

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BETH HLAVAC and GEORGE HLAVAC, individually	>:	
and as parents and natural guardians of EMILY	:	
HLAVAC and GEORGE J. HLAVAC,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 04-6112
	:	
DGG PROPERTIES t/d/b/a/ WATER’S EDGE	:	
RESORT AND SPA,	:	
and	:	
DGG PROPERTIES CO., INC. t/d/b/a WATER’S	:	
EDGE RESORT AND SPA,	:	
and DGG PROPERTIES CO., a partnership,	:	
and WATER’S EDGE REALTY, LLC,	:	
Defendants.	:	
	:	
	:	
	:	

**MEMORANDUM & ORDER**

YOHN, J. April \_\_\_\_, 2005

Pennsylvania residents Beth and George Hlavac (“the Hlavacs”) bring this diversity suit individually and on behalf of their minor children, Emily and George J. Hlavac, against Connecticut enterprises DGG Properties, DGG Properties Co., Inc., DGG Properties Co., a partnership, and Water’s Edge Realty, LLC (“defendants”). The Hlavacs allege that Emily and George J. suffered serious injuries while staying at defendants’ Connecticut resort when they inhaled fumes released by an ozone generator. Presently before the court is defendants’ motion to dismiss the complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). For the reasons set forth below, I conclude that the court lacks personal jurisdiction over defendants, but in lieu of dismissal I will transfer the case to the United States District Court for the District of Connecticut.

## I. FACTUAL BACKGROUND

Defendants operate Water's Edge Resort and Spa, located in Westbrook, Connecticut. Defendants are established under the laws of Connecticut and have never maintained offices, assets, or employees in Pennsylvania. Water's Edge is "affiliated"<sup>1</sup> with Resort Condominiums International ("RCI") and Interval International ("Interval"), time-share associations that allow their member property owners to exchange time in the members property for time in another property affiliated with RCI or Interval. (Deposition of Claudio Marasco ("Marasco Dep.") at 33, 52.) RCI and Interval distribute a catalog listing affiliated properties, including Water's Edge, to all of their member property owners. (Affidavit of Beth Hlavac ("Hlavac Aff.") at ¶ 9.) These catalogues are mailed once annually to RCI and Interval member property owners throughout the United States, including those members who live in Pennsylvania.

Defendants also maintain a website at the domain name <http://www.watersedge-resort.com>. Prospective visitors cannot schedule vacations or book rooms online. However, visitors can purchase gift certificates through the website. (Ex. 12 to Marasco Dep.) Additionally, the site provides a toll free phone number and an email link, which allow visitors to contact defendants to inquire about reservations. (Ex. 11 to Marasco Dep.)

George Hlavac's father, who lives with the Hlavacs in Pennsylvania, owns a time-share property in Florida and is a member of RCI and Interval (Hlavac Aff. at ¶ 3, 5.) As a member of RCI and Interval, Hlavac's father was eligible to exchange the use of his property for available timeshares listed in these companies' catalogs. (*Id.* at ¶ 6.) RCI and Interval mailed their

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<sup>1</sup>The parties have not explained the nature of the affiliation between Water's Edge and RCI and Interval.

catalogs to Hlavac's father in Pennsylvania. (*Id.* at ¶ 7.)

In 2003, Hlavac's father offered the Hlavacs use of his timeshare. (*Id.* at ¶ 8.) The Hlavacs reviewed RCI and Interval's catalogs in their home in Pennsylvania and selected Water's Edge. (*Id.* at ¶ 10.) The Hlavacs also visited defendants' website to learn more about the amenities available at the resort. (*Id.* at ¶ 11.) After reviewing the website, the Hlavac's made a reservation at Water's Edge through RCI. (*Id.* at ¶ 13.) After making reservations, the Hlavacs called defendants' toll free phone number to ask about the location of their room. (*Id.* at ¶ 14.) The Hlavacs claim that they would not have chosen Water's Edge if it was not listed in RCI and Interval's catalogs or if its information was not available on the internet. (*Id.* at ¶15, 16.)

The Hlavacs arrived at Water's Edge on May 17, 2003. The next day, the Hlavacs' children became seriously ill after inhaling fumes released by an ozone generator that defendants placed in the Hlavacs' villa.

