

During the summer of 2018 Pure Valley was introduced for the first time via email to representatives of a company which would eventually be organized as Third Wave Farms, LLC. (*Id.* ¶ 4.) Shortly after the email introduction, representatives of Pure Valley and Third Wave had a face-to-face meeting in Oregon. (*Id.*) Third Wave holds itself out as providing agricultural services to industrial hemp growers and sales networks for the growers’ products. (*Id.*) Pure Valley and Third Wave representatives subsequently began to negotiate a written agreement under which Pure Valley would contract for the production of approximately 100 acres of industrial hemp and process it into winterized CBD oil. (*Id.* ¶ 5; *see* May 20, 2019 Agreement (the “Agreement”) § 1.1, attached as **Exhibit 1-A**.) Third Wave, for its part, promised to purchase the CBD oil produced by Pure Valley at a minimum price of \$1,800 per liter, and then to use its best efforts to resell the product to retailers and other customers. (Fricker Decl. ¶ 5; *see* Agreement §§ 1.2, 2.) Third Wave further agreed to a 50% split of the revenue earned from its reselling of

the CBD oil produced by Pure Valley. (Fricker Decl. ¶ 5; *see* Agreement § 2.3.4.) This Agreement is specifically governed by Oregon law. (Agreement § 5.2.)

Trent Paasch was Third Wave's primary contact person and chief negotiator for the Agreement with Pure Valley. (Fricker Decl. ¶ 6.) The negotiations of the Agreement occurred principally via telephone, text message, and email communications. (*Id.*) During the contract negotiations with Pure Valley, Mr. Paasch maintained a residence in California, but before this lawsuit was filed, Mr. Paasch moved to Portland, Oregon, where he currently lives. (*Id.*) All meetings between Pure Valley and Third Wave representatives have occurred outside Kentucky. (*Id.* ¶ 7.) Initial drafts of the Agreement listed the party contracting with Pure Valley as Third Wave Farms, Inc., a Maine corporation. (*Id.* ¶ 8.) The final version of the Agreement, however, identified Third Wave Farms, LLC, a newly formed Kentucky limited liability company, as the contracting counterpart to Pure Valley. (*Id.*) According to Third Wave's most recent filing with the Kentucky Secretary of State, Third Wave Farms, LLC, has three members, including Mr. Paasch: (1) Trent Paasch, 902 SW Troy Street, Portland, OR 97219; (2) Mike Lewis, 29 Browning Cemetery Road, Mount Vernon, KY 40456; and David Eben, 12 Sunset Court, Stamford, CT 06903. (Third Wave's 2019 Reinstatement Application and Reinstatement Annual Report, attached as **Exhibit 1-B**; *see* Fricker Decl. ¶ 9.) Based on Third Wave's filing with the Secretary of State, which was signed by Mr. Paasch under penalty of perjury, Third Wave is a citizen of Oregon, Kentucky, and Connecticut. (Ex. 1-B.)

The Agreement between Pure Valley and Third Wave became effective on May 20, 2019, with Mr. Paasch executing the contract on behalf of Third Wave Farms, LLC, in his capacity as the company's Chief Executive Officer. (Fricker Decl. ¶ 8; *see* Agreement, pp. 1, 5–6.) All farmland contracted by Pure Valley in performing the Agreement is situated in Oregon. (*Id.* ¶ 10.)

Moreover, Pure Valley processed the industrial hemp and has produced the CBD oil in Oregon. (*Id.*) Testing of Pure Valley's CBD oil produced under the Agreement was performed twice. (*Id.* ¶ 11.) The first testing occurred in Oregon, and the second round of testing was performed by Evio Labs in California. (*Id.*) None of the CBD oil produced in reliance on the Agreement was ever shipped to Kentucky. (*Id.* ¶ 12.) Indeed, Third Wave advised Pure Valley that it preferred for the product to be shipped to a processor in Indiana once the parties reached that stage of the contractual performance. (*Id.*) Unfortunately, the parties never progressed to the point of shipping the CBD oil because Third Wave failed to make timely payments as required by the Agreement and is otherwise in breach of its contractual obligations to Pure Valley. (*Id.* ¶ 13.)

In response to a letter requesting that Third Wave comply with its contractual obligations to purchase the CBD oil produced by Pure Valley and pay applicable interest and storage fees, Third Wave filed this Complaint for Declaratory Relief in the Eastern District of Kentucky. (Compl., DN 1, ¶ 15.) However, the only connection between this forum and the parties' dispute is Third Wave's decision to organize as a Kentucky limited liability company and the location of its offices in Mount Vernon, Kentucky.

