

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

ESTATE of ARMETIA CHATMON, a/k/a
ARMENTER CHATMON, p/k/a “BO
CARTER” or “BO CHATMON”

Plaintiff,

v.

WARNER MUSIC GROUP CORP.,
SONY/ATV MUSIC PUBLISHING, EMI
MILLS MUSIC, INC., RHINO
ENTERTAINMENT COMPANY, d/b/a
RHINO RECORDS, VIACOM, INC., d/b/a
VIACOM INTERNATIONAL, INC.,
FOLKWAYS MUSIC PUBLISHERS, INC.,
HAL LEONARD LLC, J.W. PEPPER &
SONS, INC., ERIC CLAPTON, and JOHN
DOE NOS. 1-10,

Defendants.

Case No.: 3:16-cv-02722

Hon. Waverly D. Crenshaw, Jr.
Hon. Magistrate Judge Barbara D. Holmes

**DEFENDANT ERIC CLAPTON’S
MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS
THE AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION**

Defendant Eric Clapton (“Mr. Clapton”) respectfully submits this memorandum of law in support of his motion to dismiss the First Amended Complaint (Dkt. 90; the “Complaint”) of plaintiff Estate of Armetia Chatmon (a/k/a Armenter Chatmon, p/k/a “Bo Carter” or “Bo Chatmon”) (“Plaintiff”).

Notwithstanding the numerous reasons why Plaintiff’s Complaint is deficiently pleaded and devoid of substantive merit – not the least of which includes asserting claims that are preempted by copyright or do not even exist – this action should be dismissed with prejudice as to Mr. Clapton for a much more basic reason. Notwithstanding its amendments to the Complaint,

Plaintiff fails to establish, and cannot plausibly establish, personal jurisdiction over Mr. Clapton, warranting dismissal under Federal Rule of Civil Procedure 12(b)(2).

Mr. Clapton is not a resident or domiciliary of Tennessee, nor does he have substantial or meaningful contacts in Tennessee. None of the claims alleged in Plaintiff's Complaint arises out of conduct by Mr. Clapton that occurred in or was targeted toward Tennessee. Rather, the claims appear to arise out of a musical performance given by Mr. Clapton and recorded in London twenty-five years ago. Simply put, Plaintiff cannot meet its burden to establish personal jurisdiction over Mr. Clapton, whether general or specific. Indeed, the Complaint is bereft of any allegations that would even remotely suggest that Mr. Clapton's contacts with Tennessee warrant his being sued here.

FACTUAL BACKGROUND¹

A. General Background and Plaintiff's Claims

The Complaint alleges copyright infringement and a variety of other claims against Mr. Clapton and numerous other defendants arising from a 1992 performance by Mr. Clapton of the song "Alberta," which was taped for the television series *MTV Unplugged* at Bray Studios in London (the "Disputed Performance"). Complaint ¶ 21. A recording of the Disputed Performance was released on Mr. Clapton's hit 1992 album, *Unplugged*. *See id.* at ¶¶ 27-28. In the Disputed Performance, itself, and in the album's liner notes, the Disputed Performance is identified as a cover version of the song "Alberta" written by the folk-blues artist Lead Belly, *id.* at ¶¶ 23, 29, and is not credited to Mr. Clapton.

The Complaint contends that the attribution of the song to Lead Belly is not correct, and that the Disputed Performance actually contains the melody and lyrics of a 1920s blues song

¹ Consistent with the standards governing a motion to dismiss, and except as otherwise stated, Mr. Clapton accepts the Complaint's factual allegations as true for purposes of this motion only. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

entitled “Corrine, Corrina” purportedly written by Bo Carter. *Id.* at ¶ 24. This action was filed by Mr. Carter’s estate, which claims to be the owner of the “potential to receive royalties from [Carter’s] musical compositions,” including “Corrine, Corrina.” *Id.* at ¶ 6; Ex. B. Plaintiff’s claims against the defendants (including Mr. Clapton) include copyright infringement, false designation of origin under the Lanham Act, violation of Tennessee’s common law right of publicity, violation of moral rights under the Berne Convention (a cause of action which does not exist), conversion, unjust enrichment, and quantum meruit. *Id.* at ¶¶ 37-100.