The Hlavacs commenced this action on July 23, 2004, when they filed a Praeceptum for Writ of Summons in the Court of Common Pleas of Lehigh County, Pennsylvania. On August 3, 2004, the Hlavacs served defendants with the Writ of Summons and with a "Notice of Deposition in Aid of Drafting Complaint." On October 7, 2004, the Hlavacs filed a motion to compel discovery. Defendants' counsel appeared in the Lehigh County Court of Common Pleas to contest the Hlavac's motion. Nonetheless, the court ordered defendants to produce certain documents and to produce a corporate designee for a deposition. Pursuant to the court's order, the Hlavac's deposed Claudio Marasco, defendants' executive vice president, chief financial officer, and general corporate counsel, on November 18, 2004 at defendants' corporate offices in Connecticut.

The Hlavacs filed a complaint in the Court of Common Pleas of Lehigh County on

December 3, 2004 and defendants removed the case to this court on December 30, 2004.

Defendants filed the instant motion on January 5, 2005, to which the Hlavacs filed a response and defendants a reply.

## II. DISCUSSION

In a diversity case, a district court must apply the law of the forum state to determine whether personal jurisdiction over a non-resident defendant is proper. Fed. R. Civ. P. 4(e). Pennsylvania's long-arm statute is coextensive with the limits of the federal constitution and thus the court may exercise personal jurisdiction over defendants so long as it does not violate the constitution. 42 Pa. Cons. Stat. Ann. § 5322(b); *see also Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co.*, 75 F.3d 147, 150 (3d Cir. 1995).

The Due Process clause of the Fourteenth Amendment of the federal constitution limits the power of a state to assert personal jurisdiction over a non-resident defendant. *See Pennoyer v. Neff*, 95 U.S. 714 (1878). A state may entertain a suit involving such a defendant in two types of situations. If the foreign party maintains "continuous and systematic" contacts with a state, the state has general personal jurisdiction over the party and the non-resident may be sued in that state on any claim. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1957); *IMO Indus. v. Kierkert AG*, 155 F.3d 245, 259 n.2 (3d Cir. 1998.). When there are no such contacts, courts may assert personal jurisdiction if the litigation is "related to or arises out of the defendant's contacts with the forum." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). This is known as specific jurisdiction. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984); *IMO Indus.*, 155 F.3d at 259. Where the defendant challenges personal jurisdiction, "the burden

falls upon the plaintiff to come forward with sufficient facts to establish that jurisdiction is proper.” *Mellon Bank PSFS, Nat’l Ass’n v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992). Courts must “accept the plaintiff’s allegations as true, and . . . construe disputed facts in favor of the plaintiff.” *Toys “R” Us, Inc., v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir. 2003) (citation omitted).

The Hlavacs contend that the court may assert both general and specific jurisdiction over defendants. (Pls.’ Mem. of Law in Opp. Defs.’ Mot. Dismiss at 5–12.)

A. General Jurisdiction

In *Perkins*, the Supreme Court held that Ohio could assert personal jurisdiction over a foreign corporation even though the specific cause of action did not arise in the state because the corporation carried on “continuous and systematic” activities in the state, “consisting of directors’ meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery”. 342 U.S. at 445. Proof of general jurisdiction must meet a “higher threshold” that requires “extensive and persuasive” factual allegations. *Reliance Steel Prods. Co. v. Watson, Ess, Marshall, & Engass*, 675 F.2d 587, 589 (3d Cir. 1982); *see also Provident Nat’l Bank v. Cal. Fed. Sav. & Loan Ass’n*, 819 F.2d 434, 437 (3d Cir. 1987) (“[T]he plaintiff must show significantly more than mere minimum contacts to establish general jurisdiction.”)

The Hlavacs have not alleged that defendants carry on the types of activities in Pennsylvania that traditionally justify general personal jurisdiction. Defendants have never maintained offices, assets, or employees in the Commonwealth. Nonetheless, the Hlavacs argue that the court may assert general jurisdiction over defendants because RCI and Interval mailed

catalogs featuring defendants' resort to members living in Pennsylvania.<sup>2</sup> (Pls.' Mem. of Law in Opp. Defs.' Mot. Dismiss at 12.)

