IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

USPLABS JACK3D, LLC,	§	
Plaintiff,	§	
v.	§	**Civil Action No. 3:12-CV-1605-O**
MMRNV, LLC d/b/a MAX MUSCLE SPORTS NUTRITION, RENO, NEVADA and PHILIP TRACY,	§	
Defendants.	§	

ORDER

Before the Court are Defendants MMRNV, LLC d/b/a Max Muscle of Reno ("MMRNV") and Phillip Tracy's (collectively, "Defendants") 12(b)(2) and 12(b)(3) Motions to Dismiss for lack of personal jurisdiction and improper venue (ECF No. 9); Plaintiff USPlabs Jack3d, LLC's ("USPlabs") Response (ECF No. 13); and Defendants' Reply (ECF No. 16). Having considered the pleadings and the applicable law, the Court finds that Defendants' motion to dismiss for lack of personal jurisdiction should be and is hereby **GRANTED**.

I. FACTUAL & PROCEDURAL BACKGROUND

USPlabs is a limited liability company organized under the laws of Wyoming, with its principal place of business in Dallas, Texas. Compl. ¶ 1, ECF No. 1. MMRNV is a limited liability company organized under the laws of Nevada, with its principal place of business in Nevada. *Id.* ¶ 2. Tracy resides in Nevada. *Id.* ¶ 3.

Defendant Tracy, the owner of MMRNV, gave an interview to KRNV, a local Reno, Nevada television station. *Id.* ¶ 10. During that interview, Tracy stated that the dietary supplement Jack3d (pronounced "Jacked"), owned and licensed by Plaintiff USPlabs, was an amphetamine-like compound that "speeds up your heart rate," and that one of its ingredients, 1, 3-Dimethylamylamine ("DMAA"), causes short-term side effects such as insomnia and heart palpitations. *Id.* Tracy further stated that the product is "a derivative of rat poisoning" and could "possibly" cause death. *Id.* Tracy's statements were republished on KRNV's news website, www.vitaminpoints.com, www.aolnews.com, the Facebook pages of both Max Muscle Utah and Max Muscle Sports Nutrition, and Max Muscle Sports Nutrition's Twitter page. *Id.* ¶ 11; Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss 2-4, ECF No. 14.[1]

Plaintiff USPlabs filed this diversity action alleging business disparagement, defamation, tortious interference with business relationships, and tortious interference with prospective business relations. *See* Compl. ¶¶ 14-33, ECF No. 1. In response, Defendants filed the instant motion to dismiss for lack of personal jurisdiction and improper venue. *See generally* Defs.' Mot. Dismiss, ECF No. 9. Accordingly, Defendants' motion to dismiss is presented to the Court, and is ripe for consideration.

II. LEGAL STANDARD

A federal court may only exercise *in personam* jurisdiction over a nonresident if (1) the long-arm statute of the forum state allows personal jurisdiction over the defendant, and (2) the exercise of personal jurisdiction is consistent with the Fourteenth Amendment's Due Process Clause. *Revell*

[1] MMRNV has a franchise agreement with Max Muscle Sports Nutrition, pursuant to which MMRNV is franchised to operate a retail store in Reno, Nevada to sell supplements. Defs.' App. Supp. Mot. Dismiss Ex. A (Tracy Aff.), App. 5, ECF No. 11.

v. Lidov, 317 F.3d 467, 469 (5th Cir. 2002). Because Texas's long-arm statute extends personal jurisdiction to the full extent permitted by the Due Process Clause, the only issue is whether the exercise of personal jurisdiction over Defendants offends due process. *See id.* at 469-70.

Due process is satisfied when (1) the nonresident defendant "has purposefully availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with the forum state," and (2) "the exercise of jurisdiction over that defendant does not offend 'traditional notions of fair play and substantial justice.'" *Mink v. AAAA Dev. LLC,* 190 F.3d 333, 336 (5th Cir. 1999) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This test "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." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation marks omitted).

Sufficient minimum contacts support either specific or general jurisdiction. *Clemens v. McNamee*, 615 F.3d 374, 378 (5th Cir. 2010). Specific jurisdiction exists when the cause of action arises out of or is related to the defendant's purposeful contacts with the forum. *See Burger King*, 471 U.S. at 472. General jurisdiction arises when the defendant has continuous and systematic contacts with the forum state, regardless of whether the cause of action arises from those contacts. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

In a diversity action, a plaintiff must first make a *prima facie* showing that personal jurisdiction exists over the defendant. *Revell*, 317 F.3d at 469. Uncontroverted allegations within the plaintiff's complaint are taken as true. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985). Any genuine, material conflicts within the evidence and affidavits are resolved in the plaintiff's favor. *Id.* A district court need not "credit conclusory allegations, even if

uncontroverted[,]" nor must it "draw farfetched inferences." *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001).

