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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BY FAX

11 PHISH, INC., a Delaware corporation, and)
12 WHO IS SHE? MUSIC, INC., a Delaware)
13 corporation,)
14 Plaintiffs,)
15 v.)
16 SEAN KNIGHT, aka WALDO, an)
17 individual and doing business as B-SHARP)
18 CLOTHING, GLIDE CLOTHING,)
19 KNIGHTHOOD CLOTHING,)
20 KNIGHTHOOD MERCHANDISE,)
21 PORCUPINE GRAPHIX, SURFIN')
22 SAFARI, INC., and TRUE VIBES;)
23 KNIGHT-MACKIN, INC., a Delaware)
24 corporation doing business as B-SHARP)
25 CLOTHING, GLIDE CLOTHING,)
26 KNIGHTHOOD CLOTHING,)
27 KNIGHTHOOD MERCHANDISE,)
28 PORCUPINE GRAPHIX, SURFIN')
29 SAFARI, INC., and TRUE VIBES; AXIS)
30 ENTERPRISES; and JOANNE READER,)
31 an individual,)
32 Defendants.)

CASE NO. C 01 1147 PJH
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS FOR LACK OF PERSONAL
JURISDICTION AND IMPROPER
VENUE; OR IN ALTERNATIVE TO
TRANSFER FOR IMPROPER VENUE
(28 U.S.C. § 1406(a)); OR IN
ALTERNATIVE TO TRANSFER FOR
CONVENIENCE (28 U.S.C. § 1404(a))

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1 Defendants Sean Knight ("Knight"), Joanne Reader ("Reader"), and Axis Enterprises
2 (collectively hereinafter, "defendants"), by and through their attorneys, submit this memorandum
3 of points and authorities in support of their motion to dismiss for lack of personal jurisdiction
4 and improper venue; or in the alternative to transfer for improper venue; or in the alternative to
5 transfer for convenience.

6 INTRODUCTION

7 On March 21, 2001, plaintiffs in this matter, Phish, Inc. ("Phish") and Who Is She?
8 Music ("WISM") (collectively hereinafter "plaintiffs") filed their complaint and *ex parte*
9 application for a temporary restraining order against defendants alleging that defendants have,
10 *inter alia*, infringed on plaintiffs' copyrights and trademarks through sales of tee-shirts and other
11 merchandise which incorporate song titles and song lyrics of the band Phish.

12 Although the plaintiffs and the defendants in this action are *all* located in Vermont,
13 where virtually all the witnesses to these allegations are also located, and although plaintiffs
14 have no tangible connection to California whatsoever, plaintiffs nonetheless opted to file this
15 action in California based on transparently false assertions that jurisdiction is proper here
16 because the defendants sold goods into this forum. However, the only factual basis for plaintiffs'
17 assertion that jurisdiction is proper in this forum is evidence plaintiffs themselves manufactured
18 by having a private investigator place orders from California on their behalf. Plaintiffs' attempt
19 to render jurisdiction proper in a district some 3,000 miles away from where plaintiffs and
20 defendants reside by orchestrating a sale into this forum is patently improper, potentially
21 sanctionable, and a gross example of forum shopping. The exercise of personal jurisdiction over
22 these defendants is not proper in California, and the defendants request that this Court dismiss
23 the complaint, or in the alternative, transfer this matter to the District of Vermont, where venue
24 would be proper.

STATEMENT OF ISSUES

1
2 1. Whether the exercise of personal jurisdiction over the defendants is proper based
3 upon the plaintiffs' attempt to create jurisdiction by having their agent purchase goods from the
4 defendants in the plaintiffs' chosen forum.

5 2. Whether the minimal, sporadic, and fortuitous contacts the defendants have
6 otherwise had with California residents are sufficient to confer either general or specific
7 jurisdiction over them.

8 3. Whether venue is proper in California when plaintiffs are Delaware corporations
9 whose principal places of business are in Vermont, defendants all reside and are domiciled in
10 Vermont, virtually all the witnesses for all the parties reside in Vermont, all of the defendants'
11 books, records and other documents are in Vermont, and the plaintiffs have no connection to
12 California.