Several courts in this district have considered whether Pennsylvania courts may assert general jurisdiction over out-of-state lodgings on the basis of in-state advertising. In these cases, courts have only exercised general jurisdiction when the defendant itself engaged in extensive local advertising, specifically calculated to attract in-state residents. In *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 270 (E.D. Pa. 1991), the court found that “[t]he mailing of brochures to slightly more than one thousand Pennsylvania residents can hardly be said to constitute ‘extensive and pervasive’ contact,” and concluded that the court could not exercise general jurisdiction over the defendant. *See also Johnson v. Summa Corp.*, 632 F. Supp. 122, 126 (E.D. Pa. 1985) (“The maintenance of a toll-free number, the presence of brochures in one travel agency with no information about commissions or referrals, and a single mailings can hardly be considered ‘extensive and pervasive.’”); *cf Gehling v. St. George’s School of Medicine*, 773 F.2d 539, 541–42 (3d Cir. 1985) (concluding that Pennsylvania courts did not have general jurisdiction over a foreign medical school based on its advertisements in national publications because the advertisements “were not aimed specifically at Pennsylvania residents”). In contrast, in *Gavigan v. Walt Disney World, Inc.*, 646 F. Supp. 786, 790 (E.D. Pa. 1986), the court found that the defendant’s in-state activity was sufficiently pervasive to justify general jurisdiction because as part of a promotional campaign, the defendant “made a number of visits to the Commonwealth, . . . entered into joint ventures with at least two Pennsylvania ventures, . . . sought and received the

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<sup>2</sup>The Hlavacs have not specifically alleged how many Pennsylvania residents received RCI and Interval’s catalogs.

cooperation of the City of Philadelphia . . . , and advertised in media directed specifically to the local Philadelphia market.”); *see also Creswell v. Walt Disney Prods.*, 677 F. Supp. 284, 288 (M.D. Pa. 1987) (adopting *Gavigan’s* reasoning in a case with similar facts).

Here, unlike all of the cases described above, defendants themselves did not directly mail any advertisements into Pennsylvania. Instead, defendants’ resort was featured in two catalogs mailed by third-parties, whose relationship with defendants has not been explained. *See Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH*, 56 F. Supp. 2d 559, 571 n.14 (E.D. Pa. 1999) (“[C]ourts have found a lack of general jurisdiction where defendants had . . . limited contacts with the forum state due to the actions of a third party or the requirements of a contract.”) (citations omitted); *Allied Leather Corp. v. Altama Delta Corp.*, 785 F. Supp. 494, 499 (M.D. Pa. 1992) (refusing to assert general jurisdiction over the defendant where “defendant’s contacts with Pennsylvania are the unintended consequence of its relationships with entities which are based in other jurisdictions.”) (citation omitted). If I found that the court could exercise general jurisdiction over defendants on the basis of RCI and Interval’s catalogs, the logical conclusion would be that every resort featured in the catalogs could be sued in Pennsylvania on any claim, no matter how unrelated to the Commonwealth. This would undoubtedly offend due process. Moreover, even if I concluded that defendants are somehow responsible for jurisdictional purposes for RCI and Interval’s mailings, the catalogs alone are insufficient to subject defendants to suit in Pennsylvania on any claim. There is no evidence that RCI or Interval specifically targeted Pennsylvania residents. RCI and Interval only send their catalogs to member property owners, such as George Hlavac’s father, who have entered into a contractual relationship with

RCI and Interval.<sup>3</sup> Further, these catalogs, which are mailed once annually, fall far short of an extensive promotional campaign like the one described in *Gavigan*. See 646 F. Supp. 786, 790. In fact, there is no evidence in the record that RCI or Interval ever mailed to Pennsylvania more than the two annual catalogs that were sent to Hlavac’s father.<sup>4</sup>

The Hlavacs also argue that because defendants maintain a website that is accessible in Pennsylvania, the court may assert general jurisdiction. (Pls.’ Mem of Law in Opp. Defs.’ Mot. Dismiss at 18.) Although widespread usage of the internet is a fairly recent development, there is a substantial body of case law in this and other circuits that addresses when courts may assert jurisdiction over a nonresident on the basis of the defendant’s website. In these cases, courts generally use the sliding scale approach first articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D Pa. 1997).<sup>5</sup> See *Toys “R” Us, Inc.*, 318 F.3d at 452. In *Zippo*, the court

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<sup>3</sup>To join RCI, property owners must pay an annual subscription fee and agree to be bound by RCI’s “Terms and Condition of Subscribing Membership.” See <https://www.rci.com>. To join Interval, members must pay an annual membership fee and agree to Interval’s “Terms and Conditions of Individual Membership and Exchange.” See <http://www.intervalworld.com>.

