UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA
PINELLAS DIVISION

Sammy Adams, *Plaintiff*, v. Xtreme, S.A., and Sports.com Inc., *Defendants*.	Civil Action No: A-11-CA-2536—CHR **DEFENDANT'S BRIEF IN OPPOSITION OF MOTION TO REMAND,** & **DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL AUTHORITIES

STATEMENT OF JURISDICTION

This Court violates Due Process by exercising personal jurisdiction over Xtreme, S.A. ("Xtreme"), a foreign defendant. The Due Process Clause states in part, "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Here, the Plaintiff has not met his burden of proving that Xtreme has maintained the requisite contacts with Stetland to render personal jurisdiction proper in this instance. See Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945). In some circumstances, a defendant's contacts with the United States as a whole can be aggregated to sustain personal jurisdiction over it when it is not subject to the jurisdiction of any one state; however, that rule only applies to federal law claims, and is, therefore, inapplicable to this analysis of a state-law claim. Fed. R. Civ. P. 4(k)(2). Since Xtreme did not avail itself of the benefits of Stetland and since Stetland is an unreasonable and unfair forum, personal jurisdiction here is improper.

This Court properly exercises removal jurisdiction over these actions under 28 U.S.C. § 1332 and 28 U.S.C. § 1441 because the amount in controversy exceeds the sum or value of $75,000, and there is diversity of citizenship between the plaintiffs and all properly joined defendants. Plaintiff Sammy Adams ("Adams") has conceded that the amount in controversy exceeds $75,000. Defendant filed a

timely notice of removal within thirty days after the receipt of the pleading in accordance with 28 U.S.C. § 1446. Further, there were no defects in Defendant's removal petition. Adams's joinder of a local online retailer was fraudulent and was done only to defeat diversity jurisdiction. Therefore, this Court ignores Adams's joinder of a non-diverse defendant and exercises its original subject-matter jurisdiction. See Plymouth Consol. Gold Mining Co. v. Amador & Sacramento Canal Co., 118 U.S. 264 (1886).

QUESTIONS PRESENTED

1. Did Stetland violate due process by asserting personal jurisdiction over Xtreme, a foreign defendant who never used its website to purposefully target the state or to knowingly interact with Stetland residents?
2. Did the Plaintiff fraudulently join Sports.com, a local online retailer, by asserting a factually insufficient claim solely to defeat diversity jurisdiction and preclude Xtreme from its right to remove to federal court in the face of the heightened pleading standards outlined by the Supreme Court in Twombley and Iqbal?

STATEMENT OF FACTS

This matter arises from a personal injury action filed in Stetland state court on July 1, 2011 by Adams. (Order 1, Aug. 12, 2011.) Adams is a citizen of Stetland, a state without mountains. (Lukas Aff. ¶ 5, July 21, 2011.) Adams fell while rappelling down the sheer rock face of the highest mountain peak in Texas and now alleges that his fall was a result of a defect in the SkyNet safety harness. (Order 3.) Defendant Xtreme, a corporation incorporated in and having its principal place of business in Switzerland, is the exclusive designer, manufacturer, and marketer of the safety harness. (Lukas Aff. ¶ 3-4.)

Adams learned about the harness after searching online for mountain climbing websites and clicking a generic advertisement for Xtreme. (Pl.'s Aff. ¶ 5, Aug. 5, 2011.) There, he found general information about the harness but was not able to buy it since Xtreme's website cannot transact purchase orders. (Lukas Aff. ¶ 3.) Instead, Adams indicated he planned to climb in Texas and was linked to the website of independent retailer, Defendant Sports.com, which is incorporated in Stetland but has its principle place of business in Texas. (Pl.'s Aff. ¶ 5.) Adams admits the harness was delivered to him in Texas after he bought it online from Sports.com. Id. at ¶ 6-7. Sports.com is merely an authorized retailer of Xtreme products; thus, it cannot make any independent representations about the harness. (Lukas Aff. ¶ 4.)