13 4. Whether venue should lie in Vermont for reasons of convenience when plaintiffs
14 are Delaware corporations whose principal places of business are in Vermont, defendants all
15 reside and are domiciled in Vermont, virtually all the witnesses for all the parties reside in
16 Vermont, all of the defendants' books, records and other documents are in Vermont, and the
17 plaintiffs have no connection to California.

STATEMENT OF FACTS

18
19 Plaintiffs in this matter are Delaware corporations whose principal places of business are
20 located in Burlington, Vermont. (Complaint, ¶¶ 1, 2). Plaintiffs promote the musical group
21 Phish, and promote, produce, and sell merchandise bearing trademarks and copyrights owned by
22 the plaintiffs. (Complaint, ¶ 23). On March 21, 2001, the plaintiffs filed a 9-count complaint
23 against the defendants alleging trademark infringement, dilution, and false designation of origin
24 under the Lanham Act; copyright infringement; common law trademark and-trade name
25 infringement; unfair competition; trademark dilution under California law; commercial

1 misappropriation of name and likeness; and conspiracy. (See Complaint).

2 The defendants, who do business under the trade name Surfin Safari (Knight Decl., ¶ 3),
3 are all residents and domiciliaries of the State of Vermont. (Knight Decl., ¶ 2; Reader Decl., ¶ 2).
4 Surfin Safari is a small business that sells tee-shirts and other clothing items over the internet via
5 its website – www.knighthoodtees.com – as well as at trade shows and various retail outlets.
6 (Knight Decl., ¶ 3). The tee-shirts and other items sold primarily parody song titles and lyrics of
7 various bands, including Phish, by placing them in humorous contexts and conflating the song
8 titles and lyrics with other commercial products. (Knight Decl., ¶ 3). Thus, by way of example,
9 defendants sell a tee-shirt with the word "Glide" on it (which is the title of a Phish song) that
10 parodies an advertisement for Tide laundry detergent; defendants sell another tee-shirt with the
11 word "Bouncin'" on it (which is a portion of a Phish song title) that parodies an advertisement for
12 Bounce fabric softener. (Knight Decl., ¶ 3). Other tee-shirts and items sold by the defendants
13 similarly parody other commercially available products. (Knight Decl., ¶ 3).

14 Plaintiffs have attempted to invoke this Court's jurisdiction by means of unsupported
15 allegations that "on information and belief" the defendants are "transacting business in this
16 district," (Complaint, ¶¶ 3-6), and by blatantly attempting to manufacture evidence of such
17 transactions through the auspices of their private investigator, Alan B. Donnelly, who at
18 plaintiffs' request purchased merchandise from defendants' website from his home in Pinole,
19 California. (Donnelly Decl., ¶¶ 1, 2). Plaintiffs have not pointed to any other evidentiary basis
20 for their statements that jurisdiction and venue is proper over defendants in this forum.

21 ARGUMENT

22 I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANTS

23 Rule 12(b)(2) of the Federal Rules of Civil Procedure provides that a court may dismiss a
24 defendant for "lack of jurisdiction over the person." Fed.R.Civ.P. 12(b)(2). Where the defendant
25 moves to dismiss for lack of personal jurisdiction, "plaintiff bears the burden of establishing

1 personal jurisdiction" through a prima facie showing that jurisdiction exists. *American*
2 *Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).
3 In this context, a "prima facie" showing means that the plaintiff has produced evidence which, if
4 believed, would be sufficient to establish the existence of personal jurisdiction. *See WNS, Inc. v.*
5 *Farrow*, 884 F.2d 200, 203 (5th Cir. 1989).

6 Determining whether personal jurisdiction exists over an out-of-state defendant involves
7 two inquiries: (1) whether the forum state's long-arm statute permits the assertion of jurisdiction,
8 and (2) whether the assertion of personal jurisdiction violates federal due process requirements.
9 *See, e.g., Fireman's Fund Ins. Co. v. National Bank of Cooperatives*, 103 F.3d 888, 893 (9th Cir.
10 1996). With respect to the first inquiry, California's long-arm provisions grant courts of this state
11 "jurisdiction on any basis not inconsistent with the Constitution of this state or of the United
12 States." Cal.Civ.Proc.Code § 410.10. Thus, California's jurisdiction is as broad as the
13 Constitution permits.