<sup>4</sup>The Hlavacs also assert that defendants are subject to general jurisdiction in Pennsylvania because several Pennsylvania properties are affiliated with RCI and Interval. These facts are irrelevant because the court cannot assert jurisdiction over a defendant solely on the basis of the unilateral activity of a third party. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.”).

<sup>5</sup>Although the *Zippo* court only considered specific personal jurisdiction, a number of courts in this and other circuits have used the *Zippo* approach to assess general personal jurisdiction. See *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079 (9th Cir. 2003) (“[A] finding of general jurisdiction in the instant case would be consistent with the ‘sliding scale’ test that both our own and other circuits have applied to internet-based companies.”) (citations omitted); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002) (using the *Zippo* framework to assess general personal jurisdiction); *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1296–97 (10th Cir. 1999) (same); *Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 664 F. Supp. 2d 448, 451 (E.D. Pa. 1999) (“[The *Zippo* framework] may . . .



described three categories of internet websites, which determine whether the operator is subject to personal jurisdiction:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.  
952 F. Supp. at 1124 (internal citations omitted).

Defendants' site arguably falls into the middle category. Visitors can purchase gift certificates through the website. (Ex. 12 to Marasco Dep.) Further, although visitors cannot book rooms online, the site provides an email link that permits visitors who wish to make reservations to contact defendants. (Ex. 11 to Marasco Dep.) Nonetheless, these interactive elements are insufficient to subject defendants to general personal jurisdiction in every forum where their site is accessible. *See Molnlycke Health Care AB*, 64 F. Supp. 2d at 451 ("To hold that the possibility of ordering products from a website established general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state."). Several courts

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properly be used in cases asserting general jurisdiction."); *Desktop Techs., Inc. v. Colorworks Reprod. & Design, Inc.*, No. 98-5029, 1999 U.S. Dist. LEXIS 1934, at \*7-\*10 (E.D. Pa. Feb. 24, 1999) (using the sliding scale framework to assess whether the defendant's internet presence provided a basis for the exercise of general jurisdiction); *Grutkowski v. Steamboat Lake Guides & Outfitters, Inc.*, No. 98-1453, 1998 U.S. Dist. LEXIS 20255, \*10-\*15 (E.D. Pa. Dec. 21, 1998) (same); *but see Lakin v. Prudential Secs.* (348 F.3d 704, 711 (8th Cir. 2003) ("We agree with the courts that do not apply the 'sliding scale' presumptively for cases of general jurisdiction."); *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir 2002) (concluding that the sliding scale "is not well adapted to the general jurisdiction inquiry").

have held that email links do not rise to the level of interactivity required to justify general jurisdiction. See *Desktop Techs., Inc.*, 1999 U.S. Dist LEXIS 1934, at \*9 (“The email links are . . . ‘the electronic equivalents of advertisements’ response cards and are insufficient to make these pages more than advertisements.”) (citation omitted); *Grutkowski*, 1998 U.S. Dist. LEXIS 20255, at \*14 (same); *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 639 (E.D. Pa. 1998) (“The e-mail link alone is not enough to establish jurisdiction . . . .”) Here, unlike truly interactive travel websites where customers can make hotel reservations by entering their personal preferences and clicking an online link,<sup>6</sup> defendants’ email link does not permit visitors to transact business online. Instead, the link merely allows customers to contact defendants to inquire about the availability of rooms. This is no different than providing a reservation phone number for prospective visitors.

While defendants’ customers cannot make reservations online, the Hlavacs observe that customers can purchase gift certificates through defendants’ website. Although this element of defendants’ website is interactive, it is insufficient to justify general jurisdiction because the sale of gift certificates is not central to defendants’ business. In *Provident Nat’l Bank*, 819 F.2d at 436, 438, the Third Circuit ruled that a California bank’s contacts with Pennsylvania were sufficient to justify general jurisdiction where .071 % of its deposits were traceable to Pennsylvania residents and .083 % of its loans were traceable to the Commonwealth. Although the bank’s total business with Pennsylvania residents was small, the court reasoned that because “the borrowing and lending of money . . . are the bread and butter of its daily business” the bank

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<sup>6</sup>Examples of such websites are <http://www.hotels.com/>, <http://www.expedia.com/>, and <http://www.orbitz.com/>.

could expect to be “haled into court in Pennsylvania.” *Id.* at 438.<sup>7</sup> Here, the Hlavacs have failed to allege any facts that suggest that the sale of gift certificates are “central to the conduct of [defendants’] business.” *Id.* at 438 Hence, I cannot conclude that defendants are subject to suit in any forum where their site is accessible solely because the site offers gift certificates for sale.