Adams sues Defendants jointly, alleging only a blanket theory of liability under Restatement (Second) of Torts § 402A (1965). (Compl. ¶ 14, July 1, 2011.) Because Sports.com was fraudulently joined in this action, Xtreme filed a timely Notice of Removal under 28 U.S.C. § 1446(b) on July 22, 2011. (Order 3.) Xtreme filed this notice concurrently and without waiver of its Objection to Personal Jurisdiction and Motion to Dismiss. (Id. at 3-4.) On August 12, 2011, this Court ordered that both parties inform the Court of the appropriate standards that should be used to rule on the pending challenges to subject-matter and personal jurisdiction. (Id. at 6.)

SUMMARY OF THE ARGUMENT

Xtreme's motion to dismiss for lack of personal jurisdiction should be granted. First, Xtreme did not purposefully avail itself of Stetland by targeting its website at Stetland's residents in order to benefit from the state. Further, Xtreme's website merely provided general product information to anonymous users; thus, Xtreme did not knowingly interact with *any* Stetland resident. Second, and finally, hailing Xtreme into this Court offends notions of fair play and substantial justice. One product, sold through an independent distributor to a single Stetland resident, does not warrant an international lawsuit, especially when Stetland has exhibited no regulatory interest in adjudicating disputes of this nature.

In the alternative, Adams's motion to remand should be denied because subject-matter jurisdiction in this Court is proper since he fraudulently joined a "sham" local defendant, Sports.com. This Court should reject Adams's plea for leniency. Practically, Adams asks this Court to go on a fishing expedition to link minimal facts with a recoverable cause of action against Sports.com. To sanction Adams's argument would flaunt the Supreme Court's decisions in Twombly and Iqbal, which provide explicit guidance for plaintiffs to state a claim in civil contexts. In light of Twombly and Iqbal, Adams has failed to state a claim either (1) on the face of the pleadings or (2) with evidence introduced outside of the pleadings; therefore, Xtreme has met its burden in proving that Sports.com was joined solely to defeat diversity and subject-matter jurisdiction is proper here.

ARGUMENT

A federal district court may dismiss a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999). A court may dismiss for lack of personal jurisdiction prior to ruling on a remand motion for lack of subject-matter jurisdiction without violating separation of power principles when the personal jurisdiction motion turns on federal constitutional issues.[1] See, e.g., Barreiro v.

[1] "'Our Federalism' does not mean blind deference to 'States' Rights' … [instead] it is a system in which there is sensitivity to the legitimate interests of both State and National Governments." Younger v. Harris, 401 U.S. 37, 44 (1971).

Model Power Int'l Corp., 209 F.3d 719 (5th Cir. 2000) (unpublished opinion). As a result, federal courts are free to decide personal jurisdiction before subject-matter jurisdiction, especially where judicial economy overrides. See id. (cautioning against resolving the merits of a fraudulent joinder claim where judicial economy overrides by dismissing for lack of personal jurisdiction).

This Court is right to decide the motion to dismiss for lack of personal jurisdiction first. Here, Defendant's motion to dismiss for lack of personal jurisdiction raises significant constitutional issues. This Court, in keeping with the principles of "Our Federalism," must pay close attention to jurisdictional disputes that will significantly impact future interstate commerce. In deciding personal jurisdiction first, this Court will shape the judicial debate on the requisite internet contacts that are sufficient to confer personal jurisdiction over a foreign manufacturer. Therefore, the interests of our dual-court system and judicial economy[2] are best served by first turning to Defendant's motion to dismiss for lack of personal jurisdiction.

I. STETLAND VIOLATES THE DUE PROCESS CLAUSE BY ASSERTING PERSONAL JURISDICTION OVER XTREME.

States are only authorized to render judgments against those defendants who are subject to the personal jurisdiction of their courts. Int'l Shoe, 326 U.S. 310. A

[2] If the Court first decides the subject-matter jurisdiction question, Defendant may still be dismissed once the merits of the personal jurisdiction question are adjudicated.

two-step inquiry is used to ensure that a State does not improperly assert jurisdiction over a foreign defendant. Id.

