UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

ANTHONY MARTINO, an Illinois citizen, *Plaintiff*, v. THE ORCHARD ENTERPRISES, INC., a Delaware corporation; INDEPENDENT ONLINE DISTRIBUTION ALLIANCE, INC., a California corporation; and MEDIANET, INC., a Delaware corporation, *Defendants*.	No. 1:20-CV-02267

MEMORANDUM OF LAW IN SUPPORT OF THE ORCHARD ENTERPRISES, INC. AND INDEPENDENT ONLINE DISTRIBUTION ALLICANCE, INC.'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE OR, IN THE ALTERATIVE, TO TRANSFER FOR IMPROPER VENUE AND FOR A STAY OF DISCOVERY AND ANY ANSWER

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Defendants The Orchard Enterprises, Inc. and Independent Online Distribution Alliance, Inc. respectfully submit the following Memorandum of Law in support of their Motion to Dismiss for lack of personal jurisdiction and improper venue, or, in the alternative, to transfer for improper venue and for a stay of discovery and any Answer pending resolution of the motion.

PRELIMINARY STATEMENT

Pro se Plaintiff Anthony Martino seeks to hale into court three out-of-state defendants to litigate a 60-page, 174 paragraph complaint asserting multiple claims for copyright infringement and conversion and seeking over $6 million dollars in damages—including for purported emotional distress—regarding at most $60.00 of record album sales and royalty earnings. Notably, as set forth in the motion to dismiss filed by MediaNet, Inc. all the sales were made only to Plaintiff and his father.

Plaintiff filed this action in Illinois against The Orchard Enterprises, Inc., Independent Online Distribution Alliance, Inc. and MediaNet, Inc., even though none of the defendants has any cognizable connection to this State. Indeed, none of the defendants are incorporated or have their principal places of business in this State and none target or purposefully direct any activities into this State. Rather, Plaintiff seeks to invoke this Court's jurisdiction based on illegitimate and outmoded jurisdictional theories and untrue factual allegations. This Court is also an improper venue in which to litigate this dispute because none of the defendants resides or can be found here and, with respect to the conversion claim, no part of the events giving rise to the claim occurred here. This Court should stay discovery (other than any needed discovery related to personal jurisdiction) and the filing of any Answer while the motion is pending.

As an alternative to dismissal and to cure the defect in venue, this Court may transfer this case to the Southern District of New York under 28 U.S.C. § 1406(a). Transferring this action to

New York would allow Plaintiff to proceed with his case in an appropriate court and would moot the problem with personal jurisdiction and venue, as The Orchard Enterprises, Inc. and Independent Online Distribution Alliance, Inc. are based in New York and MediaNet, Inc. consents to suit in New York.

The below explains more fully why there is no personal jurisdiction over The Orchard Enterprises, Inc. and Independent Online Distribution Alliance, Inc. and why this is an improper venue for the copyright and conversion claims against them and why discovery and the filing of any Answer should be stayed. MediaNet has concurrently filed its own motion to dismiss explaining why this Court lacks personal jurisdiction over it.

FACTUAL BACKGROUND

The following facts and allegations are contained in Plaintiff's Second Amended Complaint ("SAC") and in the Declaration of Tucker McCrady, Executive Vice President & General Counsel at The Orchard, filed concurrently herewith.[1]

A. The Parties

Plaintiff Anthony Martino is an Illinois citizen. SAC ¶ 23. He is an investigator and "professional sing/songwriter and self-funded recording artist" who has released recordings under the names "Tony Martino" and "the Martino Conspiracy." *Id.* ¶¶ 2, 15.