The Hlavacs rely on the Pennsylvania Superior Court’s decision in *Mar-Eco, Inc. v. T & R and Sons Towing and Records, Inc.*, 837 A.2d 512 (Pa. Super. Ct. 2003). In *Mar-Eco*, the court applied the *Zippo* framework and concluded that the defendants’ website provided a basis for general jurisdiction because customers could use the website “to apply for employment, search the new and used vehicle inventory, apply for financing to purchase a vehicle, calculate payments schedule, order parts and schedule service appointments.” *Id.* at 517. Further, the website boasted that: “[t]his page allows you handle nearly all of the financial aspects of a vehicle purchase. We’ve made shopping for a car much easier for you by allowing you to show and virtually complete the entire transaction via your computer.” *Id.* Here, defendants website does not offer the same level of interactivity as the site in *Mar-Eco*. Whereas customers in *Mar-Eco* could search the vehicle inventory, purchase parts, and schedule service appointments online, defendants’ customers cannot make reservations directly through the internet. Further, unlike the site in *Mar-Eco*, which allowed customers to “handle nearly all the financial aspects of a vehicle purchase” online, the sale of gift certificates is not central to defendants’ resort business. *See Provident Nat’l Bank*, 819 F.2d at 438.

Further, it would be inappropriate to exercise general jurisdiction over defendants on the

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<sup>7</sup>Additionally, the court based its conclusion on the fact that the bank conducted business with a Pennsylvania bank “every business day.” 819 F. 2d at 438.

basis of defendants' website because the site was not designed specifically to reach customers in Pennsylvania. *See Molnlycke Health Care AB*, 64 F. Supp. 2d at 452 (refusing to assert general jurisdiction on the basis of the defendant's websites because "while the websites are available in every state they are not necessarily targeted towards every state [and] [p]laintiff has made no showing that defendant's websites targeted Pennsylvania."); *cf Toys "R" Us, Inc.*, 318 F.3d at 454 (refusing to assert specific personal jurisdiction on the basis of defendant's websites because "while commercial and interactive, [they] do not appear to have been designed to reach customers in [the forum state].").

For these reasons, I conclude that defendants' website coupled with RCI and Interval's brochures are not the type of "continuous and systematic" activities required for general jurisdiction. *See Zubyk v. LPBOC Hotel, Ltd. P'ship*, No. 00-971, 2000 U.S. Dist. LEXIS, at \*5 n.1, \*9 (E.D. Pa. June 23, 2000) (finding that the defendant's contacts were not sufficient to justify general personal jurisdiction where the defendant's website "provides an e-mail address and toll-free phone number" and the defendant advertised "every Sunday in [p]laintiffs' local newspaper").<sup>8</sup>

#### B. Specific Jurisdiction

Because Pennsylvania courts do not have general jurisdiction over defendants, the Hlavacs must rely on the theory of specific personal jurisdiction. A court may invoke specific jurisdiction if "the cause of action arises out of the defendant's forum related activities . . . ." *Vetrotex*, 75 F.3d at 151. If the litigation arises out of the defendant's contact with the forum state, courts

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<sup>8</sup>As I will discuss below, the *Zubyk* court found that these same contacts were sufficient to exercise *specific* personal jurisdiction over the defendant. 2000 U.S. Dist LEXIS, at \*9–\*10.

generally use a two-part test to determine whether they may assert specific personal jurisdiction over a non-resident. *See IMO Indus.*, 155 F.3d at 259; *Vetrotex*, 75 F.3d at 150. First, the defendant must “have certain minimum contacts” with the forum state. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Such contacts require that the defendant “purposefully availed itself of the privilege of conducting activities within the forum state.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). To make this determination, courts question whether “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). If the defendant has the requisite minimum contacts, courts ask whether the exercise of jurisdiction “would comport with ‘traditional notions of fair play and substantial justice.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985) (quoting *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92 (1978)); *IMO Indus.*, 155 F.3d at 259.