Plaintiff’s claims arise from the Disputed Performance, the release of a recording of the Disputed Performance on the 1992 *Unplugged* album (which was re-released as a deluxe CD/DVD set in 2013), the song’s inclusion in a book of *Unplugged* sheet music published in 2014, and, according to the new allegations recently added to the Complaint, a re-release of Mr. Clapton’s 1977 album *Slowhand* by Polydor Records in 2012, a version of which contained “Alberta” as a bonus track. *Id.* at ¶¶ 27-29, 31-35. In all these instances, the song is purportedly identified as “Alberta” by Lead Belly or is otherwise not attributed to Bo Chatmon, and thus Plaintiff contends that publishing royalties from sales have not been paid to Plaintiff or have been incorrectly paid to Lead Belly’s publisher instead of to Plaintiff.

B. Factual Allegations Relevant to Personal Jurisdiction Over Mr. Clapton

The Complaint makes no jurisdictional allegations specific to Mr. Clapton. For this reason alone, the Court should dismiss the Complaint against Mr. Clapton. The Complaint’s sole averments specifically regarding personal jurisdiction are contained in the following paragraph:

Upon information and belief, each of the Defendants has been transacting and continue[s] to transact business in the State of Tennessee and elsewhere in interstate commerce, or transacts business that affects such commerce, and has been committing and continues to commit the acts complained of herein in the State of Tennessee and elsewhere in interstate commerce, and regularly has been [sic] and now does business and solicits business and derives substantial revenue

from the sale and licensing of creative properties and other products and services sold, used or consumed in the State of Tennessee, including via the Internet, and elsewhere in interstate commerce. The Defendants expected or should have reasonably expected their acts, including the acts set forth above and complained of herein, to have consequences in the State of Tennessee.

Id. at ¶ 5.

It is undisputed that Mr. Clapton's actions allegedly giving rise to this lawsuit did not take place within the State of Tennessee. The Complaint itself states that the Disputed Performance was recorded in London almost 25 years ago. *Id.* at ¶ 21. As the Complaint also acknowledges, Mr. Clapton is a citizen of the United Kingdom who resides in England. *Id.* at ¶ 7(g). The Complaint does not allege (nor could it allege) that Mr. Clapton lives, or has ever lived in Tennessee. The boilerplate allegations of the Complaint also do not establish (and could not plausibly establish) that Mr. Clapton personally transacts any business in Tennessee, and to the extent any of his representatives have transacted any business there, there are no allegations that it was in any way related to the claims in the Complaint. Further, Plaintiff does not allege (and could not allege) that Mr. Clapton owns or holds any real property or tangible personal property or other assets located in Tennessee, maintains any offices or other places of business in Tennessee, or has a telephone number, mailing address, or bank account in Tennessee.

The allegations in the Complaint made on information and belief, *see* Complaint ¶¶ 46-47, do not claim (and could not claim) that Mr. Clapton personally manufactures, distributes, sells, or publishes audio or audiovisual recordings of his music, or that he personally offers any recordings for downloading or streaming via the Internet. And the Complaint does not allege that Mr. Clapton did or does have any personal involvement in whether and/or to what extent his 1992 album *Unplugged* or its 2013 deluxe edition reissue (which Plaintiff concedes was released by Warner through Rhino Records, *see* Cplt. ¶¶ 7(a), (b); 32), or the reissue of *Slowhand* (which

Plaintiff concedes was released by UMG through Polydor Records, *see id.* ¶¶ 7(h), 31), were published or distributed, including in Tennessee. The same can be said for any sheet music or songbooks of Mr. Clapton’s songs. Indeed, according to the Complaint, if any sheet music or songbooks for the *Unplugged* album or 2013 reissue, or for the reissue of *Slowhand*, were distributed in Tennessee, that process would have been undertaken by sheet music publishers. *See, e.g.*, Cplt., ¶¶ 7(e), (f); 35.