Pure Valley has no contacts with Kentucky. All of Pure Valley's activities in performing the Agreement occurred in Oregon or states other than Kentucky, and it was not contemplated that the product would be shipped to Kentucky. (Fricker Decl. ¶¶ 10–12.) Pure Valley does not conduct business, transact business, or provide goods or services in Kentucky. (*Id.* ¶ 14.) Nor is Pure Valley licensed to do business in Kentucky. (*Id.*) Pure Valley does not direct its advertising, marketing, or sales efforts to the Kentucky market. (*Id.* ¶ 15.) And Pure Valley does not own any real or personal property in Kentucky. (*Id.* ¶ 16.) The company's only offices are in Canby, Oregon. (*Id.* ¶ 20.) Pure Valley does not employ any Kentucky residents or maintain any

employees or agents in Kentucky, including any registered agent for service of process. (*Id.* ¶¶ 17–18.) Pure Valley has never sent any employees or agents to visit Kentucky, and no employees or agents of Pure Valley have attended any trade shows, exhibitions, or other industry events in Kentucky. (*Id.* ¶ 19.) No Kentucky resident holds any ownership interest in Pure Valley or Bill L. Rose, L.L.C. (*Id.* ¶ 21.) Prior to this litigation, Pure Valley had never been involved in a lawsuit in Kentucky. (*Id.* ¶ 22.)

Pure Valley now moves this Court to dismiss Third Wave’s Complaint for lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue. In the event that subject-matter jurisdiction is found, the Court may—as alternative to dismissal—transfer the case to the District of Oregon, Portland Division, where venue is proper and the convenience of the parties and witnesses would be better served.

ARGUMENT

I. COMPLETE DIVERSITY DOES NOT EXIST AMONG THE PARTIES, AND THUS THIRD WAVE’S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION.

Subject-matter jurisdiction is a threshold issue which must be determined before the Court can take any other action with respect to the claims. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Id.* at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). As the party seeking the exercise of federal jurisdiction, Third Wave must allege facts essential to show subject-matter jurisdiction and carry throughout the litigation the burden of establishing it is properly before the Court. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

Motions to dismiss for lack of subject-matter jurisdiction come in two varieties. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). First, a facial attack on the subject-matter jurisdiction alleged in the complaint questions the sufficiency of the pleading if accepted as true. *Id.* A factual attack, on the other hand, challenges the underlying factual predicate for subject-matter jurisdiction. *Id.* Under a factual attack, no presumption of truthfulness applies to the factual allegations. *Id.* The Court must weigh any conflicting evidence presented by the parties to arrive at a factual determination of whether subject-matter jurisdiction exists. *Id.* Pure Valley challenges both the facial sufficiency of Third Wave's jurisdictional pleading and the factual basis of complete diversity among the parties.

The sole basis for federal subject-matter jurisdiction offered in Third Wave's Complaint is diversity of citizenship under 28 U.S.C. § 1332(a).¹ Diversity jurisdiction, however, only exists where (1) complete diversity of citizenship exists among the parties, *see Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996), and (2) the amount in controversy exceeds \$75,000, exclusive of interest and costs, *see* 28 U.S.C. § 1332(a). Here, Third Wave does not sufficiently allege complete diversity among the parties, which requires a showing that “*each* defendant is a citizen of a different State from *each* plaintiff.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). This case involves two limited liability companies. As unincorporated entities, limited liability companies share the same citizenship as each of their members. *Delay v. Rosenthal Collins Grp., LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 F. App'x 731, 732–33 (6th Cir. 2002).

¹ The Complaint mistakenly refers to 28 U.S.C. § 1338, which concerns original jurisdiction over actions arising under federal intellectual property statutes. Moreover, even though Third Wave asserts claims under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, this remedial statute does not create an independent basis for federal subject-matter jurisdiction. *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003).

Third Wave's Complaint erroneously assumes that limited liability companies, like corporations, are citizens of the place of organization and principal place of business. *Delay*, 585 F.3d at 1005; (Compl., DN 1, ¶¶ 4–5). The Complaint contains no allegations of the citizenship of Third Wave's or Pure Valley's respective members—and thus no allegations establishing diverse citizenship. As a threshold matter, the Complaint should be dismissed as facially inadequate to show the existence of subject-matter jurisdiction.