The Hlavacs contend that the court may assert specific personal jurisdiction over defendants because if not for RCI and Interval’s catalogs, the Hlavacs would not have visited defendants’ resort, where defendants’ alleged negligence caused their children’s injuries. (Pls.’Mem. of Law in Opp. Defs.’ Mot. Dismiss at 13.) Several courts in this district have asserted specific jurisdiction over out-of-state defendants where the defendant’s in-state advertising allegedly induced the plaintiff to visit the defendant’s accommodations. *See Zubyk*, 2000 U.S. Dist. LEXIS 9671, \*9; *Piccirillo v. Hoteles Camino Real, S.A.*, No. 85-4082, 1986 U.S. Dist. LEXIS, at \*1 (E.D. Pa. Jan 31, 1986) (concluding that the requisite “minimum contacts” were established where the defendant’s “Pennsylvania promotional activities and advertising . . . induced plaintiff’s decedent . . . to travel to the [defendant’s] hotel.”) *Busch v. Sea World of Ohio*,

95 F.R.D. 336, 340 (W.D. Pa. 1982) (“Although it cannot be said the advertising injured the . . . plaintiff, her injuries did arise from defendant’s activities, namely advertising extensively in Pennsylvania.”) Like those cases that have addressed in-forum advertising and general jurisdiction, ordinarily, the defendant’s advertising must specifically target local residents before a court will conclude that the defendant “purposefully availed itself of the privilege of conducting activities within the forum state.” *Hanson*, 357 U.S. at 253. In *Busch*, 95 F.R.D. at 340, the court found that the ‘minimum contacts’ requirement . . . [were] met by the defendant’s purposeful and extensive advertising throughout Western Pennsylvania,” and in *Zubyk*, 2000 U.S. Dist. LEXIS 9671, at \*9, the court concluded that, “by advertising every Sunday in [p]laintiff’s local newspaper, [d]efendant did purposefully avail itself of the privilege of doing business in Pennsylvania.” In contrast, in *Wims*, the court found that “the causal link between [the defendant’s] brochures and the [plaintiff’s] injury [was] simply too attenuated” to assert specific jurisdiction over the defendant where the defendant’s “efforts to attract patrons [were] not as clearly aimed at inducing Pennsylvania residents to travel to its facility as were those of the defendant in *Busch*.” 759 F. Supp. at 268–69.

I cannot conclude that defendants “purposefully availed [themselves] of the privilege of conducting activities” in Pennsylvania solely because defendants’ resort was featured in two catalogs distributed by third-parties in Pennsylvania. First, the catalogs were not sent by defendants and there is no evidence that defendants themselves directed any advertisements into Pennsylvania. Further, as I described above, there is no evidence that RCI or Interval specifically targeted Pennsylvania residents or that more than two catalogs were ever sent to Pennsylvania annually. The Hlavacs would never have received the catalogs featuring defendants if Hlavac’s

father had not entered into a contractual relationship with these companies. The assertion of jurisdiction on the basis of these inconsequential contacts would certainly not “comport with ‘traditional notions of fair play and substantial justice.’” *Burger King Corp.*, 471 U.S. at 486.

The Hlavacs also claim that defendants’ website induced them to stay at Water’s Edge. (Pls.’Mem. of Law in Opp. Defs.’ Mot. Dismiss at 13.) However, the Hlavacs do not contend that they used the email link or purchased gift certificates through defendants’ website.<sup>9</sup> Instead, they merely allege that they consulted the website’s description of the resort’s amenities before making reservations. These elements of defendants’ site amount to no more than passive advertisements. Under *Zippo*, which courts also use to assess specific jurisdiction, *see e.g. Zippo Mfg. Co.*, 952 F. Supp. 1119; *Desktop Techs., Inc.*, 1999 U.S. Dist. LEXIS 1934, at \*11, “[a] passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction.” *Zippo Mfg. Co.*, 952 F. Supp. at 1124. Hence, the Hlavacs limited use of defendants’ website is insufficient to subject defendants to specific personal jurisdiction in Pennsylvania.<sup>10</sup>

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<sup>9</sup>Because these interactive components of defendants’ website did not induce the Hlavacs to stay at defendants’ resort, the Hlavacs’ claims do not arise out of these activities and I may not consider these elements as part of the minimum contacts specific jurisdiction analysis. *See Vetrotex*, 75 F.3d at 151 (“Specific jurisdiction is invoked when the cause of action arises from the defendant’s forum related activities . . .”).

