

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TALK RADIO NETWORK,)	
)	
Plaintiff,)	
)	
v.)	No. 03C 3167
)	
THOMAS V. LEAVITT <i>et al.</i> ,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF
MOTION OF DEFENDANTS THOMAS V. AND GUNILLA LEAVITT
TO DISMISS OR TRANSFER**

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An Oregon company that syndicates a radio talk show hosted by California resident Michael Weiner, known by his radio sobriquet as Michael Savage, has sued to suppress three web sites created by four individuals – three Californians and one anonymous defendant believed to reside in Arizona. Each of the web sites criticizes Savage’s most offensive and bigoted commentary, quotes other persons who share (or do not share) the web site operators’ perspectives, posts clips containing selected fragments of Savage’s performances that illustrate their criticisms, and calls for members of the public to write letters to Savage’s advertisers urging them to withdraw their support from his programming and threatening to withhold patronage from advertisers who continue to support his work. Even though each of the web sites is engaged in entirely peaceful political advocacy, in the tradition of labor unions, civil rights groups and other “cause” groups in our society, Savage’s syndicator has sued in this Court, claiming personal jurisdiction here and alleging a variety of state law claims such as interference in its contractual relations with companies that advertise on the Savage show, while making unspecified false statements. Subject matter jurisdiction is predicated on the fact that the syndicator is a citizen of Oregon while defendants live in other states.

Two of the California defendants now move to dismiss under Rules 12(b)(2), (3) and (6), or to transfer under 28 U.S.C. § 1404. As this memorandum explains, settled law regarding suits over web sites requires denial of jurisdiction and venue in Illinois. Moreover, the complaint does not properly allege valid state law claims, both because several elements of the asserted claims are omitted, and because the claims are barred by the First Amendment or preempted by federal law. Accordingly, the complaint should be dismissed or transferred to California.

STATEMENT

A. Facts

Plaintiff Talk Radio Network, Inc., is an Oregon corporation whose principal place of

business is in southern Oregon. TRN syndicates several talk shows, with emphasis on such right wing luminaries as Lucianne Goldberg, Bob Dornan, and Michael Savage. <http://www.talkradio.network.com/aboutshows.htm> TRN's shows are heard throughout the United States.¹

The one thing that unites all defendants in this case is their antipathy to one of TRN's clients, Michael Weiner, whose radio moniker is Michael Savage and whose broadcast radio program is called the Savage Nation. On his radio talk show, Savage expresses disdain for blacks, Hispanics, Jews, women, gays, liberals and a variety of other groups of which he disapproves. Savage has recently begun hosting a talk show on the cable television channel MSNBC. Characterized by the complaint as a "talk-show host and best-selling author," ¶ 1, Savage is unquestionably a public figure. Savage lives in Northern California. T. Leavitt. Aff. ¶ 4.

Each of the defendants in this case is involved with an Internet web site that is addressed to issues pertaining to incitement of hatred on the radio. Each of the sites contains extensive commentary about Savage, although one of the sites, www.takebackthemediamedia.org, is addressed to several other media personalities and issues besides Savage. Each site sets forth its operator's opinions about Savage, opinions that are supported by quotations from Savage's statements and illustrated by sound-clips from Savage's shows. *See generally* T. Leavitt Aff., Exh. C. The sites all feature the expression of opinions from persons other than the site operators. Among other

¹ Inspection of the web site of the Corporations Division of the Oregon Secretary of State raises some question of whether this action has been brought in the name of the correct corporate entity. The complaint alleges that plaintiff Talk Radio Network, Inc. is headquartered in the City of Grants Pass, Oregon, ¶ 2, but the State's web site contains no listing for a Talk Radio Network, Inc., in Grants Pass. The web site reveals that a corporation headquartered in Central Point, Oregon, once named Talk Radio Network, Inc., changed its name in the year 2000 to "The Original Talk Radio Network, Inc.", and that there is also another separate company, Talk Radio Network LLC, which has its office in Grants Pass. T. Leavitt. Aff. ¶ 15 and Exh. B.

things, each of the sites also appeals to members of the public to oppose Savage, by, for example, writing letters to his advertisers urging them to stop supporting him financially by giving him their business.

The two defendants who have filed this motion are Thomas V. Leavitt and Gunilla Leavitt. Like Savage, the Leavitts live in California: Thomas is a citizen of the United States, and his wife Gunilla is Swedish. G. Leavitt Aff. ¶ 2. Neither of the Leavitts has any connection to Illinois – they do not live or work there (and never have), they do not own property there, they have no connection to Illinois companies, and Thomas has never even passed through Illinois (Gunilla has passed through the state by changing planes at O’Hare and by riding a transcontinental bus two decades ago). T. Leavitt Aff. ¶¶ 2-3; G. Leavitt Aff. ¶¶ 2.

The Leavitts are responsible for the creation of the web site www.savagestupidity.com. Thomas, a professional computer systems administrator, is the author of all of the content on the site (except for material such as letters or emails written by other persons and posted there). T. Leavitt Aff. ¶¶ 4-5, 12-13. Gunilla, a professional web designer, designed the site when it was first established, but has done no work on it since. Gunilla has not created or authored any of the content on the site. T. Leavitt Aff. ¶ 13; G. Leavitt Aff. ¶ 5.