Even if the Court were inclined to allow Third Wave an opportunity to correct its deficient pleading, Third Wave still could not satisfy the requirements of diversity jurisdiction as a matter of fact. Complete diversity of citizenship must have existed at the time the Complaint was filed. *Napletana v. Hillsdale College*, 385 F.2d 871, 872 (6th Cir. 1967). Here, both parties shared Oregon citizenship when Third Wave initiated this action. Pure Valley is wholly owned by another limited liability company, Bill L. Rose, L.L.C., which, in turn, has three individual members—all of whom are domiciliaries and citizens of Oregon. (Fricker Decl. ¶ 3.); *see Von Duser v. Aronoff*, 915 F.2d 1071, 1073 (6th Cir. 1990) (equating citizenship of a natural person with domicile). Shortly before filing its Complaint, Third Wave declared to the Kentucky Secretary of State that its membership is comprised of three individuals, including Mr. Paasch who maintains his domicile in Portland, Oregon. (Ex. 1-B; *see* Fricker Decl. ¶ 9.) The parties' common Oregon citizenship precludes complete diversity and requires dismissal for lack of subject-matter jurisdiction.

II. PURE VALLEY IS NOT SUBJECT TO PERSONAL JURISDICITON IN A KENTUCKY FORUM.

In the event the Court finds that subject-matter jurisdiction exists, Third Wave's Complaint against Pure Valley should still be dismissing for lack of personal jurisdiction. Third Wave bears burden of establishing personal jurisdiction over Pure Valley in Kentucky. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261–62 (6th Cir. 1996). When confronted with a properly supported

motion, “the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.” *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). The exercise of personal jurisdiction over a non-resident defendant is proper only where it complies with the forum state’s long-arm statute and constitutional due process requirements. *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000). Neither Kentucky’s long-arm statute, KRS 454.210, nor federal due process authorize personal jurisdiction over Pure Valley in this forum.

A. Kentucky’s Long-Arm Statute Does Not Support Personal Jurisdiction Over Pure Valley in This Forum.

Kentucky’s long-arm statute does not permit Third Wave’s proposed exercise of personal jurisdiction over Pure Valley. Though previously interpreted to extend to the limits of federal due process, the Kentucky Supreme Court has clarified that “non-resident defendants whose activities fall outside the criteria of KRS 454.210 may not be subjected to long-arm jurisdiction.” *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56–57 (Ky. 2011). The initial question is whether the non-resident defendant’s conduct or activities fit within one of the nine enumerated subsections of KRS 454.210(2)(a). *Id.* at 56. Thereafter, “[t]he plaintiff must also show that his claim is one that arises from the conduct or activities described in the subsection.” *Id.* at 55. Kentucky’s long-arm statute cannot reach an out-of-state defendant without satisfaction of those two requirements, “regardless of whether federal due process might otherwise allow the assertion of *in personam* jurisdiction.” *Id.* at 56. Only two subsections of the long-arm statute—KRS 454.210(2)(a)(1) and (2)—could arguably apply to Pure Valley, but even those provisions cannot be so stretched as to overcome its dearth of Kentucky contacts.

First, KRS 454.210(2)(a)(1) authorizes personal jurisdiction over claims arising from a non-resident defendant’s “Transacting business in this Commonwealth.” A non-resident

defendant, however, does not transact business in Kentucky merely by entering into a contract with a Kentucky entity and engaging in communications regarding the negotiation and performance of that contract outside Kentucky. In *Envirometric Process Controls, Inc. v. Adman Electric, Inc.*, No. 3:12CV62-S, 2012 WL 4023789, at *2 (W.D. Ky. Sept. 12, 2012), Envirometric, a Kentucky engineering firm, was awarded a contract to construct conveyors at an automobile manufacturing plant in Tennessee. Envirometric subcontracted with Adman, an electrical contractor in Tennessee, to provide installation services and materials on the Tennessee project. *Id.* When the parties' relationship soured, Envirometric asserted contract claims against Adman in a Kentucky lawsuit. *Id.* But the court concluded that Adman's activities did not amount to "transacting business" in Kentucky for purposes of the long-arm statute. *Id.* at *3-4. Characterizing Envirometric's suit as a "garden variety single-contract case," the court explained that KRS 454.210(2)(a)(1) is not satisfied by the existence of a contract with a Kentucky entity—which was to be performed outside Kentucky—and "initial negotiations for the job followed by periodic contact concerning the out-of-state performance." *Id.*; see also *Tube Turns Div. of Chemetron Corp. v. Patterson Co.*, 562 S.W.2d 99, 100 (Ky. App. 1978) (no long-arm jurisdiction "solely on the basis of negotiations by telephone and mail which culminated in the acceptance of a single order from Louisville").