First, the court must "ensure the States do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system." World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980). The Supreme Court has held that a State does not have proper jurisdiction over a foreign defendant unless that defendant has had enough contact with the State to show that it was availing itself of the benefits and protections of that State. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). In addition, before a State can properly assert jurisdiction over a foreign defendant, the defendant must have *purposefully* availed itself by actually "targeting" that state with its activities. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011).

Second, even if the defendant did purposefully avail itself of the forum, the court must still "protect the defendant against the burdens of litigating in a distant or inconvenient forum." World-Wide Volkswagon, 444 U.S. at 292. Thus, if litigating in a distant forum is so burdensome upon a defendant that it is unreasonable and unfair, jurisdiction there is improper. See Int'l Shoe, 326 U.S. at 317.

A. Xtreme did not use its website to purposefully avail itself of Stetland.[3]

In McIntyre, the Supreme Court affirmed that a foreign corporation is only amenable to suit where it can be said to have *targeted* that forum, and therefore *purposefully* availed itself, not merely where it might have predicted its commercial activities would have effect. 131 S. Ct. at 2788 (emphasis added). Though no uniform standard exists to assess whether a defendant purposefully availed itself of a State based solely on its Internet activity, the Court's insistence that *all* of a defendant's contacts must target the forum to justify jurisdiction sheds light on the issue. Thus, we urge this Court to hold that a defendant must have used its website, like any other contact, to "target" or "direct" its activity toward a particular state to be amenable to suit there.

There are grave implications if this Court does not require that a defendant do something more than maintain a website before subjecting it to jurisdiction in every state. Potentially, any manufacturer would be amenable to suit in any State, even if only one resident viewed its website. This Court should be guided by the Supreme Court's admonition that "jurisdiction is [first] a question of authority rather than fairness." McIntyre, 131 S. Ct. at 2788. Ultimately, a State does not

[3] Xtreme has appropriately requested and been granted further discovery to ascertain whether any contacts exist between it and Stetland, beyond the limited number in the record. Until that time and for purposes of this brief, the analysis of Xtreme's contacts with Stetland will be limited to its Internet activity.

have authority over those defendants who have not targeted that forum. Id. The same standard must be maintained for Internet contacts as well or else "the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist." ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002).

Absent clear guidance from the Supreme Court, the Zippo opinion has become the seminal authority regarding personal jurisdiction based upon Internet contacts. Toys"R"Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003) (citing Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997)). Originating as a sliding scale of interactivity, the Zippo standard granted jurisdiction over a defendant who was "clearly doing business" over its website with residents of the forum and denied jurisdiction when a defendant's website was "passive." Zippo, 952 F.Supp. at 1124. Today, the Zippo standard has evolved to more closely mirror the "targeting" requirement of the recent McIntyre decision. Many circuits now refuse to grant jurisdiction over a foreign defendant unless there is evidence that it "purposefully availed itself of conducting activity in the forum state by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other contacts."[4] E.g. Toys"R"Us, 318 F.3d 446 (citations omitted). We urge this Court to maintain

[4] Again, pending further discovery, this analysis will be limited to Xtreme's Internet contacts.

this standard and find that, since Xtreme did neither of these things, it did not purposefully avail itself of the forum state by its website.

1. Xtreme did not directly target its website to Stetland.

Following the Supreme Court's admonition in World-Wide Volkswagon that foreseeability alone does not create jurisdiction, 444 U.S. at 295, Zippo's progeny holds that a defendant does not target a forum unless it does "something more than commit a foreign act with foreseeable effects in the forum." Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000). The Court has defined this "something more" as a defendant's "express aiming" at the forum state. Calder v. Jones, 465 U.S. 783 (1984). Merely advertising or soliciting to the entire United States with a website is not enough to sustain jurisdiction over a foreign defendant in just one state. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997).