<sup>10</sup>The fact that the Hlavacs called defendants’ toll free phone number to inquire about the location of their room does not affect the minimum contact inquiry because the unilateral acts of others, including the plaintiff, “cannot satisfy the requirement of contact with the forum state.” *Hanson*, 357 U.S. at 253. *See also Osteotech, Inc. v. GenSci Regeneration Sciences*, 6 F. Supp. 2d 349, 353 (D.N.J. 1998) (“[T]he unilateral acts of others (including the plaintiff) do not constitute a purposeful connection between the defendant and the forum state.”) (citing *Burger King*, 471 U.S. at 473).

C. Consent

The Hlavacs also argue that defendants waived any objection to personal jurisdiction because they appeared in state court in Pennsylvania to oppose the Hlavac's motion to compel pre-complaint discovery. It is well established that "an individual may submit to the jurisdiction of the court by appearance." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) (citation omitted). Nonetheless, "an appearance in a state court prior to removing a case to a federal court does not waive objections that might have been raised in the state court and that are still available under the federal rules." *Brown v. AST Sports Sci., Inc.*, No. 02-1682, 2002 U.S. Dist. LEXIS 12294, at \*15 (E.D. Pa. June 28, 2002) (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1344 (2d ed. 1990)); *see also Nationwide Eng'g & Control Sys, Inc. v. Thomas*, 837 F.2d 345, 348 (8th Cir. 1988) ("Upon removal, a defendant may assert any defense that would have been available to him in state court and which has not been lost through the operation of [the Federal Rules].") (citing Wright & Miller); *S.M.W. Seiko v. Howard Concrete Pumping Co.*, 170 F. Supp. 2d 152, 156 (D.N.H. 2001) ("Where a defendant has waived his right under state law to contest jurisdiction, he is barred from asserting a defense of personal jurisdiction in federal court."). Thus, I must determine whether defendants waived any objection to personal jurisdiction under Pennsylvania law or the Federal Rules of Civil Procedure.

In Pennsylvania, "the entry of a written appearance alone does not constitute a waiver of the right to challenge the court's jurisdiction . . . ." *Wagner v. Wagner*, 768 A.2d 1112, 1123, (Pa. 2001) (citing Pa. R. Civ. P. 1012(a)). Generally, Pennsylvania courts have held that nonresident defendants only consent to local personal jurisdiction by entering an appearance if the litigation



reaches the merits. *See Hoeke v. Mercy Hosp. of Pittsburgh*, 386 A.2d 71, 74 (Pa. Super. Ct. 1978) (“[T]o find a waiver of in personam jurisdiction the courts ordinarily have looked for ‘some other and further action on the merits’ beyond the mere filing of an appearance by the party seeking not to be bound.”). Similarly, under the Federal Rules, a defendant who voluntarily appears in federal court does not waive his right to object to lack of personal jurisdiction. *See Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1943) (“Rule 12 permits a defendant to raise a jurisdictional defense even though his voluntary appearance has already called into existence the potential power of the court to adjudicate the merits of his controversy.”); *see also Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983) (“[I]t is well settled that general appearance by a defendant does not constitute a waiver of the defense of lack of jurisdiction over the person.”) (citing 2A Moore’s Federal Practice § 12.12 (2d ed.)). However, “where litigation has proceeded on the merits, the Third Circuit has found waiver of [personal jurisdiction], when [such] preliminary matters have not been first disposed of.” *Lawrence Michaels, L.M. Consulting, Inc. v. Franks*, No. 90-5039, 1992 U.S. Dist. LEXIS 1627, at \*5 (E.D. Pa. Jan. 30, 1992) (citing *Wyrrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967)). Additionally, federal courts have emphasized that “[r]emoval, in itself, does not constitute a waiver of any right to object to lack of personal jurisdiction . . . .”) *Nationwide Eng’g & Control Sys, Inc.*, 837 F.2d at 347–48 (citing Wright & Miller). *See also Brown*, 2002 U.S. Dist. LEXIS 12294, at \*15 (“Petitioning for removal does not amount to consenting to personal jurisdiction.”) (citing Wright & Miller).