The web site is fundamentally devoted to the expression of non-commercial opinions. For some months, the site contained links to CafePress, a seller of trinkets; when Internet viewers purchased the trinkets from CafePress after having been referred by savagestupidity.com, Thomas Leavitt gained a small commission. The links to CafePress have not been functional for several months; while they were functional, two trinkets were sold, neither of them to persons in Illinois. T. Leavitt Aff. ¶6. The site also contains links to a bookseller, amazon.com. Although Thomas

Leavitt would receive commissions from the sale of books through his referrals, if enough books were sold in that manner, he has never received any such commissions. T. Leavitt Aff. ¶¶ 6. Finally, the site has appealed for donations to support the costs of maintaining it, and since this action was filed, the site has solicited donations to support Leavitt's legal defense. No donations, however, have been transmitted through the web site itself, which contains no mechanism for sending money to Leavitt. A few hundred dollars in donations were received before suit was filed, much less than the cost of maintaining the web site. T. Leavitt Aff. ¶¶ 7. None of the donors is believed to have been from Illinois. *Id.*

The complaint apparently predicates personal jurisdiction in Illinois on the proposition that "defendants" were "aware of Culligan's contract with TRN to advertise" on the Savage show, ¶ 21, and that "defendants" deliberately induced Culligan, an Illinois company, "to end its contract for advertising time with TRN." ¶ 22. Whatever may be true of the other defendants, this is not true of the Leavitts. *Savagestupidity.com* never mentioned Culligan (until after this lawsuit was filed), T. Leavitt Aff. ¶ 9, and the Leavitts were not aware that Culligan was advertising on the Savage show, or that Culligan was based in Illinois. *Id.*; G. Leavitt Aff. ¶ 6. Nor were the Leavitts aware that Savage's show was on radio stations in Chicago (they do not have a list of his stations). *Id.*; T. Leavitt Aff. ¶ 11. Nor did their web site attack TRN at all; their comments were directed only at Savage. *Id.* ¶ 10; G. Leavitt Aff. ¶ 6.

The complaint alleges that defendants are broadcasting the Michael Savage show on their web sites. ¶ 12. Again, regardless of whether this may be true of some of the other defendants, it is not true of *savagestupidity.com*. At the time suit was filed, the site had a few excerpts from various Savage broadcasts, most of them 30 seconds or less in duration. Each excerpt simply

illustrated the site's contention that Savage is a racist, sexist, anti-Semitic bigot. T. Leavitt Aff. ¶ 8.

Although the complaint alleges that “defendants” have made “false and malicious” statements about Savage, the bulk of savagestupidity.com consists of Leavitt's opinions about Savage, and to the extent that the statements on the site are factual, Leavitt sincerely believes them to be true. *Id.* ¶ 12. Because the complaint does not specify any false or defamatory words on Leavitt's site, however, it is impossible to set forth the specific factual basis that would show that any allegedly actionable statements are true.²

B. Proceedings to Date.

On May 12, 2003, TRN filed a four-count complaint in this Court. The complaint alleges four claims under state law: two common law torts (tortious interference with contract, Count I, and intentional interference with prospective economic advantage, Count II), and two statutory claims (Illinois Consumer Fraud and Deceptive Business Practices Act, Count III, and Uniform Deceptive Trade Practices Act, Count IV). Each of the claims turns on the contention that defendants are running a commercial web site and that the site makes “false and malicious” statements about Savage with intent to interfere with TRN's relationships with advertisers, specifically including Culligan. The complaint does not, however, specify any false words on the savagestupidity site; nor is there any allegation of actual malice. The complaint seeks both preliminary and permanent injunctive relief against the maintenance of the web sites, and seeks several hundred thousand

²The complaint does make reference to a graphic on the michaelsavagesucks.com web site, which puts Savage in a Ku Klux Klan uniform juxtaposed with a reproduction of the MSNBC logo. It is plainly a parody, an expression of opinion, and not a statement of fact. Moreover, because the photo refers to Savage in his new capacity as a television broadcaster for MSNBC rather than as a radio host, the photo has nothing to do with TRN and cannot form a basis for its lawsuit.

dollars in damages.

The complaint also alleges unauthorized copying and rebroadcast of program recordings that TRN claims to own, ¶¶ 10-12, and demands as relief the return of such programs to TRN, Relief Requests ¶ C. However, but there is no allegation that any copyright has been registered and no claim is stated under the copyright laws. Indeed, the complaint goes out of its way to avoid alleging any federal law claims. For example, although companies often invoke trademark claims to attempt to silence Internet critics when the web sites incorporate parts of the company's names or marks, TRN is pursuing in an administrative forum the contention that the domain name "savagestupidity.com" might confuse some of Savage's supporters into thinking that Savage sponsors the Leavitts' web site, and it has assured the panel that "this lawsuit does not concern ownership rights of Complainant's mark or the domain name at issue." T. Leavitt Aff. ¶ 14 and Exh. A. Subject matter jurisdiction is predicated solely on diversity of citizenship between TRN and the four defendants. Complaint ¶ 7.

There is no specific allegation of the basis for personal jurisdiction, although the complaint alleges venue on the theory that a "substantial part of the events giving rise to the claims herein occurred in this district." *Id.* ¶ 8. The complaint also alleges that the Leavitts' site is an "active commercial site" (but not a "commercially **interactive**" site) which enables visitors to make purchases through the Internet, and to exchange information with the site host. *Id.* ¶ 13. The complaint also alleges that the Savage show is aired on radio stations in Chicago, *id.* ¶ 10, that "defendants" were specifically aware that Culligan was advertising on the Savage Show and of TRN's contract with Culligan, and that "defendants" deliberately tried to induce Culligan to end its contract with TRN. *Id.* ¶¶ 20-22, 26-28.

The complaint was served on May 19, 2003; this responsive motion is being filed twenty days later.