14 With respect to the second inquiry, absent one of the traditional bases for jurisdiction –
15 in-state presence, domicile, or consent – the Constitution requires that the defendant have
16 "certain minimum contacts" with the forum state, "such that maintenance of the suit does not
17 offend traditional notions of fair play and substantial justice." *International Shoe Co. v.*
18 *Washington*, 326 U.S. 310, 316 (1945). The purpose of the minimum contacts requirement is to
19 protect the defendant against the burden of litigating in a distant or inconvenient forum, and to
20 ensure that states do not reach out beyond the limits of their sovereignty imposed by their status
21 in a federal system. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).
22 In the case at bar, as shown below, the defendants have do not have sufficient contacts with
23 California to enable this Court to exercise either general or specific jurisdiction over them.

24 **A. This Court Does Not Have General Jurisdiction Over the Defendants**

25 General jurisdiction refers to the authority of a court to hear any cause of action

1 involving a defendant, regardless of whether the cause of action arose from the defendant's
2 activities within the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S.
3 408, 415 (1984). In order for a court to assert general jurisdiction, the defendant must either be
4 domiciled within, or have "substantial, continuous and systematic" contacts with, the forum
5 state. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

6 In the instant case, it is undisputed that the defendants' business operations are located in
7 Vermont. (Complaint, ¶¶ 3, 5, 6). Further, defendants have no physical presence within the state
8 of California (Knight Decl., ¶ 10; Reader Decl., ¶ 8); they are not registered to conduct business
9 in California and have no registered agents, employees or sales representatives located in
10 California (Knight Decl., ¶¶ 8, 9; Reader Decl., ¶¶ 6, 7); no principals or personnel of defendants
11 have ever traveled to California on business (Knight Decl., ¶ 13; Reader Decl., ¶ 11); defendants
12 maintain no bank accounts or other tangible personal or real property in California (Knight
13 Decl., ¶ 11; Reader Decl., ¶ 9); defendants direct no advertising specifically towards California,
14 nor do they advertise in any publication that is primarily directed towards California (Knight
15 Decl., ¶ 12; Reader Decl., ¶ 10).

16 The only possible "contacts" defendants have had with California are sporadic, random
17 sales of *de minimis* amounts of merchandise to California residents (Knight Decl., ¶ 14; Reader
18 Decl., ¶ 12) and, according to plaintiffs, the maintenance of an internet presence. Plaintiffs have
19 not shown that defendants conduct in this forum is substantial, nor "continuous and systematic."
20 *Helicopteros*, 466 U.S. at 416. General jurisdiction does not exist here in light of defendants'
21 almost total lack of contact with California. *See, e.g., Millenium Enterprises, Inc. v. Millenium*
22 *Music, LP*, 33 F.Supp.2d 907, 910 (D.Or. 1999) ("sale of one compact disc and sporadic
23 purchases from a supplier are neither substantial nor continuous and systematic contact with this
24 forum").

25

26 MEMO OF POINTS AND AUTHORITIES IN SUPPORT
OF MOTION TO DISMISS

-6-

CASE NO. C01-1147 PJH
kxse9.1vrs/vmlz

1 **B. This Court Does Not Have Specific Jurisdiction Over the Defendants**

2 In the Ninth Circuit, plaintiffs must satisfy all elements of the following three-part test to
3 determine whether a district court may exercise specific jurisdiction over a nonresident
4 defendant:

- 5 (1) The nonresident defendant must do some act or consummate
6 some transaction with the forum or perform some act by which he
7 purposely avails himself of the privilege of conducting activities in
8 the forum, thereby invoking the benefits and protections of its laws;
- 9 (2) The claim must be one which arises out of or results from the
10 defendant's forum-related activities;
- 11 (3) Exercise of jurisdiction must be reasonable.

12 *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). In the case at bar, none of these factors
13 militate in favor of jurisdiction over the defendants.