Further, the Complaint indicates that any broadcast or distribution of the episode of *MTV Unplugged* featuring Mr. Clapton’s Disputed Performance of “Alberta,” including in Tennessee, would have been handled by MTV and/or its affiliates. *Id.* at ¶¶ 7(c); 19-22. Plaintiff does not even claim that Mr. Clapton has played “Alberta” in Tennessee. *See* Cplt. ¶ 25 (“Upon information and belief, Clapton has been performing his version of The Original Song since the mid-1970s.”) & ¶ 30 (“In 2011, Defendant Clapton performed a derivative version of The Original Song with Wynton Marsalis at the [sic] Lincoln Center” in New York City).

ARGUMENT

Plaintiff bears the burden of establishing personal jurisdiction over Mr. Clapton. *See Beydown v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 504 (6th Cir. 2014). “Additionally, in the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.” *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). *See Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp. 2d 653, 657-58 (M.D. Tenn. 2002). Under the Tennessee long-arm statute, jurisdiction may be asserted on “[a]ny basis not inconsistent with the constitution of this state or of the United States.” Tenn. Code Ann. § 20-2-214(a)(6). The long-arm statute has been construed to extend to the limits of the Due Process Clause of the U.S.

Constitution. *Boles v. Nat'l Dev. Co.*, 175 S.W. 3d 226, 250 (Tenn. Ct. App. 2005) (citing *Agarita Music, Inc.*, 182 F. Supp. 2d at 658). Therefore, to determine whether there is personal jurisdiction over a defendant, “the Court must decide whether the exercise of jurisdiction comports with the limits imposed by federal due process.” *Bulso v. O’Shea*, No. 3-16-0040, 2017 U.S. Dist. LEXIS 19977, at *4 (M.D. Tenn. Feb. 13, 2017) (Crenshaw, J.). Courts undertake this analysis based on two types of personal jurisdiction, “general” and “specific,” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996), neither of which Plaintiff satisfies here.

A. Mr. Clapton Is Not “At Home” in Tennessee for Purposes of General Jurisdiction

There can be no dispute that this Court does not have general personal jurisdiction over Mr. Clapton. To establish general jurisdiction, Mr. Clapton’s “affiliations with [Tennessee] [must be] so continuous and systematic as to render [him] essentially at home” in Tennessee. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation marks omitted). The Supreme Court has cautioned that “only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there,” and for an individual, “the paradigm forum for the exercise of general jurisdiction is the individual’s domicile[.]” *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (internal quotation marks omitted). Plaintiff concedes that Mr. Clapton resides in England, not Tennessee, *see* Complaint, ¶ 7(g), and does not allege (and could not allege) that Mr. Clapton lives or has ever lived in the State of Tennessee.²

Mr. Clapton’s alleged contact with Tennessee discussed further below – *i.e.*, placing goods in the stream of commerce – also falls far short of the “continuous and systematic” contacts that, in rare instances, warrant general jurisdiction over non-domiciliaries. *See Daimler*

² Plaintiff’s statement that Mr. Clapton “has a residence” in Ohio, apart from being inaccurate, is irrelevant to the question of whether Mr. Clapton has adequate contacts with Tennessee to justify exercising personal jurisdiction over him in Tennessee.