Plaintiff alleges that Defendants The Orchard Enterprises, Inc. ("Enterprises") and Independent Online Distribution Alliance, Inc. ("IODA") are, respectively, a Delaware and California corporation, with principal places of business in New York. *Id.* ¶¶ 24-25. Plaintiff further alleges that these companies—referred to here as The Orchard Defendants —provide

[1] The Court (1) may consider on this motion the facts set forth in Mr. McCrady's declaration; and (2) should reject Plaintiff's allegations where they are rebutted by those facts, given that it is Plaintiff's burden to establish that personal jurisdiction exists. *See Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987), *superseded on other grounds.*

various music distribution and administrative services to national digital and Internet retailers, national brick and mortar retail stores, and national mobile carriers and other businesses. *Id*.[2]

Plaintiff also has named MediaNet, Inc. as a defendant, and MediaNet has filed its own motion to dismiss for lack of personal jurisdiction and improper venue or, alternatively, to transfer for improper venue.

B. Plaintiff's Infringement and Conversion Allegations

Plaintiff alleges that he is the copyright owner of the sound recordings and musical compositions embodied on a record album titled "Hope in Isolation." SAC ¶ 2; Ex. A. He asserts claims for copyright infringement and conversion regarding this work.

In his copyright claims, Plaintiff alleges that The Orchard Defendants infringed his copyrights by distributing this album (and its 11 individual tracks), without his permission, to co-defendant MediaNet, for MediaNet to further distribute to its customers and, ultimately, to end users. *Id*. ¶¶ 107-112, 132, 134, 137. Plaintiff also alleges that The Orchard Defendants distributed the album to internet radio stations Live365.com and Last.fm and to an Indian "interactive music streaming service called Gaana.com." *Id.* ¶¶ 98, 101. (Plaintiff asserts similar infringement claims against MediaNet for both Hope in Isolation and a second album, titled "Slightly Defined," which The Orchard Defendants did not distribute).

In his conversion claim, Plaintiff alleges that The Orchard Defendants registered a "rights ownership" claim to receive performance royalties related to three recordings contained on the

[2] The Orchard Defendants believe that Plaintiff intended to name Orchard Enterprises NY, Inc. ("Orchard NY"), and not Enterprises, as a defendant in this case given that Orchard NY is the operating entity that engages in the music distribution business at issue here and Enterprises is a holding company. McCrady Decl. ¶ 5. Nevertheless, for purposes of this motion only, The Orchard Defendants include Orchard NY within the defined term The Orchard Defendants, given that this Court would not enjoy either general or specific jurisdiction against Orchard NY, and this district would remain an improper venue, even if Plaintiff had named Orchard NY as a defendant instead of Enterprises.

Hope in Isolation album. Plaintiff alleges that The Orchard Defendants registered this claim with SoundExchange, a rights management organization that collects and distributes royalties for certain public performances of sound recordings by internet and satellite radio companies and webcasters. *Id.* ¶¶ 21, 53-54, 78. Plaintiff contends that, as a result of this supposedly improper registration, The Orchard Defendants wrongfully obtained SoundExchange royalty payments "in minimal amounts" for performances of those three recordings by "third-party Internet radio stations, including Last.FM, Live365.com, and KBAC-FM" and that SoundExchange placed any further royalty earnings on hold given the parties' competing claims to the works. *Id.* ¶¶ 62-65, 79-81. Plaintiff contends that he is the rightful owner of the recordings and that Sound Exchange should have paid the performance royalties to him. *Id.* ¶ 58.[3]

C. Jurisdictional Allegations and Facts

The Orchard Defendants are music distributor and label services companies specializing in the marketing, sale, and distribution of music, video, and film for record labels and recording artists throughout the United States and around the world. McCrady Decl. ¶ 3.

Among other things, The Orchard Defendants collect and aggregate sound recordings from their record label and artist clients. *Id.* ¶ 7. They provide those recordings to physical music outlets and license them to digital music outlets, such as Apple, Spotify, and Amazon, for ultimate distribution and streaming to end user consumers and to other music outlets, including to co-defendant MediaNet, for those outlets to further distribute and exploit. *Id.* ¶ 8. The Orchard

[3] The Orchard Defendants have earned a total of $1.64 in revenues from the exploitation of Hope in Isolation. To date, The Orchard Defendants have received no royalties from SoundExchange, and are informed and believe that SoundExchange has placed on hold less than $3.00 of performance royalties related to this dispute. McCrady Decl. ¶ 24. Plaintiff nevertheless seeks infringement damages against The Orchard Defendants between $660,000 and $3,300,000. SAC ¶ 126; Prayer for Relief, Sections B and C. Plaintiff also seeks damages of $105,251 on his conversion claim, including damages for "emotional distress with the manifestation of physical symptoms." *Id.* Prayer for Relief Section E.