14 **1. Plaintiffs Have Not Shown "Purposeful Availment" by Defendants**

15 Plaintiffs base their claim that defendants have purposely availed themselves of this
16 forum on vague allegations that "on information and belief" defendants "transact business in this
17 district and throughout the United States." (Complaint, ¶¶ 3, 5, 6). The alleged "proof" offered in
18 support of this proposition is the purchase by plaintiffs' private investigator of various tee-shirts
19 from the defendants' web site (Donnelly Decl., ¶¶ 2, 3). On its face, this is nothing more than an
20 attempt by plaintiffs to manufacture a contact with this forum sufficient to establish personal
21 jurisdiction. Courts faced with similar attempts to establish personal jurisdiction by orchestrating
22 sales into the forum have expressly declined to exercise jurisdiction, holding that "defendants
23 cannot be said to have 'purposely' availed themselves of the protections of this forum when it
24 was an act of someone associated with plaintiff, rather than defendants' Web site advertising,
25 that brought defendants' product into this forum." *Millenium Music, supra*, 33 F.Supp.2d at 911
(noting that such "questionable and unprofessional tactics cannot subject defendants to
26 jurisdiction"). Moreover, given that the "gravamen of both an infringement and an unfair

1 competition claim is whether the defendant has created a likelihood of confusion," *Shakey's Inc.*
2 *v. Covalt*, 704 F.2d 426, 430 (9th Cir. 1983), plaintiffs can hardly argue that the sale they
3 orchestrated "caused a likelihood of confusion" – plaintiffs' private investigator knew exactly
4 with whom he was dealing and knew that defendants were not associated in any way with
5 plaintiffs. Courts have repeatedly held that jurisdiction may not be manufactured by the
6 unilateral acts of the plaintiff. *Edberg v. Neogen Corp.*, 17 F.Supp.2d 104, 112 (D.Conn. 1998);
7 *see also Chung v. NANA Development Corp.*, 783 F.2d 1124, 1127 (4th Cir.), *cert. denied*, 479
8 U.S. 948, (1986)("Jurisdiction may not be manufactured by the conduct of others"); *DeSantis v.*
9 *Hafner Creations, Inc.*, 949 F. Supp. 419, 425 (E.D. Va. 1996)("the purposeful availment
10 analysis precludes plaintiffs from manufacturing the circumstances that give rise to jurisdiction
11 over non-resident defendants").

12 Putting aside the matter of plaintiffs' attempt to manufacture jurisdiction, defendants
13 acknowledge having made *de minimis* sales of merchandise to California residents from their
14 web site. All told, defendants have made 29 sales to California residents. (Knight Decl., ¶ 14;
15 Reader Decl., ¶ 12). Although contacts that are "isolated" or "sporadic" may support specific
16 jurisdiction if they create a "substantial connection" with the forum, the Supreme Court has held
17 that such contacts "must be more than random, fortuitous, or attenuated." *Burger King v.*
18 *Rudzewicz*, 471 U.S. 462, 475 (1985). In the case at bar, the sales made by defendants in
19 California in no way can be said to create a "substantial connection" with the forum – they were
20 simply one-off sales of tee-shirts to consumers that happened upon defendants' web site. Given
21 that defendants' web site does not specifically target California residents, but is accessible to
22 anyone in the world who has internet access, for this Court to exercise specific jurisdiction based
23 on an insubstantial number of sales to random California purchasers does not comport with due
24 process requirements. The fact that someone who accesses defendants' web site can purchase
25 merchandise does not render defendants' actions "purposefully directed" at this forum. *Millenium*

1 *Music, supra*, 33 F.Supp.2d at 921; *see also Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79
2 F.Supp.2d 537, 542 (E.D.Pa. 1999)(finding defendant's commercial sale of only five products to
3 forum residents via its web site to be "the kind of fortuitous, random, and attenuated contacts
4 that the Supreme Court has held insufficient to warrant the exercise of jurisdiction"); *compare*
5 *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1126 (E.D.Pa. 1997)(personal
6 jurisdiction exercised where defendant made internet sales to 3,000 forum residents); *compare*
7 *Colt Studio, Inc. v. Badpuppy Enterprise*, 75 F.Supp.2d 1104, 1107 (C.D.Cal. 1999)(jurisdiction
8 found where defendant sold 2,100 online subscriptions to forum residents).

