IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| A.J., et al., | § | |
| | § | |
| v. | § | Civil Action No. H-04-4730 |
| | § | Jury Demanded |
| Vehicle Vin No. | § | |
| 1GRAA06283T500670, et al., | § | |

**DEFENDANT TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.'S REPLY TO PLAINTIFFS' AMENDED SUPPLEMENTAL RESPONSE TO DEFENDANT TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

TO THE HONORABLE LEE H. ROSENTHAL, UNITED STATES DISTRICT JUDGE:

**DEFENDANT TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.** ("TTMA") hereby files its Reply to Plaintiffs' Amended Supplemental Response to TTMA's Motion to Dismiss for Lack of Personal Jurisdiction. In support thereof, TTMA would respectfully show unto the Court the following:

**1. Plaintiffs Misstate The Applicable Standard to Analyze TTMA's Motion to Dismiss.**

Plaintiffs argue that TTMA's motion to dismiss failed to discuss the applicable burden of proof for a motion to dismiss for lack of personal jurisdiction. Pls.' Am. Supp. Resp. at 4. Plaintiffs further contend that the Court must defer to their jurisdictional allegations "in the absence of specific proof showing those allegations to be unfounded." *Id*. at 5. Plaintiffs, however, have misread the applicable standard.

Plaintiffs do not and cannot deny that they bear the burden of establishing personal jurisdiction. *Felch v. Transportes Lar-Mex SA De CV*, 92 F.3d 320, 326 (5th Cir. 1996). Where, as here, the district court has not conducted an evidentiary hearing on a motion to dismiss, the

plaintiffs must present a *prima facie* case that personal jurisdiction is proper. *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 380 (5th Cir. 2003) (emphasis added) (citation omitted). If the Plaintiffs have failed to make this showing, the Court must grant the motion to dismiss. *See, e.g.*, *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994).

Plaintiffs may establish a *prima facie* case of personal jurisdiction through presenting appropriate, non-conclusory affidavits. *See, e.g.*, *Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992). Plaintiffs may also rely on "other proper summary judgment type evidence." *Id.* Although the district court must resolve "conflicts between the facts as established by the [] parties' appropriate affidavits" in Plaintiffs' favor, *id.*, Plaintiffs may not simply base their arguments on conclusory allegations and unfounded affidavits. *Id.* Nor must the Court defer to allegations that have been substituted for proof. *Id.* Rather, "the facts thus arrived at must be sufficient to *affirmatively* show personal jurisdiction. *Felch*, 92 F.3d at 327.

As the Court is well aware, Plaintiffs have sought leave to file a second amended complaint that sets forth a myriad of jurisdictional *allegations* against TTMA. Plaintiffs claim that they allege a *prima facie* case of personal jurisdiction in the pleadings. Pls.' Am. Supp. Resp. at 5.

Under Fifth Circuit precedent, however, allegations in a plaintiff's complaint are taken as true *only* if they are uncontroverted. *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990). It is difficult to imagine how a contrary rule would work either in theory or in practice. Pleadings, after all, are not facts. Pleadings consist of allegations that can be conclusory, well-founded, or unfounded.

Indeed, it would be pointless to file a motion to dismiss for lack of personal jurisdiction if allegations alone sufficed to establish a *prima facie* case of personal jurisdiction. Evidence, not allegations, is necessary. Although there is a difference in kind rather than a difference in degree between facts and allegations, Plaintiffs have chosen to rely on a dearth of the former yet a surplus of the latter.

Further, the Court cannot take any of the allegations in Plaintiffs' Second Amended Complaint as true. As Plaintiffs know, TTMA has filed an answer to that pleading, subject to the present motion. In its answer, TTMA has completely denied and wholly disputed the jurisdictional allegations in Plaintiffs' Second Amended Complaint. Consequently, none of the allegations in Plaintiffs' Second Amended Complaint controls the disposition of this dispositive motion. *See id.*; *see also Wilson*, 20 F.3d at 648. Moreover, TTMA has submitted affidavits proving the absence of the requisite facts needed by Plaintiffs to support jurisdiction over TTMA.[1]

TTMA's motion to dismiss has been fully briefed by the parties, and the Court has heard arguments by counsel. The evidence before the Court, however, fails to support—and instead disproves— Plaintiffs' jurisdictional allegations.

**2. The Testimony of Plaintiffs' Consulting Expert Contradicts Plaintiffs' Claims and Representations to the Court.**

Since the beginning of this lawsuit, Plaintiffs have claimed that TTMA is "the marketing arm" of Great Dane. *See* Exhibit A: Transcript of Hearing Held on May 26, 2005 at 3:10-16. Indeed, at the May 26, 2005 hearing, counsel for Plaintiffs stated that one of their experts

[1] *See* Exhibit D: Affidavit of Richard Bowling, ¶¶ 1-9; Exhibit E: Amended Affidavit of Dick Bowling, ¶¶ 1-15; Exhibit L: Affidavit of Dick Bowling Filed in Response to the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Continuance to Conduct Limited Jurisdictional Discovery, ¶¶ 1-10.

"already indicated that this particular association is a marketing arm for many of the manufacturers. And we understand particularly for the Great Dane manufacturer." *Id*. at 4:20-23.[2]

Plaintiffs requested and the Court granted them permission to have Mr. Byron Bloch appear at the deposition of the TTMA representative, Richard Bowling. *See* Exhibit B: Transcript of Hearing Held on June 22, 2005 at 12:17-18. In support of that request, counsel for Plaintiffs informed the Court that Mr. Bloch "has been engaged in litigation involving TTMA." *Id*. at 12:1. Indeed, Mr. Hall characterized Mr. Bloch as a consulting expert on the jurisdictional question. *Id*. at 11:17-18. Mr. Bloch, in turn, attended the deposition of Mr. Bowling.