AG, 134 S. Ct. at 761 (exception to “at home” general jurisdiction requires contacts so “continuous and systematic” that defendant is effectively “at home” in the forum state); *One Media IP Ltd. v. Henry Hadaway Org., Ltd.*, No. 3:14-CV-0957, 2017 WL 492202, at *3 (M.D. Tenn. Feb. 7, 2017) (quoting *Daimler AG*, 134 S. Ct. at 751) (“[A] stream of commerce analysis relates only to *specific* jurisdiction. General jurisdiction, to the contrary, requires a showing that the defendant is ‘essentially at home in the forum state.’”).³

B. Plaintiff Cannot Satisfy the Three-Prong *Mohasco* Test to Establish Specific Personal Jurisdiction over Mr. Clapton

For this Court to exercise specific personal jurisdiction, Mr. Clapton must “have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). These minimum contacts make personal jurisdiction foreseeable when a non-resident defendant’s connection to, and conduct within, the forum state is such that “he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In the Sixth Circuit, Plaintiff must satisfy the *Mohasco* test to establish personal jurisdiction:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

³ To the extent Mr. Clapton made any concert appearances in Tennessee in recent years, he still is not subject to general jurisdiction in Tennessee, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014), and as discussed below, Plaintiff does not claim that specific jurisdiction arises out of any concert performances in Tennessee.

Means v. U.S. Conference of Catholic Bishops, 836 F.3d 643, 649 (6th Cir. 2016) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). Failure to satisfy any one of these elements “means that personal jurisdiction cannot be invoked.” *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1303 (6th Cir. 1989). Plaintiff cannot satisfy any of the three prongs as to Mr. Clapton, let alone all three.

1. Mr. Clapton Did Not Purposefully Avail Himself of the State of Tennessee

“‘Purposeful availment’ . . . is present where the defendant’s contacts with the forum state ‘proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum state . . .’” *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 889 (6th Cir. 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471 (1985)) (emphasis in original). The Sixth Circuit has interpreted the term “purposeful availment” to mean “something akin to a deliberate undertaking to do or cause an act or thing to be done in [the forum state] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [the forum state], something more than a passive availment of [the forum state’s] opportunities.” *Id.* at 891 (internal citation and quotation marks omitted). A defendant’s connection with the forum state must not just be intentionally directed toward that state, but must also be “substantial.” *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). Here, Plaintiff’s Complaint does no more than assert scattershot conclusory allegations concerning the conduct of the collective “Defendants,” much less assert any “substantial” contacts by Mr. Clapton with Tennessee, specifically, as to fall within the ambit of purposeful availment.

The law prohibits Plaintiff from aggregating jurisdictional contacts of multiple defendants, especially in light of the fact that Plaintiff announced to the Court that it has settled its claims with numerous Defendants. *See Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980)

(denouncing as “plainly unconstitutional” attempts to aggregate jurisdictional contacts of multiple defendants); *Beydoun*, 768 F.3d at 504 (plaintiff bears the burden of proving the court has jurisdiction “over each defendant independently”) (internal citations omitted). The Complaint’s boilerplate allegation that the collective “Defendants” “derive[] substantial revenue from the sale of licensing of creative properties . . . used or consumed in the State of Tennessee,” Cplt. ¶ 5, and its conclusory allegation that “Defendants” manufactured, sold, distributed, licensed, or published copies of the Disputed Performance in this district, *see id.* at ¶¶ 46-47, are insufficient to establish personal jurisdiction over Mr. Clapton in Tennessee. Moreover, under Sixth Circuit law, even assuming *arguendo* that Mr. Clapton himself placed products in the “stream of commerce,” without more, this action does not establish purposeful availment without a showing of “additional conduct” by Mr. Clapton directed specifically toward the forum state. *Agarita Music, Inc.*, 182 F. Supp. 2d at 664 (adopting “stream of commerce plus” test from *Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102, 112 (1987) (O’Connor, J., plurality opinion)).