Like the *Envirometric* defendant, Pure Valley's only connection to Kentucky is the existence a single contract with Third Wave, a company which claims to maintain its principal office in Kentucky. Pure Valley and Third Wave's representatives met face-to-face in Oregon, and Pure Valley primarily negotiated the Agreement with Mr. Paasch, Third Wave's CEO, who lived in California and now lives in Oregon. (Fricker Decl. ¶¶ 4-6.) All meetings between Pure Valley and Third Wave have occurred outside of Kentucky. (*Id.* ¶ 7.) Pure Valley has performed

its contractual obligations entirely outside Kentucky. (*Id.* ¶¶ 10–12.) Oregon is the situs of all farmland contracted for the hemp cultivation and of the CBD oil production. (*Id.* ¶ 10.) The CBD oil has been tested in Oregon and California. (*Id.* ¶ 11.) Pure Valley’s contract with Third Wave and potential remote communications concerning the contract are not sufficient for transacting business in Kentucky under KRS 454.210(2)(a)(1).

Similarly, long-arm jurisdiction cannot be exercised over Pure Valley under KRS 454.210(2)(a)(2), which authorizes personal jurisdiction based on a non-resident defendant’s “Contracting to supply services or goods in this Commonwealth.” To fall within this subsection, an out-of-state defendant must enter into a contract which “provide[s] for the supplying of services or goods to be *transported into, consumed or used in Kentucky.*” *Hinners v. Robey*, 336 S.W.3d 891, 896 (Ky. 2011) (emphasis added). Here, Pure Valley has not shipped any of its CBD oil to Kentucky. (Fricker Decl. ¶ 12.) All CBD oil produced by Pure Valley in reliance on the Agreement remains in storage in Oregon. (*Id.*) Moreover, the Agreement between Pure Valley and Third Wave contains no provision requiring the shipment of the CBD oil to Kentucky. (Ex. 1-A.) Indeed, Third Wave advised Pure Valley that it preferred for the CBD oil to be sent to an Indiana processor—not to any Kentucky facility. (Fricker Decl. ¶ 12.) Since Pure Valley has not contracted to supply Third Wave with CBD oil for transportation, consumption, or use in Kentucky, KRS 454.210(2)(a)(2) is inapplicable. The Court should dismiss Third Wave’s claims based on its failure to satisfy Kentucky’s long-arm statute.

B. Federal Due Process Does Not Condone the Exercise of Personal Jurisdiction Over Pure Valley in Kentucky.

Third Wave’s proposed exercise of personal jurisdiction over Pure Valley violates the Due Process Clause of the United States Constitution. At the most basic level, an exercise of personal jurisdiction comports with federal due process when the out-of-state defendant possesses ““certain

minimum contacts with [the forum] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Air Prods. & Controls, Inc. v. Safetech Int’l, Inc.*, 503 F.3d 544, 549 (6th Cir. 2007) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Personal jurisdiction can exist over an out-of-state defendant in two forms, either of which satisfies federal due process: “(1) general personal jurisdiction, where the suit does not arise from the defendant’s contacts with the forum state; and (2) specific jurisdiction, where the suit does arise from the defendant’s contacts with the forum state.” *Conn v. Zakharov*, 667 F.3d 705, 712–13 (2012). Here, Pure Valley lacks sufficient contacts to be subjected to suit in Kentucky under either general or specific jurisdiction.

1. General Jurisdiction Does Not Exist Over Pure Valley.

Clearly, the Court cannot exercise general jurisdiction over Pure Valley in Kentucky. General jurisdiction will not exist unless the out-of-state defendant’s contacts with the forum justify allowing suit to be maintained on causes of action arising from wholly unrelated activities. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 942 (2011). Those contacts must be “so ‘continuous and systematic’ as to render [the defendant] *essentially at home in the forum.*” *Id.* at 919 (quoting *Int’l Shoe*, 326 U.S. at 317) (emphasis added). An out-of-state defendant is “at home” when its forum contacts make it “comparable to a domestic enterprise in that State.” *Daimler AG v. Bauman*, 571 U.S. 117, 133 n.11 (2014).