9 **2. Plaintiffs' Claims Do Not Arise Out of Defendants' Forum-Related**
10 **Activities**

11 Specific jurisdiction also requires the court to limit its jurisdiction to causes of action
12 arising out of the nonresident's forum-related activities. The Ninth Circuit follows a "but for" test
13 in determining whether the claim "arises out of" the nonresident's forum-related activities.
14 *Ballard, supra*, 65 F.3d at 1500. Under the "but for" analysis, plaintiffs have failed to show that
15 the harm allegedly suffered by them, which purportedly dates back to 1994, has any connection
16 to this forum. Plaintiffs' claim that they have suffered harm in this forum should be weighed in
17 light of their gross attempts to manufacture sufficient contacts to exercise personal jurisdiction
18 herein. The fact that plaintiffs filed suit in this forum without a scintilla of evidence that
19 defendants in fact had made even one sale here belies their protestations about the harm suffered
20 by them in California. Plaintiffs cannot show that "but for" the random sales by defendants in
21 California they would not have suffered loss.

22 **3. Exercise of Jurisdiction Would Be Unreasonable**

23 Even where a court concludes that a defendant purposely availed itself of California's
24 benefits and protections, and plaintiff's claims would not have arisen but for defendant's acts
25 constituting purposeful availment, the court may not exercise jurisdiction if it would be

1 unreasonable to do so. *Callaway Golf Corp. v. Royal Canadian Golf Assoc.*, 125 F.Supp.2d
2 1194, 1204 (C.D.Cal. 2000). The Ninth Circuit has articulated seven factors used in determining
3 whether the exercise of jurisdiction over a nonresident defendant comports with traditional
4 notions of fair play and substantial justice:

- 5 (1) the extent of the defendant's purposeful interjection into the forum state's
6 affairs;
- 7 (2) the burden on the defendant of defending in the forum;
- 8 (3) the extent of conflict with the sovereignty of the defendant's state;
- 9 (4) the forum state's interest in adjudicating the dispute;
- 10 (5) the most efficient judicial resolution of the controversy;
- 11 (6) the importance of the forum to the plaintiff's interest in convenient and
12 effective relief;
- 13 (7) the existence of an alternative forum.

14 *Core-Vent Core v. Nobel Indus.*, 11 F.3d 1482, 1487 (9th Cir. 1993). Although no one factor is
15 dispositive, all of them must be considered. *Id.* In the case at bar, consideration of these factors
16 leads to the inescapable conclusion that the exercise of jurisdiction is unreasonable over these
17 defendants.

18 **(a) There was no purposeful interjection by defendants**

19 Even if defendants' sales to California residents were sufficient to meet the "purposeful
20 availment" test analyzed above, the extent of interjection into the forum state is a separate factor
21 for assessing reasonableness. *Id.* at 1488. The "smaller the element of purposeful interjection, the
22 less is jurisdiction to be anticipated and the less reasonable is its exercise." *Ins. Co. of North
23 America v. Martina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981). Here, where neither defendants'
24 web site nor its products are targeted at California residents (Knight Decl., ¶ 12; Reader Decl., ¶
25 10), defendants maintain no presence in California (Knight Decl., 8 - 11, 13), and defendants'
26 only sales to California have been minimal, sporadic, and subject to the random chance of a

1 California resident stumbling upon defendants' web site, defendants have not interjected
2 themselves into California.

3 **(b) Defending in California is unduly burdensome**

4 The plaintiffs – both corporations headquartered in Vermont – could easily have brought
5 this suit in Vermont, where all the defendants also happen to reside (Knight Decl., ¶ 2; Reader
6 Decl. ¶ 2). Instead, plaintiffs chose to file suit some 3,000 miles away from where defendants are
7 located, based on spurious allegations that jurisdiction is proper in California because of
8 defendants' limited commercial activity on the internet. Conduct of this sort by plaintiffs is not
9 only disingenuous, but raises the specter of subjecting small businesses to the "litigious
10 nightmare of being subject to suit" in every jurisdiction in this country. *Millenium Music, supra*,
11 33 F.Supp.2d at 923. Forcing defendants to defend this suit from across the country is unduly
12 burdensome not only because of the inconvenience and expense of cross-country travel, and the
13 inherent hardship in being absent from work, home, family and children (Knight Decl., ¶15(b);
14 Reader Decl., ¶ 13(b)), or because the defendants' books and records are located in Vermont
15 (*Id.*), but also because filing suit in California was clearly intended to inconvenience the
16 defendants. Given that the "burden on the defendant must be examined in light of the
17 corresponding burden on the plaintiff," *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th
18 Cir. 1988), it is difficult to comprehend how plaintiffs, who by their own admission "have spent
19 millions of dollars in creating and promoting their music and associated merchandise"
20 (Complaint, ¶ 22), would face any burden at all in litigating this matter in the state where both
21 they and the defendants happen to be located: Vermont. In contrast, it is clear that the defendants
22 – who are individuals operating a small business (Knight Decl., ¶ 3; Reader Decl., ¶ 3) – will
23 endure significant and unnecessary financial burdens from defending this matter in California.