Defendants also own and distribute their own sound recordings. *Id.* ¶ 9. The Orchard Defendants are thus part of the stream of commerce by which sound recordings are distributed from such labels and artists to their fans around the world.

The Orchard operates its distribution business on a worldwide basis, and it does not specifically direct its services towards any business or end-user located in any one state in the United States, including in Illinois. *Id*. ¶ 10. Plaintiff's own allegations bear this out. Plaintiff, for example, alleges only that The Orchard provided Plaintiff's Hope in Isolation album to MediaNet (a Delaware company headquartered in Seattle, Washington); Last.fm (a ViacomCBS company apparently registered and headquartered in the United Kingdom), Live.365.com (a Delaware company headquartered in Pittsburgh), and Gaana.com (a company located in India). SAC ¶ 101; *see* Declaration of Cynthia S. Arato ¶¶ 2-3 & Exs. A& B (concerning Live.365.com and Last.fm).

Plaintiff nevertheless alleges the following two "facts" to support this Court's personal jurisdiction over The Orchard Defendants: (1) MediaNet (not The Orchard Defendants) allegedly provided the album to two Illinois-based stores, and those stores sold its recordings to the general public through their respective online websites (SAC ¶¶ 32 & Ex. B); and (2) Plaintiff allegedly suffered harm in this State, where he resides (SAC ¶ 32).

Plaintiff's first "fact" is both irrelevant and untrue. Even if MediaNet had provided the album to these two Illinois stores (and it did not), The Orchard has no control over (1) which entities MediaNet elects to do business with; (2) where those entities are located; or (3) to whom those entities sell their music. McCrady Decl. ¶ 19. Accordingly, as set forth below, MediaNet's alleged conduct cannot be attributed to The Orchard Defendants. In any event, MediaNet's motion to dismiss establishes that MediaNet has no direct relationship with either of these two

Illinois based stores. *See* Declaration of Seth Goldstein in support of MediaNet's Motion to Dismiss, at ¶ 15. Plaintiff's second "fact" is legally irrelevant, as also set forth below.

ARGUMENT

I. THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER THE ORCHARD DEFENDANTS

The Orchard Defendants are not subject to this Court's general jurisdiction because they are not "at home" in Illinois. *Daimler AG v. Bauman*, 571 U.S.117, 138–39 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Kipp v. Ski Enters. Corp. of Wis., Inc.*, 783 F.3d 695, 697-98 (7th Cir. 2015). The Orchard Defendants are not subject to this Court's specific jurisdiction because they have not purposefully directed any case-related conduct towards Illinois and a finding of jurisdiction would offend "traditional notions of fair play and substantial justice," *N. Grain Mktg., LLC v. Greving*, 743 F.3d 487, 492 (7th Cir. 2014).

A. This Court Lacks General Jurisdiction Over The Orchard Defendants

The Orchard Defendants are not subject to the Court's general jurisdiction because they are not "at home" in this State given that (1) The Orchard Defendants are neither incorporated nor based in Illinois; and (2) this is not an "exceptional case" where general jurisdiction otherwise could be found. *Daimler*, 571 U.S.at 137, 139 n.19; *Kipp*, 783 F.3d at 697-98.

So far, the U.S. Supreme Court and the Seventh Circuit have identified only two places where the "at home" condition for general jurisdiction can be met—a corporation's state of incorporation and its principal place of business. *Daimler*, 571 U.S.at 137; *Kipp*, 783 F.3d at 698. The Orchard Defendants satisfy neither of these conditions because, as Plaintiff concedes, The Orchard Defendants are Delaware and California corporations with their principal places of business in the state of New York. SAC ¶¶ 24-25.