ARGUMENT

I. THE ACTION SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.

To be subject to in personam jurisdiction, the Leavitts must have “certain minimum contacts with [Illinois] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). The minimum contacts test requires “in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant’s connection with the state must be such that “he should reasonably anticipate being haled into court” in the state in the event of a dispute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minimum contacts analysis generally requires assessment of whether the court is exercising “general” or “specific” jurisdiction. TRN cannot sustain its burden of proving either general or specific jurisdiction because the conduct at issue – creation in California of a web site where defendants express unfavorable opinions about Savage and inform others about him — occurred outside Illinois and entails no contact by the Leavitts with this state. T. Leavitt Affidavit ¶ 4.³

³On a motion to dismiss for lack of personal jurisdiction, the Court is not limited to considering the face of the complaint; defendant’s evidence may also be considered. *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987). Plaintiff has the burden of proof on this motion. *Steel Warehouse of Wisconsin v. Leach*, 154 F.3d 712, 714 (7th Cir. 1998).

A. General Jurisdiction Is Lacking.

The exercise of general jurisdiction requires that a defendant's contacts with the forum be "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Even "continuous activity of some sorts within a state is not enough to support [general jurisdiction]." *International Shoe*, 326 U.S. at 318. "This is a fairly high standard in practice." *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). Thus, for Illinois to assert general jurisdiction over a non-resident defendant, his contacts with Illinois must be of such a "continuous and systematic" nature that personal jurisdiction over the defendant is proper even if the action is unrelated to the defendant's contacts with the state. *Id.*

Neither of the Leavitts lives in Illinois; they own no property in Illinois, they do not do business in Illinois; Thomas Leavitt has never even been in Illinois, and Gunilla Leavitt has been there only while traveling through by airplane or bus. T. Leavitt Aff ¶¶ 2-3; G. Leavitt Aff. ¶¶ 2-3. Nor does the complaint allege any other facts that would support the exercise of general jurisdiction. Clearly, the Leavitts do not have "systematic and continuous" contacts with the State of Illinois so as to support the exercise of general jurisdiction.

B. Specific Jurisdiction Is Lacking.

Specific jurisdiction is proper when the defendant's contacts with the forum are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8; *RAR, Inc. v. Turner Diesel*, 107 F.3d 1272, 1277 (7th Cir. 1997). To maintain specific personal jurisdiction, TRN must show that: (1) the Leavitts have purposely availed themselves of the privilege of conducting business or causing consequences in Illinois; (2) the cause of action arises from their activities in Illinois; and (3) their conduct has a substantial enough connection with Illinois to make the exercise of jurisdiction reasonable. The defendant's contacts with the forum state must have been sufficiently

purposeful that the defendant should have had fair warning that he would be subject to suit there. *Klump v. Duffius*, 71 F.3d 1368, 1371-1372 (7th Cir. 1995); *Heartstation v. J.L. Industries*, 2003 WL 1826130 (N.D. Ill. 2003), at *3.

The complaint does not specify any basis for a finding of specific jurisdiction, but presumably plaintiff will rely on its allegations that TRN has lost business in Illinois, and that “defendants” aimed their conduct at TRN’s commercial relationships with an Illinois company. ¶¶ 20-23. However, a specialized test has been applied to claims of personal jurisdiction based on a web site. The courts have adopted a sliding scale, first adopted in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997), under which, on the one hand, a non-resident defendant’s non-commercial web site (or a commercial but passive web site) is not a basis for jurisdiction just because it can be viewed in the forum. On the other hand, a site that is highly interactive because it was designed to permit the owner to conduct business through the web site in the forum is likely to be a basis for personal jurisdiction in any forum in which commercial activity pertaining to the alleged wrongdoing has been conducted. Finally, there is an intermediate category in which the web site displays some degree of commercial interactivity, and the court’s task is to examine the quantity and quality of the commercial online interaction to determine whether it is sufficient to warrant subjecting the defendant to personal jurisdiction in the forum.

The Seventh Circuit has yet to address this sliding scale, but many other circuits have

endorsed it,⁴ and this Court has repeatedly applied it.⁵ The rule has been described as “settled law” in the Northern District. *E.g.*, *Shapiro v. Santa Fe Gaming Corp.*, 1998 WL 102677 (N.D. Ill.); *see also Transcraft Corp. v. Doonan Trailer Corp.*, 1997 WL 733905 (N.D. Ill.) (fact that web site encourages communications by email or provides a toll-free number is not sufficient interactivity to warrant personal jurisdiction over claim that goods advertised on web site violated plaintiff’s trademark); *Scherr v. Abrahams*, 1998 WL 299678 (N.D. Ill.) (fact that web site allowed viewers to add email addresses to list for email distribution of publications that allegedly libeled plaintiff and violated his trademarks was not sufficient interactivity for exercise of personal jurisdiction, where publications were sent free of charge). Only where a web site was not only interactive, but also enabled the sale of goods in Illinois, have judges in this district deemed the site sufficient to warrant the exercise of personal jurisdiction. *E.g.*, *International Star Registry v. Bowman-Haight Ventures*, 1999 WL 300285 (N.D. Ill.); *Vitullo v. Velocity Powerboats*, 1998 WL 246152 (N.D. Ill.); *accord, First Financial Resources v. First Financial Resources Corp.*, 2000 WL 1693973 (N.D. Ill. 2000) (key question in determining personal jurisdiction in this District is the level of commercial activity that may be conducted through the site).