Not long after that deposition, however, Mr. Bloch was himself deposed in connection with a lawsuit styled *Misty Towery, Individually and as Representative of the Estate of Michael Towery, Deceased v. Great Dane Limited Partnership*, Civil Action No. 2:04-CV-173 (TJW); In the United States District Court for the Eastern District of Texas, Marshall Division. *See* Exhibit C: Transcript of Deposition of Byron Bloch. During that deposition, Counsel for Great Dane Limited Partnership, Mr. Glen M. Darbsyhire, asked Mr. Bloch several questions about TTMA. *See id*. Mr. Bloch's answers to these questions belie many of the claims that Plaintiffs have advanced. *See id.*

Mr. Bloch was asked whether TTMA markets Great Dane trailers. *Id*. at 124:16-17. He gave the following answer:

A. *Not that I'm aware of*.

[2] Counsel for TTMA wrote counsel for Plaintiffs asking them to supplement their Initial Disclosures on this point. *See* Exhibit M: Letter dated June 10, 2005 from Michael M. Gallagher to Benjamin L. Hall, III and Elizabeth Hawkins. To date, Plaintiffs have not done so.

*Id*. at 124:18 (emphasis added). In addition, Mr. Bloch conceded that TTMA does not manufacture trailers. *Id*. at 124:4-6. He also stated that he cannot say that TTMA sells trailers. *Id*. at 124:7-11.

When Mr. Bloch was asked whether TTMA can mandate changes in the design of trailers, he answered as follows:

> A. To the extent of my knowledge of TTMA and its relationship with the trailer manufacturers, TTMA does issue what they refer to as recommended practices, but it is not, I assume, a legal requirement that can be enforced in some way.

*Id*. at 121:10-18. Mr. Bloch was asked if he has any personal knowledge of TTMA mandating any aspect of the design of any trailer by Great Dane. *Id*. at 121:19-20. He gave the following response:

> A. Well, my prior answer would, I think, be the same here.

*Id*. at 121:21-22. Mr. Bloch was also asked whether TTMA has issued a recommended practice for side-underride protection. *Id*. at 12-13. He responded as follows:

> A. Not so far as I know. There is no side guard recommended practice.

*Id*. at 122:14-15. In short, the deposition testimony of Plaintiffs' own consulting "expert" contradicts the factual basis of Plaintiffs' major, jurisdictional claims.

Mr. Bloch's testimony casts doubt upon other lingering assertions put forth by Plaintiffs. From the beginning of this lawsuit, Plaintiffs have intimated that there exist marketing contracts between TTMA and its members. *See* Exhibit A: Transcript of Hearing Held on May 26, 2005 at 4:20-5:8. Similarly, Plaintiffs have averred that there are separate contracts between TTMA and its members apart from the membership application. *See* Exhibit B: Transcript of Hearing Held on June 22, 2005 at 8:25-9:4, 9:18-19. Although TTMA has consistently denied this claim, *id*. at 9:24-25, and the Court has stated that TTMA's explanation "makes a great deal of sense," *id*. at

10:1-2, and Mr. Bowling has testified that there are no other contracts, *see* Exhibit G: Deposition of Dick Bowling at 96:6-15, Plaintiffs still claimed that they had "a little contrary information." *See* Exhibit B: Transcript of Hearing Held on June 22, 2005 at 9:18-19.

To date, however, Plaintiffs have not produced any such agreements or contracts. Nor has Mr. Bloch stated that any such agreements exist. To the contrary, Mr. Bloch gave the following answer:

> A. I can't speak for the legal relationship between TTMA and the member companies whereby there may be some provisions in that agreement which would allow TTMA to legally require or mandate some action or some other attribute of a trailer that TTMA could enforce upon Great Dane. *I don't know the specifics of that relationship or legal aspect of it.*

Exhibit C: Transcript of Deposition of Byron Bloch at 122:2-8 (emphasis added). Therefore, the record does not support this allegation.

This deposition testimony of Byron Bloch undercuts many of the evidentiary representations that Plaintiffs have made to the Court. Simply put, Plaintiffs' own expert has contradicted Plaintiffs' contentions concerning both general and specific jurisdiction. Mr. Bloch's testimony further demonstrates why the Court should grant TTMA's motion to dismiss.

**3. Plaintiffs Still Have Not Established a *Prima Facie* Case of Personal Jurisdiction.**

**a. General Jurisdiction**

For the Court to deny TTMA's motion, it must find that Plaintiffs have proven that TTMA's contacts with Texas are both "*continuous* and *systematic*." *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994) (emphasis added). As the Supreme Court has noted, "[c]ontinuous and systematic is a fairly high standard in practice." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). It is a standard that Plaintiffs have not met.

Once one casts aside the unsupported rhetoric utilized by Plaintiffs' counsel, it becomes readily apparent that TTMA is not subject to the jurisdiction of Texas courts. TTMA is an international organization that focuses on numerous issues affecting the trucking industry. Little of TTMA's revenue is derived from Texas members. None of TTMA's activities and functions is directed specifically or exclusively toward Texas. The extent of TTMA's ties with Texas is insubstantial, and those ties are like the ties TTMA has with other states. General jurisdiction, therefore, has not been established. There is no Texas nexus.

**i. Plaintiffs Have Not Disputed The Material Facts in Dick Bowling's Affidavits.**

It bears noting that Plaintiffs have not contested and cannot disprove the numerous, material facts set forth in the affidavits of Dick Bowling. Indeed, the following undisputed facts are before the Court:

- TTMA's main office is located in Alexandria, Virginia;[3]
- TTMA is headquartered in Virginia;[4]
- TTMA is incorporated in Washington, D.C.;[5]
- TTMA does not have a registered agent for service of process in Texas;[6]
- TTMA is not registered to do business in Texas;[7]
- TTMA maintains no office in Texas;[8]
- TTMA last held a meeting in Texas in April 1999;[9]
- TTMA has no employees in Texas;[10]
- No one can become a member of TTMA on TTMA's website;[11]
- TTMA has no service or software to record how many people visit its website.[12]

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[3] *See* Exhibit D: Affidavit of Richard Bowling, ¶ 4.
[4] *Id.*
[5] *Id.*
[6] *Id.*, ¶ 5.
[7] *Id.*
[8] *Id.*
[9] *See* Exhibit E: Amended Affidavit of Dick Bowling, ¶ 9.
[10] *Id.*, ¶ 6.
[11] *Id.*, ¶ 13.
[12] *Id.*, ¶ 12.