Whether a defendant targeted an individual State is considered on a case-by-case basis. McIntyre, 130 S. Ct. at 2789. However, the main inquiry is whether the website appears to have been "intentionally aimed" at the forum. Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1020 (9th Cir. 2000). In Gator.com, a defendant's website was intentionally aimed at a State when it was "clearly and deliberately structured to operate as a sophisticated virtual store" in the forum. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1078 (9th Cir. 2003). There,

L.L. Bean "targeted" its website at California by directing email solicitation to forum residents and maintaining online accounts for them. Id. at 1074. On the other hand, in Pebble Beach, the defendant had taken no action that could be "construed as being expressly aimed at California" when its website only provided an online inquiry form and general information about the defendant's hotel. Pebble Beach, Co. v. Caddy, 453 F.3d 1151, 1158 (9th Cir. 2006).

Unlike the website in Gator.com, Xtreme's website was not a "virtual store;" it held no online accounts, and it did not solicit business with Stetland residents by email. Although Adams saw Xtreme's advertisement on a mountain climbing website, it would be illogical to conclude that the advertisement had been "intentionally aimed" at Stetland, since Stetland does not have a single mountain. (Pl.'s Aff. ¶ 3.) Further, like the Pebble Beach website, Xtreme merely used its website to provide general information to anonymous users. (Lukas Aff. ¶ 3.) Thus, nothing in the record suggests that Xtreme targeted Stetland or Stetland's residents with its website or its advertisement.

2. Xtreme did not knowingly interact with residents of Stetland through its website.

A defendant knowingly interacts with residents of a state when it *freely chooses* to do business with those residents either by entering into contracts with them through the website, or by email or other electronic commerce. Stewart v. Hennessey, 214 F.Supp.2d 1198, 1203 (D. Utah 2002). By knowingly interacting

with residents of a forum, a defendant "reaches out beyond [its] native state and creates ongoing relationships and obligations with citizens of the forum." Id. (citing Burger King, 471 U.S. at 479-80). Without such knowing interactions, a defendant will not be subject to the forum state's jurisdiction. Id.

The central inquiry here is whether the defendant made a "conscious choice" to conduct business with forum residents. Toys"R"Us, Inc., 318 F.3d at 452. In Stewart, a defendant's repeated emails via its website with a forum resident to discuss prices, parts and shipping for its product was enough to establish jurisdiction because the defendant was *knowingly* doing business with that resident. 214 F.Supp.2d at 1203. However, in Toys"R"Us, a Spanish corporation did not consciously choose to do business with New Jersey residents when its website did not prompt visitors for their billing or mailing addresses. Id. at 450. There, the court reasoned that the defendant had no way of knowing its products were being sold to New Jersey residents, especially since the two purchases that were made by forum residents via the defendant's website were shipped to somewhere outside of New Jersey. Id.; accord Stomp, Inc. v. NeatO, L.L.C., 61 F.Supp.2d 1074, 1078 n.8 (C.D. Cal. 1999) (explaining that a defendant does not "knowingly sell" its products to residents of a forum, and will not be amenable to suit in that forum, when it has no way of knowing whether its distributor will ship its products to residents of that forum state).

Unlike the defendant in Stewart, Xtreme did not knowingly interact with Adams through email or otherwise. Further, Xtreme had no way of knowing that Adams was a resident of Stetland. When prompted for the location where he planned to climb, Adams typed "Texas," not "Stetland." (Pl.'s Aff. ¶ 5.) Further, Xtreme's website only used that information to direct Adams to a Texas distributor, Sports.com. Id. Thus, according to the reasoning in Stomp, Xtreme had no way of knowing whether Sports.com ever consummated that sale. Indeed, Lukas attests that to his knowledge, Xtreme has never sold a product directly to any customers in Stetland. (Lukas Aff. ¶ 5.) Thus, Xtreme did not knowingly interact with a single Stetland resident over its website.

B. Even if this Court found Xtreme had purposefully availed itself of Stetland, jurisdiction in Stetland offends traditional notions of fair play and substantial justice.

Even if enough contacts exist to show that a defendant purposefully availed itself of a State, jurisdiction is still improper in a forum where it is unreasonable to require the corporation to defend itself there. Int'l Shoe, 326 U.S. at 317. Thus, the burden on the defendant is always a primary concern. Id. In addition to the burden on the defendant, though, the Court may evaluate: the plaintiff's interest in obtaining convenient and effective relief; the forum State's interest in adjudicating the dispute; the judicial system's interest in efficiency; and the "shared interest of

the several States in furthering fundamental substantive social policies." World-Wide Volkswagen, 444 U.S. at 292.