24 **(c) California has no interest in this dispute**

25 California lacks any significant contact with the activities alleged in the complaint.

1 Plaintiffs are not California residents, and their choice of forum is therefore given little
2 deference. *Kahn v. Sprouse*, 1993 U.S. Dist. LEXIS 2156 (N.D. Cal 1993). Indeed, the only
3 connection plaintiffs seemingly have to California is the fact that their attorneys maintain offices
4 here. The fact that plaintiffs' counsel resides in the forum is entitled to little, if any weight, when
5 determining the proper forum. *Id.*

6 (d) This dispute can be most efficiently resolved in Vermont

7 The analysis of where the suit would be most efficiently resolved primarily concerns
8 where the witnesses and evidence are likely to be located. *See Core-Vent Corp., supra*, 11 F.3d
9 at 1489. In the instant case, the plaintiffs are headquartered in Burlington, Vermont (Complaint,
10 ¶¶ 1, 2); all the defendants reside and are domiciled in Vermont (Knight Decl., ¶ 2; Reader
11 Decl., ¶ 2); the defendants' books, records, and papers are located in Vermont (Knight Decl., ¶
12 15(b); Reader Decl., ¶ 13(b)); the allegedly infringing merchandise which plaintiffs are seeking
13 to impound is located in Vermont; and the defendants have identified at least fifteen witnesses in
14 Vermont who are expected to offer testimony on their behalf (Knight Decl., ¶ 16; Reader Decl.,
15 ¶ 14).¹ On these facts, it is inarguable that this matter would be more efficiently resolved in
16 Vermont.

17 (e) An alternative forum exists

18 Plaintiffs cannot demonstrate the unavailability of an alternative forum. Given that all the
19 plaintiffs and defendants are located in Vermont, the District Court in Vermont is not only *an*
20 available alternative forum in which to litigate this matter, but the *preferred* forum in which to
21 do so.

22
23
24 ¹ Defendants' preliminary assessment of witnesses in this matter has identified 25 witnesses from the
25 following states: Vermont (15), New York (6), New Jersey (1), British Columbia (1), Oregon (1), and North
26 Carolina (1). No witnesses are expected to testify from California.

1 **C. Venue Is Improper In California**

2 Plaintiffs have claimed that venue is proper in California by virtue of 28 U.S.C. §§
3 1391(b) and 1400(a). Plaintiff is incorrect as to both statutes.

4 Section 1391(b) provides in pertinent part that:

5 (b) A civil action wherein jurisdiction is not founded solely on
6 diversity of citizenship may, except as otherwise provided by law,
7 be brought only in (1) a judicial district where any defendant resides,
8 if all the defendants reside in the same state, (2) a judicial district in
9 which a substantial part of the events or omissions giving rise
 to the claim occurred, or a substantial part of the property that
 is the subject of the action is situated, or (3) a judicial district in
 which any defendant may be found, if there is not district in which
 the action may otherwise be brought.

10 28 U.S.C. § 1391(b). Given that choices (1) and (3) are clearly inapplicable to the case at bar, as
11 defendants neither reside in California, nor were served in the state, plaintiffs presumably are
12 relying on the provisions of § 1391(b)(2), and claiming that "a substantial part of the events or
13 omissions giving rise to the claim occurred" in this district. As demonstrated above, however,
14 plaintiffs brought this lawsuit without any evidence of any "events" whatsoever having taken
15 place in this district. The events that plaintiffs predicated their claim on at the time of filing were
16 merely those that they had paid their private investigator to manufacture.