**ii. The Court Should Disregard the Affidavits of M. Ryan Kirby.**

TTMA has submitted three affidavits in support of its motion to dismiss.[13] Each of these affidavits was signed by Richard Bowling, TTMA's President. Mr. Bowling has been with TTMA for many years, and he is therefore familiar with TTMA's structure and function. These affidavits are proper evidence that the Court can and should consider in evaluating TTMA's motion to dismiss.

The same cannot be said of Mr. Kirby's affidavits. Mr. Kirby is one of the attorneys of record for Plaintiffs. In his first affidavit, states in general, conclusory fashion that "[t]he facts stated in Plaintiffs' Supplemental Response to Defendant's Rule 12(b)(2) Motion to Dismiss for Personal Jurisdiction are true and correct." His basis for any personal knowledge of those "facts" is not disclosed.

Mr. Kirby also claims that he talked to a representative of TTMA who provided him with additional "facts." The identity of this purported hearsay information and how it was obtained outside the normal discovery process have not been disclosed, even though this information is discoverable. *See* FED. R. CIV. P. 26(a)(1)(A). Although TTMA has asked Mr. Kirby for the name of this apparent informant, as well as the time that Mr. Kirby contacted this apparent informant, Mr. Kirby has not provided this information. *See* Exhibit K: Letter dated September 9, 2005 from Michael M. Gallagher to Ryan Kirby at 1-2.

Mr. Kirby's second affidavit proves nothing more material than his first one. In the second affidavit, he simply recounts the events surrounding Plaintiffs' issuance of subpoenas

[13] *See* Exhibit D: Affidavit of Richard Bowling, ¶¶ 1-9; Exhibit E: Amended Affidavit of Dick Bowling, ¶¶ 1-15; Exhibit L: Affidavit of Dick Bowling Filed in Response to the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Continuance to Conduct Limited Jurisdictional Discovery, ¶¶ 1-10.

duces tecum (without notifying the parties to this lawsuit). Mr. Kirby also globally lists the exhibits to Plaintiffs' amended supplemental response. At bottom, this second affidavit simply attests that these documents were obtained from others in discovery.

Apart from their substantive deficiencies, Mr. Kirby's two affidavits suffer from a procedural defect: they have been filed by an attorney to this lawsuit. As the Court knows, affidavits signed by attorneys are neither proper nor persuasive. *See, e.g., Eguia v. Tompkins*, 756 F.2d 1130, 1136 (5th Cir. 1985); *Broadway v. City of Montgomery, Ala.*, 530 F.2d 657, 660 (5th Cir. 1976). As one prominent judge aptly noted, "we think it an unnatural, if not virtually impossible, task for counsel, in his own case, to drop his garments of advocacy and take on the somber garb of an objective fact-stater." *Inglett & Co., Inc. v. Everglades Fertilizer Co., Inc.*, 255 F.2d 342, 349 (5th Cir. 1958) (Brown, J.). To put it simply, "if the 'facts' are really facts, they should be put forward as such *without interstitial argumentation*." *Id.* (emphasis added) (footnote omitted).

**iii. TTMA's Recommended Practices and Comments on Proposed Federal Regulations Do Not Set Industry Standards.**

Plaintiffs have contended that TTMA is a "*de facto* regulatory association." Pls.' Am. Supp. Resp. at 9. Specifically, Plaintiffs allege that TTMA has set the standards for the trucking industry though issuing Recommended Practices. *Id.* at 10.[14] According to Plaintiffs, the defects in TTMA's Recommended Practices resulted in the fatal injuries complained of in this litigation *Id.* at 29. This set of arguments is entirely unfounded.

[14] Plaintiffs occasionally refer to TTMA's "Recommended Practices" as "Recommended *Standards*." Pls.' Am. Supp. Resp. at 10 n.5. This reference, as Plaintiffs' own exhibits demonstrate, is erroneous.

As part of its analysis of federal regulations affecting the trucking industry, TTMA does issue Recommended Practices. TTMA develops each such publication "as a *guide* to general practices in the manufacture, use, and repair of truck trailers." *See* Exhibit F (emphasis added). It is important to note that TTMA expressly has not "undertaken any evaluation of all the conceivable ways in which Recommended Practices . . . may be used . . . ." *Id.* Most notably, compliance with TTMA's Recommended Practices is not required, "and any non-conformity with such publications is not indicative of the non-conforming practice being deficient." *Id.*

It is disingenuous (and totally unsupported by the record) for Plaintiffs to contend that TTMA's Recommended Practices have a binding effect on the entire trucking industry. Plaintiffs are well aware that TTMA's Recommended Practices are, in fact, recommendations. As Mr. Bowling testified during his deposition, TTMA does not consider its Recommended Practices to be authoritative sources. *See* Exhibit G: Transcript of Deposition of Dick Bowling at 156:12-14, 156:16-21. As previously noted, Plaintiffs' own hand-picked expert does not disagree with Mr. Bowling on this issue. Exhibit C: Transcript of Deposition of Byron Bloch at 121:14-18. In short, despite the contentions of Plaintiffs' counsel, TTMA has no standard-setting authority.[15]

Further, TTMA's Recommended Practices are issued to all of its members throughout the United States. The Recommended Practices do not focus on the laws or regulations of a

[15] Plaintiffs cite two purportedly published decisions that allegedly refer to TTMA's Recommended Practices" as "guideposts for proper trailer building." Pls.' Am. Supp. Resp. at 10. Ironically, in the latter case, *P.A.M. Transp., Inc. v. Pines Trailer Ltd. Partnership*, No. CG90-221-B-O, 1995 U.S. Dist. LEXIS 21695 (N.D. Miss. Feb. 6, 1995), the Court granted summary judgment *for the defendant* notwithstanding the plaintiff's reliance on a TTMA Recommended Practice. *Id.* at *16 ("Nor may the plaintiff's reliance on the TTMA 'Recommended Practice' (Standard 5.1.1) defeat the defendants' motion . . . ."). The citation given for the former case, 692 So. 2d 197, refers to a series of per curiam opinions issued by a Florida appellate court, some of them concerning criminal law, and none of them concerning TTMA.

particular state, and they are not issued only to manufacturers in a particular state. Although TTMA's members may find the "Recommended Practices" to be useful or helpful, only final, *governmental* regulations are binding. Certainly, Great Dane does not look to TTMA Recommended Practices as binding. *See* Exhibit J: Def. Great Dane Limited Partnership's Answers to Pls.' Five Jurisdictional Interrogatories at 4.