Here, the burden upon Xtreme to litigate in Stetland is obvious. Xtreme's representatives will have to travel across the world to defend the corporation in this suit. This suit will occur in a foreign country, language, and judicial system with unfamiliar substantive and procedural laws. And, while the burden on the defendant is not the only consideration, it is hardly outweighed by the fact that Adams chose to bring this suit in Stetland simply because he lives there.

Furthermore, Stetland has little regulatory interest in adjudicating this dispute. While Stetland may claim to have an interest in protecting its residents from defective products, nothing in the record suggests that any resident other than Adams has ever bought a product from Xtreme. Nor has Stetland exercised its Constitutional right to created a state Long-Arm Statute to assert its interest in matters such as these. In fact, the Supreme Court in Shaffer v. Heitner held that the lack of legislative interest in exercising jurisdiction over particular subject-matter was a legitimate reason to deny personal jurisdiction. 433 U.S. 186, 214-15 (1977); accord Kulko v. Super. Ct. of Cal., 436 U.S. 84, 84 (1978). And, while a state has a legitimate interest in "redressing injuries that occur *within its borders*," the Court has not extended that interest to one single resident, injured outside of the state. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1983).

Finally, allowing this litigation to proceed in Stetland has catastrophic implications for businesses across the world. Small international businesses, especially, would be deterred from expanding their American presence through the Internet. For all of these reasons, we ask the Court to find that Stetland's assertion of jurisdiction over Xtreme violates due process.

II. PLAINTIFF FRAUDULENTLY JOINED SPORTS.COM, A LOCAL DEFENDANT, SOLELY TO DEFEAT DIVERSITY JURISDICTION.

Xtreme has properly removed this action without the consent of Sports.com, the local defendant in this action, because Sports.com has been fraudulently joined, and their consent to removal is not required. See Diaz v. Kaplan Univ., 567 F. Supp. 2d 1394, 1402 (S.D. Fla. 2008).

To prove improper joinder "the removing party must prove by clear and convincing evidence either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has improperly pled jurisdictional facts to bring the resident defendant into state court. See Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997). Fraudulent joinder is a federal common law exception to the diversity of citizenship requirement mandated by 28 U.S.C.A. § 1332(a). See Plymouth Consol. Gold Mining Co. v. Amador & Sacramento Canal Co., 118 U.S. 264 (1886). The term fraudulent joinder is a term of art and does not reflect any intentional wrongdoing by counsel. See e.g., AIDS

Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 1000, 1003 (4th Cir. 1990). Rather, the term is simply legal shorthand for deciding whether a particular party's citizenship should be disregarded in assessing subject-matter jurisdiction. Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 917 (W.D. Mich. 2011).

Today, we ask this Court to adopt a two-step inquiry to conclude Sports.com has been fraudulently joined in this action. First, we ask this Court to determine, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, whether Adams has maintained a cause of action on the face of the complaint. Second, we ask this court to "pierce the pleadings" to determine whether there is a reasonable basis to believe the plaintiff might succeed against the non-diverse defendant. See Nerad v. AstraZeneca Pharm., Inc., 203 Fed. Appx. 911, 913 (10th Cir. 2006) (unpublished opinion). Through each step of this analysis, the Supreme Court's decisions in Bell Atlantic v. Twombly and Ashcroft v. Iqbal inform this Court of the factual support necessary to state a claim on the face of the complaint or in evidence brought forward beyond the pleadings. 550 U.S. 544 (2007); 129 S. Ct. 1937 (2009).

Some courts have declined to incorporate Twombly and Iqbal for the purposes of fraudulent joinder because removing the action to federal court prevents a state court from interpreting its own law. These decisions are not appealable, and thus are an abrogation of States' rights. Here, however, separation

of power concerns are not present because this Court must interpret Texas state law to determine whether Adams has maintained a cause of action to join Sports.com in a Stetland state court. Ultimately, Stetland state court is in no better position than this Court to interpret Texas state law. See, e.g., Katz v. Costa Armatori, S.p.A., 718 F. Supp. 1508, 1515 n.7 (S.D. Fla. 1989) (noting Federalism principles are not present where the state court applied another state's law to deny a motion to dismiss).