An excellent example of this line of cases is *Berthold Types Ltd. v. European Mikrograf Co.*, 102 F. Supp.2d 928 (N.D. Ill. 2000). In that case, two companies that market typefaces were in

⁴ *See, e.g., ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002); *Cybersell v. Cybersell*, 130 F.3d 414, 419 (9th Cir. 1997); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25, 29 (2d Cir. 1997).

⁵ *Amsleep v. American Mattress Ctr.*, 2002 WL 1400369 (N.D. Ill. 2002) at *6; *MJC – A World of Quality v. Wishpets Co.*, 2001 WL 987890 (N.D. Ill. 2001), at *5; *School Stuff v. School Stuff*, 2001 WL 558050 (N.D. Ill. 2001), at *3; *Euromarket Designs v. Crate & Barrel*, 96 F. Supp.2d 824, 837-839 (N.D. Ill. 2000)

litigation over whether the defendant's font software violated the plaintiff's trademarks. The court ruled, "The exercise of jurisdiction is ultimately determined by examining the level of interactivity and the commercial nature of the exchange of information." *Id.* at 933. Although the web site at issue there enabled potential customers to interact with the defendant, and enabled existing customers to access information about their commercial relationship with the defendant, the Court ruled that jurisdiction was lacking because no sales were actually conducted over the site.

The Leavitts' web site is largely passive and non-commercial. Their message is not in any way targeted at reaching Illinois residents. *See IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) (affirming dismissal based on lack of personal jurisdiction because tortious conduct was not expressly aimed at the forum). Although there are links on the web site to another web site where Internet viewers can order books that defendants recommend (from amazon.com), the orders are not placed on the web site at issue here; and although there were links that formerly allowed Internet users to order mugs or T-shirts (from CafePress.com), there is no evidence that anybody from Illinois ordered any of this material, T. Leavitt. Aff. ¶ 6.⁶

Nor does the existence of links between savagestupidity.com, the web site that is at issue in this action, and other, commercial web sites warrant the exercise of personal jurisdiction, even if the linked sites were commercial and interactive. Under the sliding scale test, the interactive site must be the basis for the cause of action in the case. *E.g., ALS Scan, supra*, 293 F.3d at 714. If the mere fact that an otherwise passive site were linked to other sites that are interactive were a basis for

⁶The appeals for donations to support the web site, and more recently to support the Leavitts' legal defense, cannot be considered commercial speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-632 (1980). Hence, their presence on the site does not aid plaintiff's claim for personal jurisdiction based on the theory that the site is commercially interactive.

personal jurisdiction, then every web site could afford a basis for personal jurisdiction, because it is the existence of links that is fundamental to the character of the World Wide Web – the links are why it is called the **Web**. For example, in *Aero Prod. Int'l v. Intex Corp.*, 2002 WL 31109386 (N.D. Ill. 2002), at * 6-7, the Court refused to exercise personal jurisdiction over a defendant that maintained a web site in the middle category of the *Zippo* sliding scale (that is, not entirely passive, but no sale of goods through its own web site), even though the company's web site linked to different web sites where the company's own goods are offered for online sale. *Accord*, *Enterprise Rent-A-Car Co. v. Stowell*, 137 F. Supp.2d 1151, 1159 (E.D. Mo. 2001); *Siebelink v. Cyclone Airsports, Ltd.*, 2001 WL 1910560, *5 (W.D.Mich. 2001) (links from defendant's site to other sites at which defendant's products could be purchased did not support jurisdiction of suit based on defendant's own site); *Northwest Airlines v. Autobahn Internet Serv.*, Civ. No. 00-889 (D. Minn. November 22, 2000), at page 5 (“personal jurisdiction must be based on Autobahn's contact with the forum, not on Autobahn's advertiser's contacts with the forum”) (copy attached). Moreover, the claims in this case do not relate in any way to the sale of goods through links on the web site; therefore, even if sales of goods through other web sites were a sufficient basis for personal jurisdiction over claims related to those sales, they would not support personal jurisdiction over claims based on non-commercial expressions of opinion on the web site.

There is a second reason why specific personal jurisdiction cannot be exercised in this case. Courts generally hold that a corporation that does business throughout the nation, or throughout the world, cannot simply elect to bring suit in any of the many jurisdictions where it conducts business, on the theory that it necessarily suffers injury there and that the defendant therefore had a relevant contact with that jurisdiction by injuring it there and acting with knowledge that the injury would be there. To the contrary, courts generally require that the plaintiff bring suit in the jurisdiction that

is the focal point of the wrongdoing and of the operations that were harmed. *Imo Industries v. Keikert AG*, 155 F.3d 254 (3d Cir. 1998). The Seventh Circuit has recognized an exception to this rule, holding that a corporation can at least bring suit at its own headquarters, on the assumption that an intentional tort was presumably directed intentionally at the plaintiff at its home. *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997). *Janmark* does not aid TRN here, however, because it is not based in Illinois.

TRN has tried to manufacture jurisdiction, however, by pointing to the withdrawal of one of its Illinois advertisers (Culligan), and claiming that “defendants” knew of its relationship with Culligan and specifically set out to damage that relationship. However, regardless of whether some of the other defendants were aware of Culligan, the Leavitts were not until after this action was filed. T. Leavitt Aff. ¶ 9; G. Leavitt Aff. ¶ 6 Nor did the Leavitts ever say anything about Culligan. *Id.* Indeed, Gunilla Leavitt were not even aware that TRN had advertising contracts, G. Leavitt. Aff. ¶ 6 and nothing that the Leavitts said on the web site was directed at TRN at all. *Id.*; T. Leavitt Aff., ¶ 10 Thus, this basis for personal jurisdiction fails for lack of evidence.