17 As to the sales that defendants acknowledged having made in this district, plaintiffs
18 cannot credibly contend that these sales constitute "a substantial part of the events giving rise to
19 the claim"; indeed, such an assertion would ring particularly false in light of plaintiffs'
20 allegations that defendants have been in the business of selling tee-shirts which infringe on
21 plaintiffs' intellectual property since at least 1994 (Complaint, ¶ 26). The sales made by
22 defendants into this district were unknown to the plaintiffs at the time they commenced this
23 action, were *de minimis*, and do not satisfy § 1391(b)(2)'s requirement that they be "a substantial
24 part of the events or omissions giving rise to the claim." 28 U.S.C. § 1391(b)(2). Venue is thus
25 also improper under § 1391(b)(2).

1 Plaintiffs' claim that 28 U.S.C. § 1400(a) renders venue appropriate here is equally
2 erroneous. § 1400(a) provides in relevant part that:

3 (a) Civil actions, suits, or proceedings arising under any Act of
4 Congress relating to copyrights or exclusive rights in mask works
5 or designs may be instituted in the district in which the defendant
6 or his agent resides or may be found.

6 28 U.S.C. § 1400(a). Although for purposes of this section, a defendant "may be found"
7 wherever personal jurisdiction is proper, *See Advideo, Inc. v. Kimel Broad. Group, Inc.*, 727
8 F.Supp. 1337, 1341 (N.D.Cal. 1989), personal jurisdiction is in fact not proper in this case, and
9 defendants may not, therefore, be "found" in this district for venue purposes. Pursuant to 28
10 U.S.C. § 1406(a), the Court should dismiss this matter for improper venue.²

11 **D. In the Alternative, Venue Should Be Transferred to the District of Vermont**

12 **1. The Interests of Justice Require Transfer**

13 The Court has authority to transfer rather than dismiss this case. *Goldlawr, Inc. v.*
14 *Heiman*, 369 U.S. 463, 465-66 (1962)(upholding transfer of venue by a court not having
15 personal jurisdiction over the defendant); 28 U.S.C § 1406(a). If the Court determines under §
16 1406(a) that the interests of justice will be served by transferring the case, it is within the Court's
17 discretion to do so. *See, e.g., CD Solutions, Inc. v. Tooker*, 965 F.Supp. 17 (D.Tex. 1997).

18 A review of the pertinent facts clearly indicates that justice will be served by transferring
19 this matter to Vermont. First, it is unclear from plaintiffs' pleadings why this case was brought in
20 the Northern District of California. The plaintiffs are Delaware corporations headquartered in
21 Vermont. (Complaint, ¶¶ 1, 2). The alleged injuries involve the decisions made by Vermont
22 defendants concerning the operations of a small business in Vermont. All of the defendants
23

24 ² The Court should take notice that plaintiffs' copyright infringement claims are based on defendants'
25 alleged use on their tee-shirts of either one, or no more than a few, words from various Phish songs, which in most
instances replicate the song title. Defendants do not believe that this alleged use states a claim for copyright
infringement under 17 U.S.C. §501.

1 reside and are domiciled in Vermont, and all are amenable to suit there. (Knight Decl., ¶ 2;
2 Reader Decl., ¶ 2). The only apparent reason plaintiffs have for bringing suit in this district is
3 the convenience of plaintiffs' counsel, which is a factor that is given little weight when
4 determining whether transfer is appropriate. *Kahn, supra*, at 23.

5 Second, plaintiffs have gone to great lengths to attempt to manufacture evidence that
6 would confer jurisdiction in this forum. Lacking any good faith basis for asserting that
7 jurisdiction was proper in the Northern District of California, plaintiffs took it upon themselves
8 to retain a private investigator to purchase goods from defendants web site *for the express*
9 *purpose of conferring jurisdiction in a forum some 3,000 miles away from where defendants*
10 *reside*. Given that plaintiffs and defendants are all located in Vermont, plaintiffs' all-too-obvious
11 litigation strategy was to create as much hardship for defendants in defending this action as
12 possible. This sort of litigation "strategy" has been condemned by numerous courts as violative
13 of traditional notions of fair play. *see, e.g., Millennium Music, supra*, at 911; *Neogen Corp.,*
14 *supra*, at 112; *NANA Development Corp., supra*, at 1127; *Hafner Creations, supra*, at 425, and
15 should likewise meet with condemnation in this Court. The interests of justice mandate that this
16 Court transfer venue to the District Court in Vermont.