As a trade association, TTMA has the option to participate in the rule-making process through which government regulations are promulgated. TTMA has done so by commenting on proposed regulations filed by the National Highway Traffic Safety Administration. TTMA has also sent correspondence to its members regarding such proposals. Yet TTMA's participation in the rulemaking process regarding issues of national significance cannot give rise to personal jurisdiction in a particular state. *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991); *Inv. Co. Inst. v. United States*, 550 F. Supp. 1213, 1216-17 (D.D.C. 1982). These activities are fully protected by the First Amendment. *Klinghoffer*, 937 F.2d at 51.

The Court does not have to look any further than the deposition testimony of Plaintiffs' chosen expert to understand the nature of TTMA's Recommended Practices. To put it in Mr. Bloch's words:

> TTMA does issue what they refer to as recommended practices, but it is not, I assume, a legal requirement that can be enforced in some way.

Exhibit C: Transcript of Deposition of Byron Bloch at 122:14-15. Further, Plaintiffs themselves concede that "[a]t present, there is no governmental regulation relating to side underride protection features." Pls.' Am. Supp. Resp. at 29 n.14. This is correct. The National Highway Traffic Safety Administration has not issued a safety standard requiring side-underride protection for passenger vehicle collisions. To the contrary, it has determined that countermeasures for side underride accidents are not cost justified. *See* Exhibit N: *Preliminary Regulatory Evaluation,*

*Combination Truck Rear Underride Guards*, NHTSA Plans and Policy Office of Regulatory Analysis, September 1991, at 15. Nor has TTMA ever recommended the absence of side-underride protection, as Plaintiffs' own expert concedes. Exhibit C: Transcript of Deposition of Byron Bloch at 122:14-15.

**iv. TTMA's Website Does Not Establish Personal Jurisdiction.**

Plaintiffs have apparently revived their previously discounted arguments regarding their claim of general jurisdiction based on TTMA's website. Plaintiffs now reassert that TTMA's website helps them establish personal jurisdiction. Pls.' Am. Supp. Resp. at 23-27. Plaintiffs contend that TTMA's website is interactive and that TTMA solicits members over the Internet. *Id*. Neither of these arguments is based in fact. Nor does TTMA's website help establish general jurisdiction under Fifth Circuit precedent. The Court previously looked with disfavor on these arguments. *See* Exhibit A: Transcript of Hearing Held on May 26, 2005 at 15:7-16:18. The Court should do so again.

Plaintiffs' claims to the contrary, one cannot join TTMA through its website. *See* http://www.ttmanet.org (last visited Sept. 9, 2005). Nor can one purchase a single product on the website. *See id*. Instead, potential customers "are instructed by the website to remit any completed order forms by regular mail or fax." *Mink v. AAA Dev. LLC*, 190 F.3d 333, 337 (5th Cir. 1999). Moreover, as Mr. Bowling has noted, TTMA does not have software that records the number of and the location of people who access the website. *See* Exhibit E: Amended Affidavit of Dick Bowling, ¶ 12. To allude to the Court's observations at the May 26, 2005 hearing, TTMA's website is available to "anybody in Texas as well as everybody in the world." *See* Exhibit A: Transcript of Hearing Held on May 26, 2005 at 16:17-18.

Plaintiffs also note that there is a generic e-mail address on TTMA's website. Pls.' Am. Supp. Resp. at 26. Yet "[t]here is no evidence . . . that the website allows [TTMA] to do anything but reply to e-mail initiated by website visitors." *Mink*, 190 F.3d at 337. Moreover, as Mr. Bowling has explained, only he and Jeff Sims, TTMA's engineering manager, monitor this email address. *See* Exhibit E: Amended Affidavit of Dick Bowling, ¶ 14. Although Plaintiffs repeatedly cite *Mink* in support of their arguments, *Mink* holds that the presence of a generic e-mail address on a website does not establish personal jurisdiction. *Mink*, 190 F.3d at 337; *see also Arriaga v. Imperial Palace, Inc.*, 252 F. Supp. 2d 380, 386 (S.D. Tex. 2003).

TTMA's website is available to and viewable by anyone in the entire United States or the entire world. TTMA's website is neither a commercial juggernaut nor an engine of interstate commerce. To the contrary, TTMA's website is nothing "more than passive advertisement which is not grounds for the exercise of personal jurisdiction." *Mink*, 190 F.3d at 337 (citation omitted). To put it another way, TTMA's website "is not targeted specifically to reach Texans." *Arriaga*, 252 F. Supp. 2d at 386. The facts concerning TTMA's website fit precisely within the contours set by this Fifth Circuit precedent. Plaintiffs' arguments regarding the TTMA website are therefore unavailing.

**v. TTMA Has Not Utilized the Attorney-Client Privilege as a Sword in this Case.**

According to Plaintiffs, TTMA has "surprisingly asserted an attorney-client privilege over Plaintiffs' attempt to discover material facts relating to jurisdiction." Pls.' Am. Supp. Resp. at 7. Plaintiffs also contend that TTMA has utilized the attorney-client privilege "as a sword and shield in this case." *Id.* Neither of these arguments is accurate.