The opinion in *Agarita Music, Inc.* is instructive. In that case, the court rejected a copyright plaintiff’s attempt to exercise personal jurisdiction over a music publisher defendant based on allegations like those here: that the defendant had licensed music in Tennessee and collected royalties from Tennessee sales. The court held that “without a showing of any additional conduct directed towards the state, the mere generalized exploitation of a copyright in the stream of commerce does not amount to purposeful availment,” noting that to hold otherwise would subject copyright defendants to personal jurisdiction in any forum in which a copy of the allegedly infringing work was sold and “would amount to a judicial rewriting of the Copyright Act.” *Id.* Likewise, here, generalized (and groundless) allegations that Mr. Clapton exploited or

benefitted from an allegedly infringing song on a nationwide basis and that music patrons consumed the infringing song in Tennessee are insufficient to establish purposeful availment.

The necessary “additional conduct” element requires Plaintiff to make an evidentiary showing of “purposeful action directed toward Tennessee” by Mr. Clapton – *i.e.*, that he made a concerted effort to “reach out to Tennessee residents *any more than to persons residing elsewhere.*” *Id.* at 665 (internal citation omitted; emphasis added); *see also State Indus., Inc. v. Beckett Gas, Inc.*, 200 F.R.D. 392, 396 (M.D. Tenn. 2001) (passive agreement to receive compensation for goods sold in forum state is not sufficient). Plaintiff has failed to allege any specific facts sufficient to establish the something “more” that is required for a showing of purposeful availment aside from mere expectation of consequences in Tennessee, and particularly in light of his failure to even plead the existence of any other meaningful contacts in Tennessee, Plaintiff cannot plausibly establish purposeful availment with respect to Mr. Clapton. *See First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 391 (Tenn. 2015) (holding that allegations that defendants could reasonably foresee that purchase of investment products would occur in Tennessee and alleged fraudulent statements and omissions would cause harm there were, without more, insufficient to establish personal jurisdiction over defendants in Tennessee; plaintiff failed to show acts were “directed toward and sufficiently connected to the State of Tennessee”).

The amendments to the Complaint do not change this outcome, in particular, Plaintiff’s newly minted attempt to hold the collective “Defendants” both vicariously and contributorily liable for copyright infringement in light of some undefined “control over the dissemination, sale, distribution, and licensing of the infringing copies of the Plaintiff’s 1929 Copyright” and their purported “actual knowledge or constrictive knowledge” of infringement. Cplt. ¶¶ 52-59.

As discussed above, Plaintiff's speculative and nondescript allegations of control and knowledge on behalf of the collective "Defendants" is improper, and the conclusory claim that Mr. Clapton must personally control all his distribution and sales of music simply because he is a "songwriter" or "copyright holder" (*see* Cplt. ¶ 54) is factually unsupported and is simply not plausible, especially because Plaintiff's own Complaint clearly alleges that many other parties (including other defendants) were charged with publishing, distributing, or selling Mr. Clapton's music as sound recordings, audiovisual works, sheet music, and/or songbooks. *See, e.g.,* Cplt., ¶¶ 7, 20-22, 31, 32, 35.

Nonetheless, alleged control and knowledge are irrelevant to the jurisdictional inquiry because neither allegation imputes any purposeful availment to Mr. Clapton. Mere knowledge that allegedly infringing copyrighted works are being distributed and sold in the forum State does not establish purposeful availment, and has been deemed – by the very case upon which Plaintiff has heavily relied – as "too random, fortuitous, and attenuated for a finding of purposeful availment." *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 480-81 (6th Cir. 2003) (holding that a defendant must actively solicit nationwide distribution and that knowledge alone that a third party was likely to distribute nationally – and lack of objection to sales in Tennessee – is insufficient to establish purposeful availment).