If any tort was committed, it was in California, where the web site was created, and where the HTML code was loaded onto the server. T. Leavitt. Aff. ¶ 4. *See Compuserve v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (jurisdiction could be exercised in Ohio over a defendant who had loaded his software onto the plaintiff’s server in Ohio, but Court pointedly declined to extend its holding to any Internet user who happened to use the software on a computer in a different state). In sum, Illinois’s interest in protecting TRN from a Californian’s exercise of his First Amendment rights to criticize another resident of the same state is slim, and does not trigger exercise of personal

jurisdiction based upon the Illinois long-arm statute.⁷

Indeed, a finding of jurisdiction here would have chilling implications for citizens' right to speak freely about corporations and even public officials that they believe have wronged them. This case is not, after all, about a manufacturer or entrepreneur who placed a product in the stream of commerce in the hopes of making profits, an expectancy which can be balanced against the danger of being sued in some location where the product came to rest and caused injury. Every person who posts an opinion on the Internet knows that persons sitting at computers not just in their own country, but in foreign lands half way around the globe, may gain access to their views by the simple act of "clicking on their link" or finding them through a search engine. If citizens knew that they could be forced to defend themselves against litigation in every such forum, they would surely be chilled in the exercise of their First Amendment rights.⁸

II. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF VENUE, OR SHOULD BE TRANSFERRED TO FEDERAL COURT IN CALIFORNIA UNDER 28 U.S.C. § 1404.

Because jurisdiction is based on diversity of citizenship, in order to establish proper venue plaintiff must show either that all of the defendants reside in the Northern District of Illinois (and

⁷TRN has sued here rather than in California to avoid facing a motion to strike under California's anti-SLAPP statute, which allows an award of attorney fees in favor of a defendant who is sued for exercising the right of free speech in what is called Strategic Litigation Against Public Participation (thus the acronym SLAPP). California Code of Civil Procedure § 425.16(a). This provision applies to litigation in federal court. *United States ex rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 970-973 (9th Cir. 1999).

⁸ In recent cases, for example, France and Germany have sought to bar leading internet companies from allowing sites accessible in their countries from mentioning Nazis or carrying Nazi paraphernalia, which are beyond the bounds of free speech protection in those countries. Other countries, such as China and Cuba, have undertaken efforts to purge the Internet of any dissenting opinions. If jurisdiction is allowed anywhere that a web site is accessible, the chilling effects on free Internet speech will become even more serious.

at least one within the Northern District) or that “a substantial part of the events or omissions giving rise to the claim occurred” in the Northern District of Illinois. 28 U.S.C. § 1391(a).⁹ The Leavitts reside in Santa Cruz, California. Complaint ¶ 17. Thus, the only basis for venue in this action would have to be that a substantial part of the actions giving rise to TRN’s claim occurred in the Northern District of Illinois. Even a cursory inspection of the facts of this case, however, clearly shows that the only acts giving rise to TRN’s claims occurred outside Illinois. Accordingly, the case should be dismissed for lack of venue under Rule 12(b)(3), or transferred under 28 U.S.C. § 1404(a).

The purpose of the general federal venue requirement is to protect the defendant against plaintiffs who may select an unfair or inconvenient place of trial. *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-184 (1979). The Leavitts have never lived in Illinois, and neither of them has even set foot in Illinois except for passing through in transit between other places. Although the web site can be visited from a computer in Illinois, as it can from computers in the other 49 states and the rest of the world, the web site was created in California. *Id.* ¶ 4. The server from which the site is uploaded to the world wide web is located in California, and the Leavitts place their web site on that server from their home in California. Any statements about Savage occurred there. *Id.* ¶ 4. *Cf. Nine Point Mesa v. Nine Point Mesa*, 769 F. Supp. 259, 261 (M.D. Tenn. 1991) (determining that proper venue inquiry is where tortious activity occurred).

It certainly cannot be said that a “substantial part” of the acts creating a basis for TRN’s claim occurred in the Northern District. *See, e.g., Eastman v. Initial Inv.*, 827 F. Supp. 336, 338 (E.D. Pa. 1993) (undertaking to “weigh” the contacts to determine whether venue should be had in one forum or another); *accord, Holiday Rambler Corp. v. Arlington Park Dodge*, 204 U.S.P.Q. 750,

⁹ The third prong of venue set forth in section 1391(a) is inapplicable here, because it is used only where there is otherwise no district in which venue would be proper.

751 (N.D. Ill. 1979); *Hindu Incense v. Meadows*, 439 F. Supp. 844 (N.D. Ill. 1977). In analogous circumstances, it has been specifically held that the mere fact that a minor fraction of an allegedly infringing publication was distributed in a foreign jurisdiction is insufficient to support venue for a trademark action. *Transamerica Corp. v. Transfer Planning*, 419 F. Supp. 1261, 1263 (S.D.N.Y. 1976), *cited with approval*, *Chicago Reader v. Metro College Pub.*, 495 F.Supp. 441, 443 (N.D..Ill. 1980). Similarly, when there is tortious interference with a contract in the forum state, but the defendant's interfering acts occur outside the forum, venue is not established. *National Occupational Health Serv. v. Advanced Industrial Care*, 50 F. Supp.2d 1111, 1119 (N.D. Okla. 1998); *Pennsylvania Gear Corp. v. Fulton*, 1999 WL 80260 (E.D.Pa. 1999) (no venue where defendant did not direct allegedly interfering remarks to any customers in the forum state); *cf. divine/Whittman-Hart v. King*, 2002 WL 1611585 (N.D. Ill 2002). *Compare Astor Holdings v. Roski*, 2002 WL 72936 (S.D.N.Y. 2003) (mere economic harm in the forum from acts committed elsewhere is inadequate to support venue; venue found because acts committed elsewhere were intentionally directed toward concrete New York events). Thus, if the Court is unwilling to dismiss this matter for lack of personal jurisdiction, it should dismiss for lack of venue. In the alternative, given the predominance of disputes between Californians in this action, the Court should transfer this case under 28 U.S.C. § 1404(a) to the Northern District of California, where both the Leavitts and Savage reside. *See Yuba Nursing Home v. TLC of Bay Area*, 2001 WL 1136140 (N.D. Ill. 2001), at *5-*6.

III. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

The complaint should also be dismissed for failure to state a claim on which relief can be granted. Even though dismissal under Rule 12(b)(6) is inappropriate only if plaintiff “can prove no

set of facts in support of his claims which would entitle him to relief,” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), established law makes clear that the complaint cannot survive under Rule 12(b)(6). Because the web site is alleged in the complaint, and the complaint is based upon it, the Court may examine the web site under the established rule that a court may look beyond the four corners of the complaint and consider the contents of the documents which it references. *Venture Assoc. v. Zenith Data Sys.*, 987 F.2d 429, 481 (7th Cir. 1993). *Accord, PBGC v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Cortes Indus. v. Sum Holding*, 949 F.2d 42, 47-48 (2d Cir. 1991).

A. The Claims Are Barred by the First Amendment and Federal Statutory Law.

The first reason why the complaint should be dismissed under Rule 12(b)(6) is that the complaint alleges nothing more than speech that is fully protected by the First Amendment. Relief sought from a court by private parties is still government action, and thus is subject to First Amendment scrutiny.¹⁰ And peaceful efforts to encourage a consumer boycott for reasons connected with a social cause is protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981) (boycott over racial discrimination); *Beverly Hills Foodland v. UFCW Local 655*, 39 F.3d 191, 196-197 (8th Cir. 1994) (First Amendment barred tortious interference claim based on union boycott of grocery store); *State of Missouri v. National Organization for Women*, 620 F.2d 1301, 1319 (8th Cir. 1980) (boycott over failure to support the Equal Rights Amendment). As the Supreme Court stated in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), reversing an Illinois court’s injunction against leafleting about a realtor’s alleged blockbusting, “The claim that the expressions were intended to exercise a coercive impact on respondent does not

¹⁰*Shelley v. Kraemer*, 334 U.S. 1, 14-15 (1948); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

remove them from the reach of the First Amendment.” Although the Seventh Circuit has not addressed this issue explicitly, it cited *Missouri v. NOW* favorably in *National Organization for Women v. Scheidler*, 968 F.2d 612, 617-618 and n.6 (7th Cir. 1992) (distinguishing peaceful activities that were protected by the First Amendment in the *Missouri* case from the violent activities deemed not protected by the First Amendment in *Scheidler*).

To be sure, TRN alleges in general terms that the Leavitts have urged a boycott by making “false” statements about Savage, but when the gravamen of a tort cause of action is the falsity of the statements made, then the First Amendment requires the plaintiff to satisfy the standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964), for the establishment of a libel claim. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (intentional infliction of emotional distress); *Jefferson County School Dist. No. R-1 v. Moody's Investor Services*, 175 F.3d 848 , 857-858 (10th Cir.1999) (intentional interference with contract, intentional interference with business relations); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (product disparagement or "trade libel" and tortious interference with business relationships); *Redco Corp. v. CBS*, 758 F.2d 970, 973 (3rd Cir. 1985) (unless defendants "can be found liable for defamation, the intentional interference with contractual relations count is not actionable"); *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 232 Cal.Rptr. 542, 728 P.2d 1177 (1986) (intentional interference with prospective economic advantage); *see also Bose Corp. v. Consumers Union*, 466 U.S. 485, 493-514 (1984) (product disparagement action); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-274 (7th Cir. 1983) (describing as a “makeweight” the plaintiff’s attempt to “end run around the[] rules on defamation” by characterizing false statements as intentional interference with business relations, and predicting that Illinois courts would not allow it).

Moreover, even if the complaint could be construed as attempting to state a cause of action

for libel, the complaint fails to state a claim on which relief can be granted, for three reasons. The courts in this district have repeatedly held, in concert with federal courts across the country, that claims for defamation must state with particularity the words alleged to be false and defamatory. *E.g., Smith v. Chicago Park Dist.*, 1999 WL 33883 (N.D. Ill. 1999), at *4, *aff'd mem.*, 221 F.3d 1339 (7th Cir. 2000); *Seaphus v. Lilly*, 691 F. Supp. 127, 134 (N.D. Ill. 1988); *Derson Group v. Right Mgmt. Consultants*, 683 F. Supp. 1224, 1229 (N.D. Ill. 1988); *accord, Bobal v. RPI*, 916 F.2d 759, 763 (2d Cir. 1990); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). As Judge Shadur has explained, only by such pleading does the plaintiff give the defendant a fair opportunity to file a proper answer to the complaint, or to discern whether the words alleged to be actionable may be subject to dismissal for such reasons as that they are protected opinion. *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 707 (N.D.Ill.1990) (plaintiffs alleging defamation must recite the precise language alleged to be defamatory). *See also Jones v. Sabis Educational Systems*, 1999 WL 1206955 (N.D.Ill.1999), at *4. TRN has not identified any specific item on *savagestupidity.com* that allegedly constitutes a false statement of fact.