The bulk of the Court's and counsel's time at the May 26, 2005 hearing was devoted to *general*, not specific, jurisdiction. *See* Exhibit A: Transcript of Hearing Held on May 26, 2005 at

2:25-3:6. After hearing the arguments of counsel, the Court allowed the deposition of Mr. Bowling to go forward. *Id*. at 20:9-17. Noting that it was "not enthusiastic about the idea," *id*. at 20:9-10, the Court chose to limit Mr. Bowling's deposition "to the matters that are covered in the affidavit on a strict basis." *Id*. at 20:18-19. With that admonition, the Court then granted Plaintiffs' motion for leave to conduct limited jurisdictional discovery, as stated on the record (Dkt. #22).

At the deposition of Mr. Bowling, however, counsel for Plaintiffs asked him a myriad of questions that go to the substantive merits of Plaintiffs' claims, including whether TTMA ever "aided and abetted" Great Dane in the construction of allegedly dangerous trailers. Exhibit G: Deposition of Dick Bowling at 110:11-112:5, 123:19-21, 127:12-128:9. Counsel for TTMA objected to that line of questioning on the grounds that it was beyond the scope of the Court's order. *See, e.g.*, *id.* at 121:2-7. Indeed, counsel for TTMA literally read from the transcript of the May 26, 2005 hearing in stating his objection to these questions. *Id*. at 126:1-21. In short, counsel for TTMA followed the spirit and the letter of the Court's order granting in part and denying in part Plaintiffs' motion for leave to conduct limited jurisdictional discovery. *Id*.; *see also* Exhibit I: Transcript of Hearing Held on July 8, 2005 at 21:14-23.

Further, counsel for Great Dane, Mr. Glen Darbyshire, objected during Mr. Bowling's deposition to the extent that such questions sought information excluded from discovery by the attorney-client privilege and by the work-product doctrine. *See* Exhibit G: Deposition of Dick Bowling at 144:6-8. Mr. Darbyshire has also served as special counsel for TTMA. In that capacity, he has an attorney-client relationship with TTMA and every committee member who has joined the joint defense project. Therefore, discussions and communications among those participants, including Great Dane, are privileged. Mr. Darbyshire consistently asserted this

privilege. *See id*. He did not, as Plaintiffs represent, instruct Mr. Bowling not to answer specific questions.

After asking questions that fell beyond the scope of the Court's order concerning Mr. Bowling's depositions, Plaintiffs chose to issue subpoenas duces tecum to TTMA members without notifying the parties to this lawsuit. The Court, in turn, heard argument on these subpoenas and allowed Plaintiffs to obtain the documents they sought. The Court also ordered Defendant Great Dane to respond to five jurisdictional interrogatories that specifically went to the issue of specific jurisdiction.[16] Plaintiffs, in short, have been able to obtain jurisdictional discovery. The objections and instructions given by TTMA's counsel during the deposition of Mr. Bowling were appropriate to limit the discovery to jurisdictional, not substantive, issues.

Plaintiffs have also contended that TTMA submitted itself to the laws of Texas by asserting the attorney-client privilege. Pls.' Am. Supp. Resp. at 9. By doing so, the argument goes, TTMA has established minimum contacts with the State of Texas. *See id*. This argument is factually inaccurate.

During Mr. Bowling's deposition, counsel for TTMA did not lodge objections on the basis of the attorney-client privilege. Rather, Mr. Darbyshire did so based on his role as special counsel for TTMA. *See* Exhibit G: Deposition of Dick Bowling at 144:6-8. Counsel for TTMA, in turn, objected to Plaintiffs' wide-ranging questions because they went well beyond the scope of jurisdictional discovery allowed at that juncture. *Id*. at 126:1-21. This argument is unsupported by the record.

[16] Plaintiffs have not included a copy of Great Dane's responses to their jurisdictional interrogatories with their Amended Supplemental Response. TTMA will discuss Great Dane's responses later in this Reply.

**vi. TTMA's Ties to Texas Are Insubstantial.**

In attempting to delineate the alleged contacts TTMA has with Texas, Plaintiffs intimate that many of TTMA's activities are directed toward Texas. Pls.' Am. Supp. Resp. at 17. Indeed, Plaintiffs simply, and repeatedly, use a bold-faced font in an effort to somehow particularize TTMA's ties with Texas. *Id*. at 17-18. This effort, however, obscures the truth of TTMA's actual function, which is not unique to the extent it involves the State of Texas.

TTMA has members throughout the entire United States, including Texas. TTMA sends out its Recommended Practices and Technical Bulletins to all of its members in all of the members' respective States, including those in Texas. TTMA receives dues from all of its members, including those in Texas and those in other states. And TTMA periodically sends out newsletters and emails to all of its members, including those in Texas and those in other states. Texas is neither a central nor a substantial focus of TTMA. The revenue TTMA receives from its Texas members is *less than five percent* of TTMA's total revenue. *See* Exhibit E: Amended Affidavit of Dick Bowling, ¶ 9. In light of these undisputed facts, TTMA submits that personal jurisdiction does not exist.[17]

The method by which TTMA evaluates membership applications and collects dues from its members further demonstrates that all of its members are treated similarly regardless of their location. *See* Exhibit L: Affidavit of Dick Bowling Filed in Response to the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Continuance to Conduct Limited

[17] *See, e.g.*, *Academy of Ambulatory Foot Surgery v. Am. Podiatry Ass'n*, 516 F. Supp. 378, 381-83 (S.D.N.Y. 1981); *Fricke v. Owens-Corning Fiberglass Corp*., 647 So. 2d 1260, 1263-65 (La. Ct. App. 1994); *Skinner v. Flymo, Inc.*, 505 A.2d 616, 622-23 (Pa. Super. Ct. 1986); *cf., e.g.*, *Tobacco Merchants Ass'n of the United States v. Broin*, 657 So. 2d 939, 942 (Fla. Dist. Ct. App. 1995) ("The plaintiffs' failure to respond with a counter-affidavit or other sworn proof . . . establishing the basis for the exercise of personal jurisdiction defeated the exercise of long-arm jurisdiction . . . .").