And the issue of control is a red herring based on implausible speculation and distinguishable case law cited in Plaintiff's opposition to Mr. Clapton's prior motion to dismiss. As noted above, Plaintiff does not (and could not) plausibly allege that Mr. Clapton *personally* distributes the reissues of *Unplugged* or *Slowhand* in Tennessee or sells them himself at local record stores. Even so, such allegations, apart from being entirely hypothetical, would be legally insufficient to satisfy the "something more" required for purposeful availment on a "stream of

commerce” theory like Plaintiff’s. *See, e.g., CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996) (entering contract with a resident of a state does not satisfy additional conduct element); *Agarita*, 182 F. Supp. 2d at 665 (additional conduct element “not satisfied by a passive agreement to receive compensation if and when goods are sold in the forum”). Further, the mere fact that third parties may sell those records in Tennessee (in stores or at concerts) is insufficient to establish jurisdiction over Mr. Clapton. *Agarita*, 182 F. Supp. 2d at 664 (sale of allegedly infringing work by others without defendant taking further acts directed at forum cannot be imputed to defendant, and is insufficient for jurisdiction).

The cases on which Plaintiff likely relies (and has relied on in the past) in connection with his “control” argument do not tip the balance, as they are distinguishable, in particular *Still N the Water Publishing*, 327 F.3d 472 (6th Cir. 2003). In that case, the court found purposeful availment on the part of one defendant (“DM”) based upon contractual language which affirmatively required DM’s recordings to be distributed in all fifty states. *See id.* at 483-84. By contrast, with respect to the other defendant (“NTW”), the court held there had been no purposeful availment because, while NTW may have been aware that nationwide distribution was likely, the plaintiff failed to point to any contractual language or other evidence showing that NTW *required* any third party “to market, distribute, or license NTW’s compositions nationally, in Tennessee specifically, or elsewhere.” *Id.* at n.11.

Mr. Clapton’s situation is akin to NTW’s because Plaintiff does not even plead that Mr. Clapton entered into any specific distribution agreement “that placed an affirmative obligation upon [the distributor] to distribute” the 2013 Release in Tennessee (or in all fifty states), *id.* at 480. Further, while the *Still N The Water* plaintiff asserted that NTW’s sound recordings were being sold in Tennessee record stores, it – like Plaintiff here – failed to “adduce any evidence

that [defendant] took any actions to direct the compositions to Tennessee.” *Still N The Water*, 327 F.3d at 480.⁴ *See also CompuServe, Inc.*, 89 F.3d at 1264 (the court found purposeful availment in Ohio where the defendant signed a specific contract governed by Ohio law with an Ohio-based company, sent software to the company, and advertised through the company). The Court should disregard Plaintiff’s “control” theory of personal jurisdiction.

2. Plaintiff’s Claims Do Not Arise from Any Activities of Mr. Clapton in Tennessee

Even if Plaintiff could establish that Mr. Clapton purposefully availed himself of this forum, personal jurisdiction is still lacking because Plaintiff cannot satisfy the second prong of the test: that the causes of action arise from Mr. Clapton’s forum-related activities. *See Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002) (second prong calls for “an analysis of whether [the plaintiff’s] claims ‘arise from’ the [out-of-state defendants’] contacts with [the forum state]”). This element requires “that the cause of action . . . have a substantial connection with the defendant’s in-state activities.” *Id.* (internal citations and quotation marks omitted).

Plaintiff’s claims against Mr. Clapton arise from activities by Mr. Clapton that took place in London, not Tennessee. All of Plaintiff’s claims against Mr. Clapton stem from allegations that, in 1992, Mr. Clapton recorded an episode of *MTV Unplugged* in London during which he engaged in the Disputed Performance and allegedly incorrectly identified Plaintiff’s “Corrine Corrina” as “Alberta” by Lead Belly. *See* Complaint, ¶¶ 23-26. Further, contrary to the Complaint’s vague and conclusory allegations concerning performances of “Alberta,” *see id.* at ¶

⁴ To the extent Plaintiff relies on Internet sales of the reissues of *Unplugged* and *Slowhand* through Mr. Clapton’s website, its allegations are also insufficient. As in *Still N The Water*, Plaintiff “does not assert that [Mr. Clapton’s website] is sufficiently interactive for a finding of purposeful availment.” *Id.* at 483. Also, as in *Agarita*, 182 F. Supp. 2d 653, Plaintiff pleads no facts to support the assertion that consumers purchase the 2013 Release through Mr. Clapton’s website, and the court “will not assume that such sales occur just because” one might have “no reason to doubt” that such sale occurred. *Id.* at 661.