Here, defendants did not consent to personal jurisdiction by appearing in state court because at the time of their appearance no complaint had been filed. Clearly, the litigation had not

reached the merits when no complaint had yet been filed. Further, defendants could not have raised lack of personal jurisdiction at this stage because under Pennsylvania law, “preliminary objections,” such as challenges to personal jurisdiction, “may not be filed until after the complaint is filed.” *Monaco v. Montgomery Cab Co.*, 208 A.2d 252, 255 (Pa. 1965);<sup>11</sup> see also Pa. R. Civ. P. 1028 (including “lack of jurisdiction over . . . the person of the defendant” as a “preliminary objection”). Finally, defendants did not consent to jurisdiction by removing the case to this court. See *Nationwide Eng’g & Control Sys, Inc.*, 837 F.2d at 347–48 (citing Wright & Miller); *Brown*, 2002 U.S. Dist. LEXIS 12294, at \*15 (citing Wright & Miller).

D. Transfer under 28 U.S.C. § 1406(a)

Even though this court may not constitutionally assert personal jurisdiction over defendants, I will refrain from dismissing the action, and instead I will exercise my discretionary power to transfer this matter to the United States District Court for the District of Connecticut. Under 28 U.S.C. § 1406, a district court may transfer a case that was improperly filed in the wrong district to “any district or division in which it could have been brought” to further “the interests of justice.” Courts may invoke this section to cure lack of personal jurisdiction. See *Sinclair v. Kleindienst*, 711 F.2d 291, 294 (D.C. Cir. 1983) (“The procedural obstacles which may be removed by a transfer include the lack of personal jurisdiction, improper venue and statute of limitations bars.”) (citation omitted); *English Sports Betting, Inc. v. Tostigan*, No. 01-2202, 2002 U.S. Dist. LEXIS 4985, at \*12 (E.D. Pa. Mar. 15, 2002) (“Courts have read 28 U.S.C. § 1406(a) to

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<sup>11</sup>In *Monaco*, the court held that the defendant did not waive any objection to venue when it entered an appearance to obtain a rule to file a complaint pursuant to Pa. R. Civ. P. 1037. 208 A.2d at 255.

permit a district court that lacks personal jurisdiction to transfer a case in the interest of justice to a district in which personal jurisdiction and venue can be established.”) (citations omitted). Here, personal jurisdiction and venue are proper in Connecticut because defendants are established under the laws of Connecticut and “a substantial part of the events giving rise to the claim occurred” there. *See* 28 U.S.C. 1391 (listing the requirements for venue in diversity cases). Moreover, transferring the case will further the interests of justice because it will avoid additional filing and service costs and potential statute of limitations problems raised by the Hlavacs.

### **III. CONCLUSION**

For the foregoing reasons, I conclude that the court lacks personal jurisdiction over defendants, but in lieu of dismissal I will transfer the case to the United States District Court for the District of Connecticut.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BETH HLAVAC and GEORGE HLAVAC, individually	:	
and as parents and natural guardians of EMILY	:	
HLAVAC and GEORGE J. HLAVAC,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 04-6112
	:	
DGG PROPERTIES t/d/b/a/ WATER'S EDGE RESORT	:	
AND SPA,	:	
and	:	
DGG PROPERTIES CO., INC. t/d/b/a WATER'S EDGE	:	
RESORT AND SPA,	:	
and DGG PROPERTIES CO., a partnership,	:	
and WATER'S EDGE REALTY, LLC,	:	
Defendants.	:	

**ORDER**

AND NOW, this \_\_\_\_\_ day of April, 2005, upon consideration of defendants DGG Properties, DGG Properties, Co., Inc., DGG Properties, a partnership, and Water's Edge Realty LLC's motion to dismiss the complaint for lack of personal jurisdiction (Doc. No. 2), plaintiffs Beth and George Hlavac's opposition thereto (Doc. No. 4), and defendants' reply (Doc. No. 7), it is hereby ORDERED that the court lacks personal jurisdiction motion over defendants, but in lieu of dismissal the above captioned matter, Civil Action No. 04-6112, is transferred to the United States District Court for the District of Connecticut.

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William H. Yohn, Jr., J.