This case also comes nowhere close to being an "exceptional case" that could support the exercise of general jurisdiction over the companies. The notion of an "exceptional" case has its genesis in a footnote in *Daimler* keeping open "the possibility" that an "exceptional case" may exist where a corporation's operations are "so substantial and of such a nature as to render the corporation at home in that State." 571 U.S.at 139 n.19. Since *Daimler* was decided, neither the Supreme Court nor the Seventh Circuit has found this exceptional case to exist and, accordingly, the bar for an "exceptional case" has not yet been set. The Seventh Circuit has nevertheless made clear that the criteria for such a case "require more than the 'substantial, continuous, and systematic course of business'" that was once thought sufficient to establish general jurisdiction and upon which Plaintiff appears to rely. *Kipp*, 783 F.3d at 698 (internal quotation omitted).

Rather, an exceptional case must involve "continuous corporate operations" that "are so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from [the challenged] activities." *Id.*; *see also Daimler*, 571 U.S. at 139 n.20 ("at home" standard requires more than "doing business" test because a "corporation that operates in many places can scarcely be deemed at home in all of them"); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016) (when "a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case'").

To support general jurisdiction, Plaintiff alleges only that The Orchard Defendants supposedly do business in the State, including by regularly entering into contracts with persons in this State, employing people in the State, and advertising for employees in the State. *See* SAC ¶ 32. Even if these allegations were true (and they are not), Plaintiff still would miss the bar given that The Orchard Defendants are not registered to do business in Illinois, do not own or

rent office space or other property in Illinois, do not direct any marketing or advertising to Illinois entities or residents, and do not store their music catalogue on computer servers located in the State. *See* McCrady Decl. ¶¶ 11-14; *see also Daimler*, 571 U.S. at 123 (even if imputed to defendant, no general jurisdiction even where subsidiary of defendant had multiple California based facilities, including a regional office, and California sales amounted to 10% of company's nationwide sales); *Kipp*, 783 F.3d at 698 (no general jurisdiction where defendant had "a few contacts" with Illinois, including Illinois customers, but did not maintain an Illinois office, was not registered to do business in the state, and did not advertise or have employees there).

Plaintiff's jurisdictional allegations are, moreover, not true. Contrary to Plaintiff's allegations, The Orchard Defendants do not "regularly solicit" employees from the State of Illinois (McCrady Decl. ¶ 15); they collectively employ only two individuals (out of over 250 total employees who work for the companies in the United States) who reside in Illinois (*id.* ¶ 16); and they do not "regularly" enter into contracts with Illinois citizens (to the extent they enter into any such contracts at all), given that few record labels and online digital platforms are based in Illinois (*id.* ¶ 17).

B. This Court Lacks Specific Jurisdiction Over The Orchard Defendants

Plaintiff cannot show that The Orchard Defendants are subject to specific jurisdiction in Illinois because (1) The Orchard Defendants have not purposefully directed their activities into this State and (2) it would be unfair and unjust to subject The Orchard Defendants to the jurisdiction of an Illinois court.

"For a State to exercise [specific] jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). Under this "substantial connection" test, the exercise of specific jurisdiction is appropriate only where "(1) the defendant has purposefully directed his

activities at the forum state or purposefully availed himself of the privilege of conducting business in that state, and (2) the alleged injury arises out of the defendant's forum related activities." *N. Grain Mktg.*, 743 F.3d at 492. The exercise "must also comport with traditional notions of fair play and substantial justice." *Id.*

i. The Orchard Defendants Did Not Direct Suit-Related Conduct Towards Illinois

The Orchard Defendants never purposefully directed any case-linked activity to this forum sufficient to establish specific jurisdiction, and Plaintiff hardly contends otherwise. At best, Plaintiff alleges that The Orchard Defendants distributed Hope in Isolation to MediaNet, and that MediaNet, in turn, allegedly distributed Plaintiff's albums to two brick-and-mortar music stores located in Illinois. *See* SAC ¶ 32 & Ex. B. As set forth in MediaNet's own motion to dismiss, however, MediaNet has no direct relationship with either of those stores, or, indeed, any other "brick and mortar retailers" in Illinois. Goldstein Decl. ¶ 15.