25, Plaintiff does not allege that Mr. Clapton has ever even performed “Alberta” in Tennessee.⁵ In short, Plaintiff has stated no facts that would plausibly suggest that the alleged wrongdoing by Mr. Clapton had any connection to Tennessee at all, let alone a “substantial” one.

Even if the Complaint’s boilerplate allegations that the collective “Defendants” infringed Plaintiff’s song “by manufacturing, distributing, exploiting, performing, licensing and selling, in the Middle District of Tennessee and elsewhere in the world, audio/visual recordings of the Original Song,” Cplt. ¶ 46, were sufficient to invoke a “stream of commerce” theory – and they are not, *see* Sec. B.1, *supra* – these allegations would still fail to establish personal jurisdiction over Mr. Clapton. As discussed above, each defendant’s contacts with the forum state must be assessed individually, *see Calder v. Jones*, 465 U.S. 783, 790 (1984), and Plaintiff’s attempt to lump all “Defendants” together for purposes of jurisdiction is improper. *See Rush*, 444 U.S. at 332. Even so, the Complaint does not allege that Mr. Clapton himself manufactures, distributes, sells, or publishes audio or audiovisual recordings or sheet music; indeed, according to the Complaint, this is all the province of third parties. *See, e.g.*, Cplt. ¶¶ 7, 20-22, 31, 32, 35. The claims at issue here relating to distribution of the reissues of *Unplugged* and *Slowhand* fail to meet the second *Mohasco* prong because they cannot “arise out of” activity that is not properly attributable to Mr. Clapton. *See Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002) (cause of action must have “substantial connection with the defendant’s in-state activities”) (emphasis added).

Finally, even if Mr. Clapton engaged other defendants or third parties that do business nationwide to sell recordings of the Disputed Performance (or sheet music) in Tennessee, those

⁵ Plaintiff does not couch this allegation – which again impermissibly lumps all “Defendants” together – as a basis for jurisdiction, but even if Plaintiff meant to, for the reasons stated above, this case does not arise out of any performance of the allegedly infringing song in Tennessee.

actions would also be insufficient to establish personal jurisdiction over Mr. Clapton. *See Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1362 (Fed. Cir. 1998) (receipt of royalty income from licensees for sales in forum state not sufficient to establish personal jurisdiction over licensor) (citing *World-Wide Volkswagen*, 444 U.S. at 299).

3. Exercising Personal Jurisdiction Over Mr. Clapton Would Be Unreasonable

Plaintiff cannot satisfy the third prong of the *Mohasco* analysis because the exercise of jurisdiction over Mr. Clapton would be unreasonable. In evaluating the reasonableness of the exercise of jurisdiction, the Court must consider the burden on the defendant in defending in the forum, the interest of the forum state in adjudicating the dispute, the importance of the forum to the plaintiff's interest in obtaining convenient and effective relief, and considerations of judicial efficiency in adjudicating the case. *See Burger King Corp.*, 471 U.S. at 476-77.

First, where as in this case a defendant is a foreign national, the “unique burdens” on the defendant having to defend himself here should be given “significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” *Asahi*, 480 U.S. at 114. The concept of “fair play and substantial justice” inherent in Constitutional Due Process prevents a defendant from being unduly burdened by having to defend himself in a faraway and inconvenient forum. *Int'l Shoe Co.*, 326 U.S. at 323-24; *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 944-45 (11th Cir. 1997) (summarizing Supreme Court opinions discussing “fair play and substantial justice” requirement). Requiring Mr. Clapton, a citizen of the United Kingdom who resides in England, to travel internationally to engage in litigation would be burdensome. *See, e.g., Conn v. Zakharov*, 667 F.3d 705, 720 (6th Cir. 2012) (noting that the “burden on [the defendant] to defend this action in Ohio is heavy because he lives in Russia and would have to travel around

the world to engage in litigation”). Forcing Mr. Clapton to defend this case would not comport with notions of “fair play and substantial justice,” especially given the attenuated nature of Mr. Clapton’s contacts with Tennessee as discussed above. *See World-Wide Volkswagen Corp.*, 444 U.S. at 287 (due process analysis considers whether defendant’s connection with forum state is such that he should “reasonably anticipate being haled into court there”).