Jurisdictional Discovery, ¶¶ 6-10. Companies who express an interest in joining TTMA must fill out the exact same application form, depending on which type of membership they seek. *Id.*, ¶ 6. All potential members of TTMA are charged an administrative fee of $1,000 in connection with the processing of their applications. *Id.*, ¶ 7.

Similarly, TTMA does not consider the location of a member company in charging membership dues. *Id.*, ¶ 8 ("The location of a member plays no role in this calculation.").[18] Instead, TTMA charges membership dues based on gross sales volume categories for the preceding year. *Id.* Consequently, TTMA's structure for determining membership dues is based on mathematical calculations, not geography. *See id.*

TTMA does indeed have a joint defense project whereby *any* of its members can consult with Mr. Glen Darbyshire regarding pending or actual litigation.[19] This project, however, is open to all of TTMA's members. Each member, no matter what its location is, may consult with Mr. Darbyshire for up to two hours on litigation-related issues. TTMA's Litigation Defense Project is a nation-wide effort that is available to—and indeed open to—all of TTMA's members.

[18] TTMA does not, however, collect dues from any members based on their monthly production reports. Production reports, which are submitted by Tank Conference Manufacturers only, do not include any data relating to the price of trailers listed in the report. Moreover, there is no evidence that Great Dane manufactures tank trailers (it does not) or that it is a member of the Tank Conference (it is not).

[19] During the July 8, 2005 hearing, Mr. Hall represented to the Court that "there is a specific solicitation letter by TTMA to Texas residents asking them to participate in the defense of these cases." *See* Exhibit I: Transcript of Hearing Held on July 8, 2005 at 23:4-6. The letter to which Mr. Hall presumably refers, Plaintiffs' Exhibit F to their amended supplemental response, undermines this representation. The letter was sent from Dick Bowling to trailer and tank conference manufacturers, as well as to members of TTMA's Product Liability Committee. This letter was not, however, sent just to Texas members. Indeed, the letter states that "membership in the Project will be *available to all TTMA members* who are involved in or anticipate being involved in these suits."

Even if one of TTMA's members consulted with Mr. Darbyshire regarding a case in Texas, that consultation would occur solely because the plaintiff chose to file that lawsuit in Texas. In short, consultation would be triggered by the mere fortuity of the plaintiff having sued in Texas. What Plaintiffs now ask the Court to do in this case is hail TTMA into Texas litigation because some of its members have been sued in Texas and TTMA offered assistance that was the same assistance offered to other members sued in other states. The Court should decline this invitation.

Strangely, Plaintiffs have imputed sinister motives to TTMA simply because a joint defense project has been established. There is, however, nothing dastardly or abnormal about this project. Trade associations have members, and from time to time their members are sued in courts of law. Members of trade organizations, in turn, may find it beneficial to discuss issues of common interest with each other, including common issues in the defense of litigation. The existence of a joint defense project does not give rise to personal jurisdiction in a given state. Nor is the existence of a joint defense project all that remarkable.

Plaintiffs have repeatedly accused TTMA and Great Dane of engaging in a myriad of conspiracies. These charges, however, are baseless. Yet even assuming, *arguendo*, that TTMA and Great Dane have engaged in a conspiracy, the Court should still grant TTMA's motion to dismiss. In the Fifth Circuit, it is clear beyond peradventure that "mere allegations of a tort occurring outside the forum state is not sufficient to meet the purposeful availment requirement." *Hawkins v. Upjohn Co.*, 890 F. Supp. 601, 608 (E.D. Tex. 1994) (citing *Southmark Corp. v. Life Investors*, 851 F.2d 763, 772 (5th Cir. 1988)).[20] Instead, one must show that the "alleged

[20] *See also Thomas v. Kadish*, 748 F.2d 276, 282-83 (5th Cir. 1984); *Star Tech., Inc. v. Tultex Corp.*, 844 F. Supp. 295, 299 (N.D. Tex. 1993); *Deiniger v. Deininger*, 677 F. Supp. 486, 493 (N.D. Tex. 1988); *Bamford v. Hobbs*, 569 F. Supp. 160, 163 (S.D. Tex. 1983).

tortfeasor's intentional actions were *purposefully directed toward the forum state . . . .*" *Id.* (emphasis added). Plaintiffs have not done so. To put it simply, Plaintiffs have not proved a single alleged act committed by TTMA that was purposefully directed *toward Texas.*

Trade associations who play no part in the sale, manufacturing, or marketing of their members' products are not hailed into the forum state. An excellent example of this is the *Graziose* case, which Plaintiffs have still failed to address (or mention) in their briefing. *Graziose v. Am. Home Prods. Corp.*, 161 F. Supp. 2d 1149, 1154 (D. Nev. 2001) (granting defendant's motion to dismiss for lack of personal jurisdiction). Although it is not binding precedent,[21] *Graziose* parallels this lawsuit and its reasoning is persuasive. *See id.* at 1151-54. Indeed, *Graziose* aptly illustrates why this Court lacks personal jurisdiction over TTMA. *See id.*

In *Graziose*, the plaintiffs sought damages from the Consumer Healthcare Products Association ("CHPA"), a non-profit trade association, in connection with "the use of various over-the-counter . . . drug products containing phenylpropanolamine . . . ." *Id.* at 1151. The CHPA, however, filed a motion to dismiss for lack of personal jurisdiction, contending that it "ha[d] never manufactured, marketed, distributed, promoted, tested or sold any products—in Nevada or elsewhere." *Id.* Deeming that motion meritorious, the district court granted it and dismissed CHPA from the lawsuit. *Id.* at 1154.