Moreover, even if MediaNet did distribute the album to those stores, that is a not a ground for exercising jurisdiction over The Orchard Defendants, given that The Orchard Defendants have no control over (1) the companies with which MediaNet does business, (2) where those entities are located, or (3) to whom those entities sell their music. Accordingly, the distribution of Plaintiff's recordings by either MediaNet or MediaNet's own customers cannot be attributed to The Orchard Defendants for jurisdictional purposes. *See Walden*, 571 U.S. at 277 (predicate for specific jurisdiction must be "contacts that the defendant *himself* creates with the forum" (emphasis original)); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts or of the unilateral activity of another party or a third person").

At best, Plaintiff contends only that The Orchard Defendants placed music into a "stream of commerce" that flows into Illinois, but that, "without more," cannot demonstrate purposeful availment of the forum. *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112 (1987) (plurality op.); *see J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (plurality op.) ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (no specific jurisdiction based on sending of misleading emails into the state absent evidence that defendant "in some way targeted residents of a specific state"); *Lorusso v. Menard, Inc.*, No. 15-CV-7208, 2016 WL 704839, at *2 (N.D. Ill. Feb. 29, 2016) (no specific jurisdiction where defendant knew its products would be offered in Plaintiff's Illinois stores, unless defendant affirmatively sought that result). Plaintiff has not alleged, and cannot allege, the necessary "more." He has not alleged, and cannot allege, that The Orchard Defendants have targeted Illinois through marketing or other means or have otherwise expressed a specific intention to serve Illinois markets, *see Asahi*, 480 U.S. at 112, much less shown that those actions are directly connected to his claims.

It is irrelevant to the specific jurisdiction analysis that Plaintiff resides, and claims to have suffered damages, in this State. SAC ¶ 32. "[M]ere injury to a forum resident" cannot subject a defendant to personal jurisdiction in that forum. *Walden*, 571 U.S. at 290; *Advanced Tactical*, 751 F.3d at 802 ("[A]fter *Walden*, there can be no doubt that the plaintiff cannot be the only link between the defendant and the forum."); *Philos Techs., Inc. v. Philos & D, Inc.*, 802 F.3d 905, 915-16 (7th Cir. 2015) (post-*Walden*, jurisdiction cannot be based on the theory that

an out-of-state defendant performed a tortious act or omission that caused injury in Illinois). For this same reason, Plaintiff cannot establish personal jurisdiction by alleging that The Orchard Defendants knew that Plaintiff resided in this State and could be "injured" here. SAC ¶ 32. A defendant's knowledge that a plaintiff will be injured in forum state is a necessary *but insufficient* condition for the exercise of specific personal jurisdiction; the plaintiff still must show that the defendant expressly aimed its conduct at the forum state, which Plaintiff cannot do here, as set forth above. *See Felland v. Clifton*, 682 F.3d 665, 674-75 (7th Cir. 2012) (delineating "three showings" necessary to prove purposefully directing activity).

In any event, Plaintiff has failed to allege any facts demonstrating The Orchard Defendants' knowledge of (1) him at the time of their alleged infringement or their assertion of a "rights ownership" claim with SoundExchange or (2) his residence at any time before Plaintiff brought suit. McCrady Decl. ¶¶ 20-22; *see also Sunny Handicraft (H.K.) Ltd. v. Edwards*, No. 16 C 4025, 2017 WL 1049842, at *6 (N.D. Ill. Mar. 20, 2017) (no specific jurisdiction where plaintiffs failed to establish defendant's knowledge that Plaintiffs would be injured in Illinois). The Orchard Defendants certainly did not possess that knowledge when they lodged their royalty rights claim with SoundExchange in 2012 (SAC ¶ 78), given that even Plaintiff concedes he did not surface to dispute that claim until 2017 (*Id.* ¶¶ 57-60).