III. ANALYSIS

Plaintiff argues that the Court has specific jurisdiction over Defendants because Defendants made defamatory false statements, re-published those statements, and allowed others to republish those statements. *See* Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss 4-5, ECF No. 14.[2] Defendants argue that the Court lacks specific jurisdiction because none of the comments, nor any of the re-publications were "'directed at residents of the forum' such that Defendants would have reasonably anticipated being haled into court in Texas." *See* Defs.' Reply Supp. Mot. Dismiss 5, ECF No. 16. Based on the following, the Court concludes that specific jurisdiction does not exist.

A. Tracy's Comments

The Court first turns to whether specific jurisdiction exists based on comments made by Tracy during an interview with KRNV, a local Reno, Nevada, television station. Plaintiff argues that specific jurisdiction exists because Tracy made the comments knowing USPlabs was headquartered in Texas, and directed his comments to Texas residents "in an effort to discourage and/or influence" them not to buy the product. *See* Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss 8, ECF No. 14. Defendants assert that specific jurisdiction does not exist because Tracy did not direct his comments at the state of Texas, nor were the effects of his comments felt in Texas. *See* Defs.' Reply Supp. Mot. Dismiss 8-9, ECF No. 16.

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[2] It appears from Plaintiff's Response that Plaintiff concedes that the Court lacks general jurisdiction. *See generally* Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss, ECF No. 14. Plaintiff has not submitted any evidence that Tracy's contacts with Texas were "continuous, substantial, and systematic." *See Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 217 (5th Cir. 2000). Therefore, the Court analyzes only whether specific jurisdiction exists. *See Dibon Solutions, Inc. v. Chugach Alaska Corp.*, No. 3:08–CV–0097–B, 2008 WL 2354946, at *3 (N.D. Tex. June 10, 2008); *see also Pension Advisory Grp., Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680, 693 (S.D. Tex. Feb. 11, 2011).

Courts analyze specific jurisdiction for suits alleging defamation under the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984). *See Clemens*, 615 F.3d at 380 (applying *Calder*). In *Calder*, the Supreme Court upheld a California court's exercise of personal jurisdiction over two defendants from Florida because the defendants had "expressly aimed" their conduct—writing and publishing an article in the National Enquirer—at the forum state and knew that the effects of their conduct would be felt there. 465 U.S. at 788-89. The Court reached this decision because their article concerned a California resident, addressed activities occurring in California, was drawn from California sources, and the "brunt of the harm" was suffered in California. *See id*. Therefore, for *Calder* to apply, the forum must "be the focal point" of a defendant's conduct. *Clemens*, 615 F.3d at 379 (quoting *Calder,* 465 U.S. at 789). In a defamation case, the forum will be considered the focal point if both the subject matter of the article or conduct, and the sources relied upon for the article or conduct were in the forum state. *Id.* at 380.

Tracy's comments do not satisfy the *Calder* effects test. During his interview, Tracy says that Jack3d speeds up your heart rate, may cause damage to your body and possibly death, lead to side effects, and is a "derivative of rat poisoning." Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss 3, ECF No. 14. Plaintiff argues that because it operates its business in Texas, "[a]nyone involved in the dietary and health supplement retail business, such as Tracy as owner of Max Muscle Reno," would know that the effects of Tracy's statements would cause injury in Texas. *See id.* at 7. Plaintiff imputes this knowledge, in part, based on information printed on the Jack3d bottles. *See id.*

In *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 427 (5th Cir. 2005), the Fifth Circuit cautioned against an approach that only looks at where a plaintiff identifies an injury. "To employ this approach would turn the jurisdictional analysis on its head, focusing attention not on where the

alleged tortfeasor directed its activity, but on where the victim could identify tangential harms." *Id.* at 427. The fact that USPlabs resides and suffered harm in Texas "will not alone support jurisdiction under *Calder*." *Revell*, 317 F.3d at 473; *see also Clemens*, 615 F.3d at 380 (declining jurisdiction, because even though the defendant knew harm would result in Texas, Texas was not the focal point of the alleged defamatory statement); *Panda Brandywine Corp.*, 253 F.3d at 869 ("*Calder*'s 'effects' test is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state."). Instead, specific jurisdiction exists only if Texas was the focal point of Tracy's comments. *See Clemens*, 615 F.3d at 379.

The Court finds that Texas was not the focal point of Tracy's comments. First, Tracy did not reference Texas during the interview, nor did he reference the Texas-based activities of USPlabs. *See Revell*, 317 F.3d at 473. Second, Tracy made his comments on a local television station in Reno, Nevada. *See* Pl.'s App. Supp. Resp. Defs.' Mot. Dismiss Ex. A (Doyle Aff.), App. 4, ECF No. 15. This demonstrates Tracy intended to direct these comments to Reno, Nevada residents, not Texas residents. *See Fielding*, 415 F.3d at 427-28 (declining jurisdiction because defendants clearly aimed their conduct at a German audience). Third, when making his comments, Tracy does not appear to rely on Texas sources. For these reasons, the Court concludes that specific jurisdiction does not exist over Defendants.