Second, although TRN repeatedly alleges that “defendants” statements about Savage are “malicious,” the First Amendment imposes a higher standard on defamation claims brought over the criticisms of public figures such as Savage – the plaintiff must show “actual malice.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Importantly, a showing of actual malice cannot be accomplished merely by establishing “malice” in the conventional sense of personal spite or even ill-will. *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 666-667 (1989) Rather, “actual malice” requires, at a minimum, that the statements were made with a reckless disregard for the truth. *Id.* That is, a plaintiff must show that the defendant actually had a “high degree of awareness of . . . probable falsity,” but published the material anyway. *Masson v. New Yorker Magazine*, 501 U.S.

496 (1991). *See also Genelco, Inc. v. Bowers*, 181 Ill. App.3d 536, N.E.2d 783, 787-788 (1989) (dismissing complaint for inadequate pleading of actual malice under state law); *Mittelman v. Witous*, 171 Ill. App.3d 691, 525 N.E.2d 922, 931-932 (1988) (required pleading of actual malice).

Third, although the law is clear that a corporation may sue for libel, just as an individual can, the rule that libel is personal to the one defamed applies as much to corporations as to individuals. Thus, a corporation or group cannot sue for libel unless the defamatory words are “of and concerning” that corporation. *Darling v. Piniella*, 1991 WL 193524 at *2 (S.D.N.Y.); *Church of Scientology of California v. Flynn*, 578 F. Supp. 266, 268 (D. Mass. 1984); *National Nutritional Foods Ass’n v. Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1980); *Security Sales Agency v. AS Abell Co.*, 205 Fed. 941 (D. Md. 1913).¹¹ TRN has not alleged that the web site says anything false about TRN, and hence it may not bring a claim that is tantamount to a libel claim.

A final claim that is barred by federal law, but which is not fully articulated, is the assertion that the Leavitts have wrongfully placed copies of Savage’s recordings on their web site. Given the accompanying prayers for relief, which demand that defendants’ copies of the works be turned over to TRN, and given the allegations that TRN “owns” the works within the meaning of the Copyright Act, it is apparent that TRN is attempting to plead a cause of action for copying its works. However, there is no claim for copyright infringement under federal law, because TRN does not allege registration, which is a fundamental requirement for an infringement claim. 17 U.S.C. § 411. Presumably, TRN is attempting to plead a state law cause of action for this copying in order to avoid the federal fair use defense, 17 U.S.C. § 106, which would be quite potent because the Leavitts have done no more than attach small segments of Savage’s shows to their web site to illustrate and

¹¹ The “of and concerning” requirement is the same in both Illinois and California. *Vanatassell-Matin v. Nelson*, 741 F. Supp. 698, 708 (N.D. Ill. 1990).

demonstrate the veracity of their opinion that Savage is a crude bigot, much as a passage from a copyright book might be quoted in a book review. *Harper & Row Pub'rs. v. Nation Enterprises*, 471 U.S. 539, 564 (1985); *Ty, Inc. v. Publications Int'l*, 292 F.3d 512, 517 (7th Cir. 2002). However, the evasion does not succeed, both because the Copyright Act preempts state causes of action that seek to enforce any of the exclusive rights created by the Copyright Act, 17 U.S.C. § 301, *see Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986), and because the Supreme Court has repeatedly made clear that the federal fair use defense embodies the requirements of the First Amendment, and that a legislative effort to pare down that defense might run afoul of the First Amendment. *Eldred v. Ashcroft*, 123 S. Ct. 769, 790 (2003).

B. TRN's Claims Also Fail Under State Law.

TRN's complaint should also be dismissed because each count is insufficient to state a claim under state law. Beginning with the common law claims, the Seventh Circuit has squarely held that no claim may be brought for tortious interference with contract unless there has, in fact, been a **breach** of contract; merely terminating a contract that has no fixed term is, if anything, an interference with prospective economic advantage. *Speakers of Sport v. ProServ*, 178 F.3d 862, 864 (7th Cir. 1999); *Cook v. Winfrey*, 141 F.3d 322, 328 (7th Cir. 1998). *See also Thompson v. Telephone & Data Systems Inc.*, 130 Or. App. 302, 881 P.2d 819, 826 n.1 (1994). This Court has held that the elements of contract and breach must be pleaded in order to state a claim for tortious interference with contract. *Automated Concepts v. Weaver*, 2000 WL 1134541 (N.D.Ill. 2000), at *17-18; But Count I alleges only that "defendants" engaged in conduct intended to induce Culligan to "end" its contract with TRN, and that Culligan then "terminated" a contract that it had "with TRN's 'The Michael Savage Show.'" There is no allegation that a contract was breached. Count I must therefore be dismissed for failure to state a claim.

Turning then to the claim for intentional interference with prospective economic advantage (Count II), the Seventh Circuit's decision in *Speakers of Sport* condemns this Count as well, because it makes clear that this tort is limited to intentional interference that is (1) effected through the commission of some other tort or other wrongful conduct, such as defamation, (2) carried out by a business competitor. 178 F.3d at 867. *See also Willamette Dental Group v. Oregon Dental Service Corp.*, 130 Or. App. 487, 882 P.2d 637, 644 (1994). The complaint does not allege any independent tort, simply the exercise of free speech rights, and there is no contention that the Leavitts are business competitors of TRN; they are, rather, consumers. Count II should therefore be dismissed as well.