ii. It Would Not Be Fair To Subject MediaNet to Specific Jurisdiction In This Forum

The exercise of specific jurisdiction against The Orchard Defendants also would offend traditional notions of fair play and substantial justice and should be rejected because The Orchard Defendants have never purposefully directed commercial activities towards the state of Illinois and have no meaningful contacts with this State, such that they could not have reasonably anticipated being haled into this Court based on an attenuated chain leading to the most indirect

contact with Illinois. *See Tower Commc'ns Expert, LLC v. TSC Constr., LLC*, No. 18 C 2903, 2018 WL 5624268, at *9 (N.D. Ill. Oct. 30, 2018) (dismissal appropriate on fairness grounds where defendants had "no ties to Illinois"); *Paldo Sign & Display Co. v. United Vending & Mktg., Inc*., No. 13-CV-1896, 2014 WL 960847, at *3 (N.D. Ill. Mar. 11, 2014) (exercise of specific jurisdiction over foreign defendant based on conduct committed by defendant's customers would offend fair play and substantial justice); *Labtest Int'l, Inc. v. Ctr. Testing Int'l Corp.*, 766 F. Supp. 2d 854, 864 (N.D. Ill. 2011) (dismissal appropriate on fairness grounds because defendant had "no employees or facilities in Illinois, and none of its records, files or witness or information regarding the infringement . . . [were] located in Illinois").

Indeed, to hold The Orchard Defendants susceptible to personal jurisdiction here would, in essence, make it amenable to suit in any jurisdiction where one of their customers' customers' customers independently operates—an outcome that would be plainly inconsistent with the mandates of due process. *See Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (due process requires that defendant himself have "minimum contacts" with forum state).

II. THE COURT SHOULD DISMISS OR TRANSFER THIS CASE BECAUSE VENUE IN THIS DISTRICT IS IMPROPER

This case also should be dismissed because Plaintiff filed the case in an improper venue. Contrary to Plaintiff's allegations, venue in this district is not found under either 28 U.S.C. § 1400(a), the copyright venue statute, or 28 U.S.C. § 1391(b), the general venue statute. SAC ¶ 31.[4] It is Plaintiff's burden to prove venue and this Court need not accept as true Plaintiff's

[4] Where, as here, "a single case involves claims that are subject to the general venue statute, and other claims arising from the same core facts that are subject to a specific venue statute, the specific venue statute controls and applies to all of the claims in the case." *Wahba v. Kellogg Co.*, No. 12 C 6975, 2013 WL 1611346, at *2 (N.D. Ill. Apr. 12, 2013). Accordingly, the copyright venue statute, 28 U.S.C. § 1400(a), should apply to all the claims in this case including

allegations where they are contradicted by defendants' evidence. *Wakley v. Frontera Produce, Ltd.*, No. 13 C 5597, 2014 WL 12767672, at *1 (N.D. Ill. Jan. 15, 2014).

This district cannot be a proper venue under the copyright venue statute because (1) the statute provides for venue "in the district in which the defendant or its agent resides or may be found" (28 U.S.C. § 1400(a)); and (2) none of the defendants reside or can be found here. Under controlling Seventh Circuit law, a corporate defendant "resides" under this statute only where it is incorporated or has its principal place of business. *See Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 443 & n.3, 445 (7th Cir. 1993). As none of the named Defendants in this case are incorporated or based in Illinois, none "reside" here for copyright venue purposes.

In addition, none of the defendants can "be found" in this district because (1) to be "found" here, a defendant must be subject to personal jurisdiction "in the judicial district in which the action was filed" and not just "in the state in which the district court sits," *Milwaukee Concrete*, 8 F.3d at 445-446; and (2) none of the defendants is amenable to personal jurisdiction in this district. For the reasons set forth above and in MediaNet's motion to dismiss, none of the defendants in this action are subject to personal jurisdiction in this district given that none are subject to such jurisdiction within the State of Illinois as a whole. In addition, even if Plaintiff could demonstrate personal jurisdiction over any defendant in this State as a whole, Plaintiff has failed to allege facts demonstrating such jurisdiction over any defendant in this specific district.