The Court in *Graziose* held that Plaintiffs had not established "a specific act . . . that CHPA committed in, or directed at, Nevada that gave rise to their Complaint." *Id.* at 1153. In particular, CHPA had no role in the sale of its members' products. *Id.* at 1151. CHPA was neither incorporated in Nevada nor headquartered in Nevada. *Id.* The Court found that CHPA's

[21] *Cf. Southeast Tex. Envtl., L.L.C. v. BP Amoco Chem. Co.*, 329 F. Supp. 2d 853, 868 (S.D. Tex. 2004) ("Ninth Circuit precedent does not bind this Court."); *Fleming Cos., Inc. v. USDA*, 322 F. Supp. 2d 744, 755 (E.D. Tex. 2004) ("[T]his court is neither bound to follow nor obligated to consider decisions from the Ninth Circuit.").

sporadic, isolated contacts with Nevada did not establish general or specific jurisdiction. *Id*. at 1153-54.

Here, as in *Graziose*, the Court lacks either general or specific jurisdiction over a non-profit trade association. Like the CHPA in *Graziose*, TTMA is neither incorporated nor headquartered in the forum state. Like the CHPA in *Graziose*, TTMA's activities in the forum state are sporadic and infrequent, and no different from its activities in other states (except for Virginia, where it has its only office). Like the CHPA in *Graziose*, TTMA has no role in manufacturing, marketing, distributing, promoting, or testing any of its members' products. Consequently, the Court should grant TTMA's motion to dismiss for lack of personal jurisdiction. *See id*. at 1154.

To be sure, TTMA has members who are from Texas. And each of these member companies filled out a membership application and submitted it to TTMA. Yet the mere existence of Texas members in TTMA does not mandate a finding that personal jurisdiction exists. The Fifth Circuit has repeatedly held that "merely contracting with a resident of the forum state is *insufficient* here to subject the nonresident to the forum's jurisdiction." *Colwell Realty Inv., Inc. v. Triple T Inns, Inc.*, 785 F.2d 1330, 1334 (5th Cir. 1986) (per curiam) (emphasis added).[22] Nor is there a separate membership document apart from the application for membership in TTMA. *See* Exhibit G: Deposition of Dick Bowling at 96:6-15. Oddly, however, Plaintiffs make the following statement: "Because membership in TTMA constitutes a contract in this state, TTMA could reasonably have known that it would be subject to suit in this state to enforce these contracts." Pls.' Am. Supp. Resp. at 21. This contention misses the mark.

[22] *See also Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 344-45 (5th Cir. 2004); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986); *Stuart v. Spademan*, 772 F.2d 1185, 1992-93 (5th Cir. 1985).

This lawsuit does not involve a dispute *between* TTMA and its members, either in Texas or elsewhere. Moreover, the enforcement of a membership contract is not at issue. The only TTMA member named as a defendant in this lawsuit, Great Dane, is not a Texas corporation. Further, none of the membership applications to which Plaintiffs point is related to the events that gave rise to this lawsuit. Nor are any of TTMA's Texas members implicated by Plaintiffs' allegations. This argument is unavailing.

Although Plaintiffs have alleged that TTMA has conducted extensive business in Texas, *id.*, this claim is untenable under Fifth Circuit precedent. In *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 437-38 (5th Cir. 1977), the Fifth Circuit observed that "a professional association does not 'transact business' in a judicial district merely because some of its members reside in the district and receive the association's publications there." Similarly, a trade association is not conducting business in a state merely because its some of its members reside there and receive correspondence and publications. *See id.*

According to Plaintiffs, TTMA has "gratuitously undertaken to participate in the defense and/or prosecution of **Texas** litigation involving the design, manufacturing, marketing and/or the regulation of tractor trailers of the type involved in this litigation." Pls.' Second Am. Compl., ¶ 16B (bold-face font in original). During Mr. Bowling's deposition, counsel for Plaintiffs claimed that Mr. Bowling had discussed a side-underride case in Texas with members of the press and had participated in that case. *See* Exhibit G: Transcript of Deposition of Dick Bowling at 154:3-13.[23] Similarly, Plaintiffs claim that TTMA has filed pleadings in Texas, among other states. Pls.' Second Am. Compl., ¶ 16EE. These two claims are unsubstantiated.

[23] Indeed, during a colloquy over an objection to his question to Mr. Bowling, Mr. Hall made the following statement regarding Mr. Bowling's involvement in that case:

First, Plaintiffs have produced no such documents to the Court indicating that TTMA has ever participated in Texas lawsuits involving side-underride protection. Instead, Plaintiffs have included two pleadings include in their amended supplemental response. *See* Pls.' Exs. DD, EE. Exhibit DD is an *amicus* brief filed by TTMA in the Supreme Court of Oregon. Exhibit EE is a motion for leave to file an *amicus* brief in the Supreme Court of the United States. Notably, TTMA was not a party to either of those cases.

Nor was TTMA a party to the side-underride case in Texas referenced by Plaintiffs. In the *Maravilla* lawsuit, Lufkin Trailers, a TTMA member, was sued in connection with the death of Ricardo Maravilla in Laredo, Texas. *See* Exhibit H: Douglas Pasternak, *Are truck 'underride' crashes preventable?,* U.S. NEWS & WORLD REPORT, OCT. 2, 2000, at 40. TTMA was not sued and Mr. Bowling did not testify in that lawsuit. He was contacted by a reporter who wrote a story mostly devoted to the *Maravilla* case before it went to trial. *See id.* Mr. Bowling, however, did not comment on or offer any observations regarding the *Maravilla* case. *Id.* Accordingly, this argument is inaccurate.

The controlling Fifth Circuit precedent mandates that Plaintiffs establish a *prima facie* case that TTMA's contacts with Texas are continuous and systematic. The evidence now before the Court, however, shows that TTMA's contacts with Texas are sporadic and infrequent. Accordingly, Plaintiffs have not established general jurisdiction.

**b. Specific Jurisdiction**

Nor have Plaintiffs established specific jurisdiction. "[S]pecific jurisdiction includes a nexus requirement, *i.e.*, the purposeful availment by a defendant of the rights and protections of

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> MR. HALL: Bruce, he's in the newspaper talking about the case, your man here, a Texas case. *He's participating in it.*

*See* Exhibit G: Transcript of Deposition of Dick Bowling at 154:11-13 (emphasis added).