TRN's statutory claims are similarly faulty. Count III alleges a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, ("ICFA") which allows one who is injured by fraudulent conduct or deceptive advertising "in the conduct of any trade or commerce" to sue for damages and injunctive relief. Several elements of the ICFA cause of action are absent here. First of all, the Leavitts are not engaged in any advertising of services in trade or commerce; theirs is a "gripe site" whose purpose is to call the public's attention to the offensive nature of the Michael Savage show, and to urge them to take action against its host. Although the complaint alleges that the web site is "in trade or commerce," ¶ 32, it is apparent from a review of the site that the only basis for this allegation is the fact, alleged in the complaint, that there are advertisements on the web site. But the presence of such advertisements do not make the site commercial for the purposes of the ICFA any more than a newspaper's advertisements makes it engaged in trade or commerce under the ICFA. On TRN's theory, any business that was unhappy about its portrayal in a newspaper article would have a cause of action against the newspaper under the ICFA, which is surely not what the legislature intended. Perhaps a newspaper could be sued

under the ICFA if it attracted advertising by misstating its circulation figures; but figures in the news cannot sue a newspaper under the ICFA simply because the newspaper carries ads. Put another way, although there is some advertising on defendants' web site, it is not the **advertising** that is alleged to violate the ICFA, and the Act applies only to the advertising.

Another requirement for an ICFA claim is that, under several recent decisions of the Illinois Supreme Court, to properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under that Act, a plaintiff must allege that he was, in some manner, deceived. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 153-154, 776 N.E.2d 151, 162-163 (2002), *rev'd on other grounds*, 201 Ill.2d 134, 776 N.E.2d 151 (2002), *citing Zekman v. Direct American Marketers*, 675 N.E.2d 994 (Ill. App. 1997), *rev'd on other grounds*, 695 N.E.2d 853, 860-861, 182 Ill.2d 359 (1998). There is no allegation in the complaint that TRN, or anybody else, was deceived by statements on the *savagestupidity.com* web site.

Yet another requirement for an ICFA claim is that the plaintiff must show how the allegedly deceptive activity implicates consumer protection concerns. As the Seventh Circuit stated in *Speakers of Sports, supra*,

while a competitor is permitted to bring suit under the Act as a representative of the consumer interest (an example would be a case in which a multitude of consumers had been deceived by a competitor and their individual losses were too small to warrant the costs of suit), he must "prove, by clear and convincing evidence, how the complained-of conduct implicates consumer protection concerns." [citations omitted] No effort at proving this was made here. The only consumer in the picture is Rodriguez, and the allegation that he was injured is made by Speakers rather than by him.

178 F.3d at 868.

The complaint does not come close to alleging any harm to consumers, and that is not what TRN is worried about. It is worried about its own loss of advertisers, not deception of consumers.

Finally, TRN alleges in Count IV that *savagestupidity.com* violates the Uniform Deceptive Trade Practices Act (“DTPA”), 815 ILCS § 510/1 *et seq.* Because TRN has foresworn the prosecution of any trademark related claims in this action, in order to preserve its access to the UDRP, T. Leavitt Aff. ¶ 14, the only possible provision on which it could be relying is subsection (8), which applies when, “in the course of his or her business, vocation or occupation, the person . . . disparages the goods, services or business of another by false or misleading representation of fact.” This statute does not apply for reasons similar to the flaws in the ICFA claim: the web site, which can be considered on this motion, is clearly neither business, vocation or occupation; even if there is advertising on the site, it is not the advertising that is alleged to be deceptive; and the DTPA applies only to complaints that are based on “**consumer** confusion or deception,” *Menasha Corp. v. News America Marketing*, 238 F. Supp.2d 1024, 1035 (N.D. Ill. 2003) (emphasis added), which is not present here.

There is an additional flaw in the DTPA claim, however – the courts distinguish between product disparagement, which is barred by the DTPA, and disparagement of the producer, which is governed by defamation law. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983); *Allcare, Inc. v. Bork*, 176 Ill.App.3d 993, 531 N.E.2d 1033, 1037-1038 (1988). Although we assume that TRN is going to argue that Savage’s show is their “product” and that disparagement of Savage personally thus constitutes a disparagement of their product, the Illinois courts have consistently resisted efforts to “blur the distinction between defamation and commercial disparagement” by characterizing the criticism of an individual as product disparagement under the DTPA. *Allcare, supra*, 531 N.E.2d at 1038, and cases cited there. In sum, there is no substantial claim here under the DTPA, and Count IV should be dismissed along with the rest of the complaint

for failure to state a claim under Rule 12(b)(6).¹²

However, defendants should be awarded their attorney fees under the DTPA. TRN admits in its complaint that fees may be awarded to the prevailing party in a DTPA suit, ¶ 33, and the Seventh Circuit has decided the standard for such awards: “Even if a suit is brought in good faith, it could be so lacking in merit or so burdensome to defend against as to be oppressive, in which event the defendant would have a powerful equitable claim to recover a reasonable attorneys’ fee.” *Door Systems v. Pro-Line Door Systems*, 126 F.3d 1028, 1030 (7th Cir. 1997). This suit was defective in so many ways, under both First Amendment and state law, that it is hard to characterize it as anything other than oppressive.

CONCLUSION

The motion to dismiss or to transfer should be granted, and defendant should be awarded his attorney fees.

Respectfully submitted,

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¹²Because Illinois choice of law principles require application of the law of the plaintiff’s domicile, *Cook v. Winfrey*, 141 F.3d 322, 329 (7th Cir. 1998); *Medline Industries v. Maersk Medical*, 230 F. Supp.2d 857, 864 (N.D.Ill. 2002), it is doubtful that these Illinois statutes apply at all.

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