Pure Valley maintains no offices, employees, or agents in Kentucky. (Fricker Decl. ¶¶ 17–20.) Pure Valley does not advertise or market its business in Kentucky or otherwise conduct business in Kentucky. (*Id.* ¶¶ 14–15.) It owns no real or personal property in Kentucky. (*Id.* ¶ 16.) Oregon is home to the only entity and individuals with ownership interests in Pure Valley. (*Id.* ¶¶ 3, 21.) Pure Valley’s sole connection to Kentucky is its Agreement with Third Wave—

which was negotiated from Oregon and entirely performed in Oregon. (*Id.* ¶¶ 5–12.) Pure Valley is not equivalent to a Kentucky enterprise, and thus general jurisdiction is unavailable in Kentucky.

2. Specific Jurisdiction Does Not Exist Over Pure Valley.

Pure Valley also lacks the minimum Kentucky contacts for the exercise of specific jurisdiction. A finding of specific jurisdiction requires the satisfaction of three elements:

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

Conn, 667 F.3d at 713 (quoting *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002)). Third Wave cannot establish these elements of specific jurisdiction over Pure Valley based solely on the existence the Agreement and Pure Valley’s remote communications from Oregon.

“Purposeful availment . . . is ‘the *sine qua non* of *in personam* jurisdiction.’” *Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381–82 (6th Cir. 1968)). “The ‘purposeful availment’ requirement is satisfied when the defendant’s contacts with the forum state ‘proximately result from actions by the defendant *himself* that create a *substantial connection* with the forum State” *CompuServe*, 89 F.3d at 1263 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis added). The out-of-state defendant’s contacts and connections with the forum must be such that he “‘should reasonably anticipate being haled into court there.’” *Id.* (quoting *Burger King*, 471 U.S. at 474).

Courts in the Sixth Circuit have consistently recognized that “the mere existence of a contract . . . between [an out-of-state defendant] and [forum-state plaintiff] is insufficient to confer personal jurisdiction.” *Calphalon*, 228 F.3d at 722. In *Calphalon*, for example, the Sixth Circuit affirmed the district court’s dismissal of declaratory action brought by Calphalon in Ohio, seeking

confirmation that it lawfully terminated an manufacturer's representative agreement. *Id.* at 721. The defendant, Rowlette, had served as a Calphalon representative *outside Ohio*, and in addition to his contract with Calphalon, he had remotely communicated with the Ohio corporation via telephone and facsimile and made visits to Calphalon's Ohio offices. *Id.* at 722. In concluding that Rowlette had not purposefully availed himself of the Ohio forum, the Sixth Circuit characterized his Ohio contacts as "random," "fortuitous," and "attenuated." *Id.* at 723. Rowlette's forum contacts did not occur because he wished to establish a relationship with Ohio, but instead "solely because Calphalon chose to be headquartered in Ohio." *Id.*

Relying on *Calphalon*, district courts have concluded that "jurisdiction will not lie solely because the out-of-state defendant has *some* business contacts with the forum state, particularly where the negotiation and performance of the agreement occurs largely out-of-state." *Papa John's Int'l, Inc. v. Entm't Mktg. & Commc'ns Int'l, Ltd.*, 381 F. Supp. 2d 638, 643 (W.D. Ky. 2005). The *Papa John's* decision dismissed contract litigation over a marketing campaign where the out-of-state defendants negotiated and performed the alleged agreement outside Kentucky. *Id.* The work of plaintiff, Papa John's, in developing and implementing the marketing campaign from its Kentucky headquarters could not be attributed to the defendants. *Id.* Similarly, in *Hillerich & Bradsby Co. v. Hall*, 147 F. Supp. 2d 672, 676–77 (W.D. Ky. 2001), a multi-year contract with an out-of-state defendant, who contacted the plaintiff's Louisville offices several times each year to place equipment orders, was still found insufficient to confer personal jurisdiction in Kentucky. The *Hall* defendant's relationship with Kentucky was "almost entirely passive," and his performance occurred in another state. *Id.* at 677.

Pure Valley has no connection with Kentucky—let alone the "substantial connection" necessary for purposeful availment. Like the above case law, the nexus between Kentucky and

the claims in this action is limited to Third Wave’s decision to organize as a Kentucky limited liability company and to allegedly base its headquarters here. This is not enough to support personal jurisdiction over Pure Valley. After an email introduction the parties met face-to-face in Oregon. (Fricker Decl. ¶ 4.) The parties’ then negotiated the Agreement among Pure Valley’s Oregon-based representatives and Third Wave’s chief negotiator, Mr. Paasch, who lived in California and now lives in Oregon. (*Id.* ¶¶ 5–6.) The Agreement even selects Oregon law. (Agreement § 5.2.) No representatives of Pure Valley have visited Kentucky, and all performance by Pure Valley has occurred in Oregon or states other than Kentucky. (Fricker Decl. ¶¶ 10–12, 19.) The Agreement does not require the CBD oil to be shipped to Kentucky; Pure Valley has not shipped any of the CBD oil to Kentucky; and Third Wave preferred for the product to be sent to Indiana. (*Id.* ¶ 12.) Under the circumstances, Pure Valley has not purposefully availed itself of a Kentucky forum, and the exercise of personal jurisdiction in Kentucky is otherwise unreasonable. Third Wave’s Complaint should be dismissed for lack of personal jurisdiction.