[Texas] courts, to give rise to a cause of action." *Graziose*, 161 F. Supp. 2d at 1154 (citation omitted). The Fifth Circuit has established a rigid standard for a district court to find that a trade association has minimum contacts with the forum state. *See Guidry v. United States Tobacco Co., Inc.*, 188 F.3d 619, 628 (5th Cir. 1999). Specific jurisdiction is present only if the trade association defendant intentionally or negligently targets citizens in the forum state. *Id.* at 628-30. Plaintiffs have not met this standard. Nor have Plaintiffs shown a tangible connection between TTMA and the facts underlying this lawsuit.

As the Court is well aware, Defendant Great Dane Limited Partnership was ordered to answer five jurisdictional interrogatories on the issue of specific jurisdiction. *See* Exhibit J: Def. Great Dane Limited Partnership's Answers to Pls.' Five Jurisdictional Interrogatories at 1-4. Great Dane's answers to this Court-ordered discovery are illuminating. Indeed, they further undermine Plaintiffs' jurisdictional case.

Plaintiffs asked Great Dane the following question: What advice, information and/or materials did TTMA provide you regarding the feasibility of placing side underride guards on trailers such as the one involved in this litigation. *Id.* at 3. Great Dane responded as follows: "*Nothing* pertaining to the design and manufacture of the trailer at issue." *Id.* (emphasis added). This confirms what TTMA has alleged since this lawsuit began, and it renders this particular claim factually infirm.

Plaintiffs also asked Great Dane the following question: What information has TTMA provided you since January 1, 2000 regarding side underride guards and/or side underride litigation in the State of Texas? *Id.* Great Dane gave the following answer: "Nothing pertaining to the design and manufacture of the trailer at issue." *Id.* This answer similarly undercuts Plaintiffs' claim that TTMA has engaged in litigation in the State of Texas.

Plaintiffs also asked Great Dane the following question: What services and/or information has and/or does TTMA provide you since January 1, 2000 regarding the manufacture, design, and/or marketing of trailers like the one involved in this case? *Id.* Great Dane responded, in part, with the following statement: "Great Dane has received no services or information from TTMA regarding the marketing of Great Dane trailers." *Id.* at 4. This response completely contradicts Plaintiffs' assertions that TTMA is a "marketing arm" for its members.

Plaintiffs have also contended that TTMA "actually solicits members to consider including a 'TTMA compliance label' on their trailers to suggest adequate construction." Pls.' Am. Supp. Resp. at 10 (citation omitted). This contention is belied by Great Dane's responses to the jurisdictional interrogatories. Defendant Great Dane has stated that it "has seen no evidence that the trailer involved in the accident at issue had a label on it that references 'TTMA's Recommended Practices.'" Exhibit J: Def. Great Dane Limited Partnership's Answers to Pls.' Five Jurisdictional Interrogatories at 3. Thus, this argument is of dubious validity. If Plaintiffs intend to rely upon any such evidence, the time to produce it has long since passed.

TTMA plays no role in the sale, manufacturing, or marketing of its members' products. As previously shown, the testimony of Byron Bloch and the affidavits of Dick Bowling both reach that same conclusion. *See* Exhibit C: Transcript of Deposition of Byron Bloch at 124:4-6, 124:7-11, 124:16-18. Moreover, TTMA played no role in manufacturing, developing, or designing the trailer at issue in this lawsuit.

TTMA has already established that its "Recommended Practices" are not binding on its members or on the general public. TTMA has also shown that there has been no government

regulation issued on side-underride protection. In turn, TTMA has not issued a "Recommended Practices" publication regarding side-underride protection.

Overall, Plaintiffs have had approximately nine months to conduct jurisdictional discovery. Yet despite having taken a jurisdictional deposition, obtained answers to jurisdictional interrogatories, and obtained documents from non-parties without prior notice, Plaintiffs are left with nothing more than conclusory allegations, invalid affidavits, and sworn testimony from their own expert that repudiates their jurisdictional allegations. Despite having deposited more than two boxes and thousands of pages of documents with the Court and counsel, Plaintiffs have still failed to establish a *prima facie* case of specific jurisdiction.

**4. Plaintiffs' Arguments Contravene Sound Public Policy.**

The theories of personal jurisdiction upon which Plaintiffs rely are unsupported by fact and unmoored in precedent. Plaintiffs ask the Court to uphold jurisdiction over a trade association who has members all over the United States because it has members in one state. They ask the Court to uphold personal jurisdiction based on a website that is as available to Texans as it is to the entire world. They ask the Court to elevate the form of their pleadings over the substance of TTMA's evidence.

Although they bear the burden of establishing personal jurisdiction over Defendant, Plaintiffs have failed to meet this burden either under a specific jurisdiction or under a general jurisdiction theory. TTMA, in short, lacks minimum contacts with the forum state. The absence of minimum contacts with the forum state means that the Court need not consider the reasonableness requirement. *See Wilson*, 20 F.3d at 647. Accordingly, the Court should grant TTMA's motion to dismiss for lack of personal jurisdiction and dismiss TTMA as a party to this

lawsuit. *See Graziose*, 161 F. Supp. 2d at 1154 (granting motion to dismiss for lack of personal jurisdiction).[24]

WHEREFORE, PREMISES CONSIDERED, Defendant Truck Trailer Manufacturers Association, Inc. prays that the Court grant its Motion to Dismiss for Lack of Personal Jurisdiction. TTMA further prays for any such additional relief, either at law or in equity, to which it may be justly entitled.

Respectfully submitted,

**HAYS, McCONN, RICE & PICKERING**

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[24] *See also City & County of San Francisco v. Philip Morris*, No. C-96-2090 DLJ, 1998 U.S. Dist. LEXIS 3056, at *30 (N.D. Cal. Mar. 3, 1998) (same); *Mass. Sch. of Law at Andover v. ABA*, 959 F. Supp. 36, 40 (D. Mass. 1997) (same).

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing instrument has been duly sent via CM/ECF to all counsel of record on this the twelfth day of September, 2005, as follows:

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