This district is also not a proper venue to resolve Plaintiff's conversion claim, as tested under any of the three prongs of the general venue statute. Venue in this district is not proper under the first prong of the general venue statute because (1) that prong provides for venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in

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Plaintiff's claim for conversion. However, even if the general venue statute, 28 U.S.C. § 1391(b), applies to Plaintiff's conversion claim, venue remains improper under that statute as well.

which the district is located" (28 U.S.C. § 1391(b)(1))—with "reside" meaning where personal jurisdiction exists (*id.* § 1391(c)(2))—and (2) neither of The Orchard Defendants is subject to personal jurisdiction in this district or this State.

Venue is not proper under the second prong because (1) that prong provides for venue in "a judicial district in which a substantial part of the events . . . giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated" (*id.* § 1391(b)(2)); and (2) Plaintiff has not alleged facts demonstrating that any events giving rise to his conversion claim occurred in the Northern District of Illinois, let alone the "substantial part" needed to establish venue. Indeed, all of the alleged acts of "conversion"—The Orchard Defendants' registration of a SoundExchange ownership claim over some of Plaintiff's songs, their non-withdrawal of the claim, their receipt of performance royalties, and SoundExchange's placing the royalties on hold—occurred, if at all, in New York (where The Orchard Defendants operate) or (to a lesser degree) in Washington, where SoundExchange is based. *See* McCrady Decl. ¶¶ 4,6; *Huster v. j2 Glob. Commc'n, Inc.*, No. 13 C 6143, 2014 WL 4699675, at *3 (N.D. Ill. Sept. 19, 2014) ("[S]ection 1391(b)(2) does not provide a basis for venue in this district because none of the events giving rise to the claim occurred here.").

Venue is not proper under the third prong because (1) that prong requires that there be "no district in which an action may otherwise be brought as provided in this section" (*id.* § 1391(b)(3)); and (2) Plaintiff can bring his claim for conversion in New York, where The Orchard Defendants reside. *See Huster*, 2014 WL 4699675, at *3 ("fallback provision in section 1391(b)(3) cannot be used as a basis for venue" if "there is another district in which an action may be brought consistent with either section 1391(b)(1) or (2)").

For these reasons, this Court also should dismiss this case or transfer it to the Southern District of New York, pursuant to 28 U.S.C. § 1406(a).

III. THE COURT SHOULD STAY DISCOVERY AND ANY ANSWER PENDING RESOLUTION OF THE MOTION

This Court should stay discovery (other than any needed jurisdiction related discovery) and the filing of any Answer pending this Court's ruling on Defendants' motion. Courts in this district and Circuit have recognized that a stay of merits-based discovery is appropriate pending resolution of personal jurisdiction because it is a threshold issue "without which the court is powerless to proceed to an adjudication" and resolve any discovery issues. *Alexander v. Take-Two Interactive Software, Inc.*, No. 3:18-CV-966, 2019 WL 2176321, at *2 (N.D. Ill. May 20, 2019); *see also Calloway v. AT&T Corp.*, 419 F. Supp. 3d 1031, 1033 (N.D. Ill. 2019); *Advanced Tactical Ordnance Systems, Inc.*, No. 1:12-CV-296, 2012 WL 4854765 (N.D. Ind. Oct. 11, 2012) (granting stay). As the Seventh Circuit has noted in connection with a motion to dismiss on jurisdictional grounds, the "proper course of action is to request that the district court enter a stay of discovery until all jurisdictional issues are decided . . . ." *Daniel J. Hartwig Assocs., Inc. v. Kanner*, 913 F.2d 1213, 1223 (7th Cir. 1990). For these same reasons, good cause also exists for a stay over the filing of any Answer required under this Court's MIDP rules. *See*, *e.g.*, *Calloway*, 419 F. Supp. 3d at 1033 (granting stay of Answer and MIDP deadlines, and discovery stay).

Dated: July 15, 2020
New York, New York

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