17 2. Reasons of Convenience Support Transfer to Vermont

18 Federal law provides that: "For the convenience of the parties and witnesses, and in the
19 interests of justice, a district court may transfer any civil action to any other district or division
20 where it might have been brought." 28 U.S.C. § 1404(a). In assessing convenience, courts
21 analyze three factors: (1) the convenience of the parties; (2) the convenience of the witnesses;
22 and (3) whether transfer would be in the best interests of justice. *See E. & J. Gallo Winery v. F.*
23 *& P. S.p.A.*, 899 F.Supp. 465, 466 (E.D.Cal. 1994). All three factors are to be balanced in the
24 court's discretion and interpreted broadly to allow the court to consider the particular facts of
25 each case. *Colt Studio, supra*, at 1112; *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22

1 (1988)(noting that decision to transfer involves an "individualized, case-by-case consideration of
2 convenience and fairness").

3 In order to grant defendants' motion to transfer venue, this Court must make two
4 findings. First, the Court must determine that the transferee court is one in which the action
5 "might have been brought." Second, the "convenience of the parties and witnesses" must favor a
6 transfer. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). In this case, it is
7 indisputable that the plaintiffs could have properly commenced this action in the District of
8 Vermont. The issue is thus narrowed to the convenience of the parties and the witnesses.

9 Even a cursory analysis of the convenience of both the parties and the witnesses in this
10 matter leads to the inevitable conclusion that this case will be more conveniently litigated and
11 tried in Vermont. As stated previously, none of the parties to this case have any connection to
12 California; all the plaintiffs and the defendants are located in Vermont (Complaint, ¶¶, 1-6),
13 where the defendants maintain all their books and records (Knight Decl., ¶ 15(b); Reader Decl., ¶
14 13(b)), and it would be an enormous burden on defendants to force them to defend this case
15 3,000 miles away from their business, home, family and children (Knight Decl., ¶ 15(b); Reader
16 Decl., ¶ 13(b)). The inconvenience of forcing defendants to defend this action in California
17 cannot seriously be contested by plaintiffs, who will merely face the inconvenience of hiring
18 local counsel to prosecute this action. In weighing the respective burdens on the parties, it is
19 entirely likely that it is *more* convenient for plaintiffs to try this action in Vermont, given that
20 their businesses are headquartered there and virtually all their employee witnesses reside in
21 Vermont.

22 With respect to the inconvenience of witnesses, defendants have identified 25 individuals
23 in their declarations who are expected to testify regarding the allegations in plaintiffs' complaint.
24 (Knight Decl., ¶ 16(a)-(s); Reader Decl., ¶ 14(a)-(s)). None of these witnesses reside in
25 California. Instead – as is to be expected, given the presence in Vermont of both the plaintiffs

1 and the defendants – the majority of the defendants' witnesses reside in Vermont (15 witnesses),
2 and the remaining witnesses reside in New York (6 witnesses), New Jersey (1 witness), British
3 Columbia (1 witness), Oregon (1 witness), and North Carolina (1 witness). These witnesses are
4 not subject to subpoena in the Northern District of California, and would be seriously
5 inconvenienced by the necessity of appearing for depositions or other proceedings in California.
6 Defendants operate a small business in Vermont, and are not in any position to pay the air fare
7 and lodging costs necessary to have their witnesses appear in California – nor should they be
8 required to do so, given that plaintiffs' obvious choice of forum is in their home state of
9 Vermont. The inconvenience of having multi-million dollar corporations bring suit in the state
10 where they are headquartered rather than in their chosen forum is clearly minimal when
11 compared to the gross inconvenience that the defendants and witnesses will suffer in appearing
12 and testifying from across the country. Plaintiffs cannot show that they will truly be
13 inconvenienced by litigating in Vermont, and appear to have filed this action in California solely
14 for the purpose of inconveniencing the defendants.

15 **CONCLUSION**

16 For the foregoing reasons, defendants respectfully request that this Honorable Court
17 dismiss plaintiffs' Complaint for lack of jurisdiction and improper venue; or in the alternative,
18 transfer this matter for improper venue; or in the alternative, transfer this matter for reasons of
19 convenience.

20 Dated: April 10, 2001

COLLETTE & ERICKSON LLP

21
22 By: 

23 Robert S. Lawrence
24 Attorneys for Defendants
25 SEAN KNIGHT, JOANNE READER,
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