B. Republication

Plaintiff argues that specific jurisdiction exists over Defendants because other websites republished or referenced Tracy's KRNV interview. *See* Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss 2-4, ECF No. 14. Specifically, Plaintiff argues that Defendants "purposely re-produced and re-published the false statements made by causing the original interview given in Reno, Nevada to be

reproduced on the internet through" various websites, including mynews4.com, vitaminpoints.com, aolnews.com, Max Muscle Utah's Facebook page, Max Muscle Sports Nutrition's Facebook page, and Max Muscle Sports Nutrition's Twitter page. *See id.* at 3-4, 7-9.[3] Therefore, Plaintiff concludes the Court has specific jurisdiction over Defendants. The Court disagrees.

For a court to exercise specific jurisdiction, there must be a "sufficient nexus between the non-resident's contact with the forum and the cause of action." *Clemens*, 615 F.3d at 378-79. While Plaintiff provides an affidavit and other attachments along with its response, Plaintiff has not shown any nexus between this evidence and how Tracy intended for his comments—made during a local Reno, Nevada, television interview—to cause third parties to then republish, reference, or link his comments. *See Fielding v. Hubert Burda Media, Inc.*, 2004 WL 532714, at *6 (N.D. Tex. Feb. 11, 2004), *aff'd*, 415 F.3d 419 (5th Cir. 2005) (declining jurisdiction over German newspapers on the theory that several Texas publications ran versions of the articles originally published by the German newspapers); *see also Panda Brandywine Corp.*, 253 F.3d at 869 (finding "conclusory allegations" and "farfetched inferences" does not support a finding of specific jurisdiction). Therefore, specific jurisdiction over Defendants does not exist.

Even if Defendant established a nexus, specific jurisdiction still does not exist because Texas was not the focal point of Tracy's comments. *See Revell*, 317 F.3d at 472 (citing *Calder*, 465 U.S.

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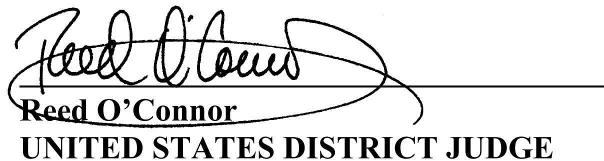
[3] In parts of its brief, Plaintiff refers to Max Muscle's Twitter page as belonging to Max Muscle Sports Nutrition. *See* Pl.'s Br. Supp. Resp. Defs.' Mot. Dismiss 4, ECF No. 14. In other parts, Plaintiff refers to Max Muscle's Twitter page as belonging to MMRNV. *See id.* at 2. Whether the Twitter account belongs to MMRNV or Max Muscle Sports Nutrition does not affect the Court's conclusion that specific jurisdiction does not exist. The "tweet" cited in Plaintiff's brief reads, "MMSN Owner PJ Tracy in Reno, educating his area on the dangers of Dimethylamylamine (DMAA) & why it's NOT at Max Muscle!" *See* Pl.'s App. Supp. Resp. Defs.' Mot. Dismiss Ex. 6 (Twitter page), App. 32-38, ECF No. 15. This tweet does not refer to Texas, nor is it based on Texas sources. *See Revell*, 317 F.3d at 473. The tweet also is "not directed at Texas readers as distinguished from readers in other states." *Id.* Furthermore, the "educating his area" language indicates that Tracy aimed his comments at Reno, Nevada residents. *See Fielding*, 415 F.3d at 427-28.

at 784-85). As noted above, Tracy did not reference USPlabs' activities in Texas, nor did he appear to rely on Texas sources for his information. *See supra* Part III.A. Instead, Tracy directed his comments at the local Reno, Nevada market. *See* Pl.'s App. Supp. Resp. Defs.' Mot. Dismiss Ex. 1 (News4 Article), App. 7, ECF No. 15 (citing Tracy's comments in an article entitled "Dietary supplement under microscope by FDA, still on shelves in Reno"). Because Texas was not the focal point of Tracy's comments, the Court finds specific jurisdiction does not exist based on Plaintiff's theory of third-party republication. *See Fielding*, 2004 WL 532714, at *6.

IV. CONCLUSION

Because the Court lacks personal jurisdiction over Defendants, it need not address whether there is proper venue. *See Fielding*, 2004 WL 532714, at *8. For the reasons stated above, Defendants' motion to dismiss for lack of personal jurisdiction is **GRANTED**. Accordingly, this case is **DISMISSED** without prejudice.

SO ORDERED on this **31st day** of **October**, **2012.**



Reed O'Connor
UNITED STATES DISTRICT JUDGE