III. VENUE IN KENTUCKY IS IMPROPER FOR THIS SUIT AGAINST PURE VALLEY.

Third Wave’s Complaint does not reference an appropriate venue provision to support its filing of this action in Kentucky. Instead, Third Wave incorrectly cites 28 U.S.C. § 1391(c)(2), which merely defines a legal entity’s residence for purposes of the general venue state. (Compl., DN 1, ¶ 3.) A defendant limited liability company, like Pure Valley, “resides . . . in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.” 28 U.S.C. § 1391(c)(2). However, since no personal jurisdiction exists over Pure Valley in Kentucky, it cannot be deemed to reside here to create proper venue. This lack of personal jurisdiction—and thus residence in Kentucky—precludes Third Wave from relying on venue under 28 U.S.C. § 1391(b)(1) and (b)(3).

The last option under the general venue statute is 28 U.S.C. § 1391(b)(2), which is likewise unavailable to Third Wave because “a substantial part of the events or omissions giving rise to the claim” did not occur in this district, nor is “a substantial part of property that is the subject of the action” situated here. All activities related to Third Wave’s claims have occurred outside of Kentucky (*i.e.*, contract negotiation, formation, and performance). Moreover, all CBD oil which is the subject matter of the Agreement is stored in Oregon. This case should be dismissed for improper venue.

IV. TRANSFER TO OREGON FEDERAL COURT IS AN APPROPRIATE ALTERNATIVE TO DISMISSAL.

A. Transfer Is Appropriate Based on Lack of Personal Jurisdiction and Improper Venue.

Alternatively, if the Court finds subject-matter jurisdiction and that it is in the interest of justice, this action should be transferred to the District of Oregon, Portland Division. Pursuant to 28 U.S.C. § 1406, the Court may transfer an action over which it lacks personal jurisdiction or proper venue to any district or division where the action could have been brought. *See Pittock v. Otis Elevator Co.*, 8 F.3d 325, 329 (6th Cir. 1993); *Martin v. Stokes*, 623 F.2d 469, 473–74 (6th Cir. 1980). Third Wave’s failure to establish personal jurisdiction and venue requires either dismissal or transfer. There is no dispute personal jurisdiction and venue would be proper in the District of Oregon for an action against Pure Valley.

B. Transfer Is Appropriate for the Convenience of the Parties and Witnesses.

The facts outlined in this motion also support transfer to the District of Oregon for the convenience of the parties and witnesses under 28 U.S.C. § 1404(a). *See D.C. Micro Dev., Inc. v. Lange*, 246 F. Supp. 2d 705, 712–13 (W.D. Ky. 2003). Change in venue is allowed “to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). The

balance of the various public and private factors support transfer under § 1404(a). *Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 364 (6th Cir. 2008).

Nearly all (if not all) of the events related to the negotiation, formation, and performance of the Agreement have occurred in Oregon, and the key witnesses for Third Wave and Pure Valley live in Oregon. Access to proof and witnesses all favor venue in Oregon, which will less expensive for both parties over the course of discovery and potential trial. In addition, Oregon has a public interest this dispute involving two Oregon citizens and CBD oil produced in Oregon. It is make no sense to burden the citizens of Kentucky with jury service in an Oregon dispute. The parties agreed that Oregon law governs their contract, and Oregon courts and attorneys are more familiar with the applicable of Oregon law. If this case is not dismissed, transfer to Oregon is the most efficient and economical option for the parties, the witnesses, and the judiciary.

CONCLUSION

Pure Valley respectfully requests that this Court enter an order dismissing this action for lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue. If the Court finds subject-matter jurisdiction, and concludes that transfer is a more appropriate remedy, Pure Valley alternatively requests transfer to the District of Oregon, Portland Division.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2020, a true and correct copy of the foregoing *Defendant's Motion to Dismiss or, in the Alternative, Transfer* was filed with the Clerk of Court using the CM/ECF system, which will transmit notice of electronic filing to the following:

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