A. On the face of the pleadings, Adams has not stated a claim against Sports.com.

A majority of circuits use a 12(b)(6) analysis to first determine the merits of a fraudulent joinder claim. See Shue v. High Pressure Transports, LLC, No. 10–CV–0559–CVE–PJC, slip op. at 6–7 (N.D. Okla. Nov. 22, 2010); Doucet v. State Farm Fire & Cas. Co., No. 1:09-CV-142, slip op. at 5–6 (E.D. Tex. Sept. 25, 2009); Pascale Serv. Corp. v. Int'l Truck & Engine Corp., C.A. No. 07—0247—S, 2007 WL 2905622 at *2–3 (D.R.I. Oct. 1, 2007). At its core, the 12(b)(6) analysis interprets Rule 8[5] to determine whether the plaintiff's "plain statement" possesses enough "heft to show that the pleader is entitled to relief." Twombly, 550 U.S. at 557.

The threshold inquiry of a 12(b)(6) analysis for fraudulent joinder purposes is whether a factual fit exists between the plaintiff's allegations and the pleaded

[5] Fed. R. Civ. P. 8(a)(2).

theory of recovery. See Escuadra v. Geovera Specialty Ins. Co., 739 F. Supp. 2d 967, 976 (E.D. Tex. 2010). A factual fit exists when (1) specific facts are pled in support of the theory of liability and (2) cognizable theory of liability is alleged. See Griggs v. State Farm Lloyds, 181 F.3d 694, 701-02 (5th Cir. 1999). For example, the First Circuit correctly applied a Twombly 12(b)(6) analysis and denied a motion to remand when the plaintiff only pled the elements of a cause of action, yet failed to incorporate any facts specific to the local defendant or the cause of action alleged. See Pascale Serv. Corp. at *2–3. Alternatively, a Fourth Circuit district court found a factual fit did not exist when the plaintiff alleged the wrong theory of liability and ignored the general rule that attorneys are not liable to third parties. Bertwell v. Allstate Ins. Co., No. 0:07—3875—CMC, 2008 WL 304736 (D.S.C. Jan. 31, 2008).

Here, Adams has failed to allege a cognizable theory of liability by ignoring the general rule in Texas that non-manufacturing retailers are not liable for the defects of the products sold. (Compl. ¶¶ 13-14); see Tex. Civ. Prac. & Rem. Code Ann. § 82.003 (Vernon 2009). Instead, Adams has incorporated the Restatement (Second) of Torts § 402A (1965) to recover against Sports.com. Normally, in most circumstances, the Restatement imposes strict liability on any retailer of a defectively manufactured product, so long as the retailer is in the business of selling those goods. Id. But in 2009, Texas enacted a tort reform statute, which

largely superseded the blanket liability on non-manufacturing retailers prescribed by the Restatement. See § 82.003(a)(1)-(7); see also New Tex. Auto Auction Servs., L.P. v. Gomez de Hernandez, 249 S.W.3d 400, 405 (Tex. 2008). As a result, "a seller that [does] not manufacture a product is not liable for harm caused to the claimant by the product." Gomez de Hernandez at 405 n.32 (quoting § 82.003(a)).