Second, considerations of the Plaintiff’s convenience strongly weigh against exercising jurisdiction over Mr. Clapton. The legal representative of Plaintiff is a resident of Mississippi, not Tennessee. Cplt., ¶ 6. None of the other defendants is incorporated in Tennessee or has a principal place of business in Tennessee, *see id.*, ¶ 7 (majority of Defendants are Delaware entities and/or have their principal place of business in New York), and accordingly it appears that few, if any, of the relevant documents or witnesses would be in Tennessee. Moreover, as discussed above, the Disputed Performance on which Plaintiff’s claims are based occurred and was recorded in London. Maintaining this case in Tennessee – and in particular against Mr. Clapton – is clearly not crucial to Plaintiff’s case.

Third, the interest of the State of Tennessee in adjudicating this dispute is a limited one given the federal nature of Plaintiff’s core claims for copyright infringement and violation of the Lanham Act (and because his other claims are clearly brought largely as duplicative afterthoughts). *Cf. Patent Rights Prot. Grp., LLC v. Video Gaming Techs., Inc.*, 603 F.3d 1364, 1371 (Fed. Cir. 2010) (because patent infringement is a matter of federal law, forum state’s interest in “furthering fundamental substantive social policies” is not implicated). While Mr. Carter was a Tennessee resident when he passed away in 1964, *see* Cplt. ¶ 6 & Ex. A, Tennessee’s interest in protecting the Estate is diminished here because it is undisputed that Mr. Clapton “did not commit [his] alleged [unlawful acts] within the geographical confines of

Tennessee.” *Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir. 2005). Indeed, the lone connection of the Estate to Tennessee is not sufficient to outweigh the other considerations relevant to the reasonableness analysis, which clearly favor Mr. Clapton – especially burden, which is given the most significant weight in the calculus. *Asahi*, 480 U.S. at 114.⁶

Plaintiff cannot overcome the inherent unreasonableness in exercising jurisdiction over Mr. Clapton, and Plaintiff certainly is not entitled to a presumption of reasonableness given that Plaintiff fails to satisfy the first two prongs of the *Mohasco* test. *See Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th 2005). Indeed, Plaintiff’s failure to satisfy either of the first two prongs of the *Mohasco* test is itself fatal to the Complaint. *See, e.g., Rice v. Karsch*, 154 F. App’x 454, 464 (6th Cir. 2005) (“Further, because this Court finds that the Plaintiffs-Appellants have not satisfied the first element, we will not address the second and third criteria.”); *Southern Sys., Inc. v. Torrid Oven Ltd.*, 58 F. Supp. 2d 843, 848; *In re Reciprocal of Am. (ROA) Sales Practices Litig.*, No. MDL 1551, CIV.A.04-2078, 2005 WL 1140737, at *3 (W.D. Tenn. May 12, 2005).

CONCLUSION

For the reasons stated herein, this Court lacks personal jurisdiction over Mr. Clapton. The Complaint should be dismissed in its entirety as to Mr. Clapton pursuant to Federal Rule of Civil Procedure 12(b)(2).

⁶ Notably, the Complaint indicates that Plaintiff’s Estate was probated in Shelby County Probate Court in Memphis, Tennessee. Cplt. ¶ 6. Memphis, however, is in the Western District of Tennessee, not this District.

Dated: August 31, 2017

New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I filed the foregoing document with the Court's CM/ECF system, which is expected to serve a copy on all counsel of record as listed below:

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