Not only has Adams failed to allege a cognizable theory of liability, but he has also failed to allege specific facts to support any theory of liability. Sometimes courts will speculate about an unlikely factual fit not apparent on the face of the complaint, but they only do so when plaintiffs include specific courses of conduct and a clear theory of liability. See, e.g., Archuleta v. Taos Living Ctr., LLC, No. CIV 10—1150, 2011 WL 2429329, at *8 (D.N.M. May 30, 2011). Because Adams has failed to plead an adequate theory of liability, this Court should not speculate in any way about the possible ways this Plaintiff can recover. Although Adams has complained that Xtreme specifically marketed the SkyNet safety harness for its improved safety, Adams did not make a similar specific allegation about Sports.com. (Compl. ¶ 9.) However, Adams has claimed that Sports.com's general assurances are enough to impute liability for a product defect. (Id. ¶ 8.) But, the Fifth Circuit, in interpreting section 82.003, rejects this position, stating that a plaintiff may not rely on non-actionable puffery when a co-defendant merely

generalizes the assurances of the manufacturer. See Griggs, 181 F.3d at 701-02. Even though the Restatement has not been expressly overruled by section 82.003, Adams has not pled enough facts under even this broader theory of liability. Thus, this Court should not speculate as to the potential theories of liability Adams might recover under since Adams has made no specific allegation against Sports.com in the face of a Texas statute that limits plaintiffs' ability to recover from non-manufacturing sellers.

Because the Supreme Court's guidance in Twombly and Iqbal informs the first step of the fraudulent joinder analysis, Adams has not stated a claim against Sports.com on the face of the complaint; therefore, Xtreme has satisfied the first step in proving Sports.com was fraudulently joined solely to defeat diversity.

B. Even looking beyond the pleadings, Adams has not introduced *any* evidence to maintain a cause of action against Sports.com.

When a plaintiff misstates or omits determinative facts from the complaint that would determine the propriety of joinder, this Court should look beyond the pleadings to conduct a summary inquiry of affidavits, deposition transcripts, and other summary-judgment type evidence. Smallwood, 385 F.3d at 573-74. In looking beyond the pleadings, courts should not speculate about theories of liability excluded from the original complaint. See Griggs, 181 F.3d at 700 (courts may not consider post-removal evidence that presents "new causes of action or theories" not raised original complaint). The threshold inquiry in this analysis

remains whether specific facts are pled in support of a theory of liability and whether a cognizable theory of liability was alleged. Id. at 701.

Further, courts need not accept all of the plaintiff's claims as true in the face of unanswered affidavits squarely contradicting the plaintiff's factual assertions. Askew v. DC Medical, LLC, No. 1:11–cv–1245–WSD, slip op. at 3 (N.D. Ga. May 12, 2011). In Askew, when the defendant's declaration stated that he had no reason to know of the product defect and the plaintiff did not bring forward specific evidence to contradict defendant's assertions, the court concluded no claim was stated beyond the pleadings. Here, Askew is dispositive and illustrates the correct application of Twombly when evidence is introduced outside the pleadings to determine the merits of a fraudulent joinder claim.

Adams has failed to create even the possibility of factually sufficient or legally adequate claim through his affidavit and the order confirmation receipt from his SkyNet safety harness. (Pl.'s Aff); (Pl.'s Ex. 1.) In his Affidavit as in his Complaint, Adams alleges Sports.com made assurances similar to Xtreme's relating to the intended usage of the safety harness. (Pl.'s Aff. ¶ 7.) But, Xtreme has squarely contended that Sports.com is not authorized to market any part of the SkyNet safety harness. (Lukas Aff. ¶ 3.) Just like Askew, Adams includes nothing in or beyond the pleadings to answer this assertion. Further, Xtreme has cautioned that the SkyNet safety harness cannot be used for every style of high-altitude

climbing. (Def.'s Ex. 1.) In a futile response, Adams has clung to the false hope that Sports.com's "promise to stand behind their [retail] products at all times" is enough to impute liability. (Pl.'s Ex. 1.) In light of the specific evidence brought forward by Xtreme, Adams has simply failed to create even a speculative factual fit between a recognized theory of liability and the conduct of Sports.com.

Askew and Twombly inform the analysis of the evidence introduced beyond the pleadings and lead this Court to the correct conclusion because no claim was stated against Sports.com, their joinder was improper, and thus removal should be sustained.

CONCLUSION

For the foregoing reasons, we ask this Court to dismiss the case for lack of personal jurisdiction; alternately, we ask this Court to deny Plaintiff's motion to remand because the proper parties are completely diverse.

Respectfully submitted,

/s/_____
Team # 1128