IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

ROBIN READ, Individually and in her Capacity as administratrix of the Estate of Brandon Michael Read, deceased, and MICHAEL A. READ,	)	
Plaintiffs,	)	NO. 2:08-cv-116
v.	)	
LIFEWEAVER, LLC and DAN FRAZIER,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS LIFEWEAVER, LLC'S AND DAN FRAZIER'S MOTION TO DISMISS

INTRODUCTION

Like many Americans, Dan Frazier opposes the Iraq War and the suffering that it has caused. To protest the war, Mr. Frazier, a long-time peace activist, acted under the protections guaranteed to him by the First Amendment. He, through his company, Lifeweaver, LLC (collectively, "Frazier"; individually, "Dan Frazier" and "Lifeweaver"), created political t-shirts criticizing President Bush that contain the names of more than 4,000 American troops who have died in the Iraq War printed in a small font that cannot be read beyond arm's length.

Some have objected to Frazier's political speech. In fact, Arizona, where Dan Frazier lives and where Lifeweaver is located, passed a statute banning his t-shirts and related products. Compl. ¶ 3. However, the federal district court in Arizona declared the statute unconstitutional, stating that the "Nation's debt to its fallen soldiers may not be paid by giving their families a toll on free speech. The debt must be paid, but in other ways." *Frazier v. Boomsma*, CV 07-08040-PHX-NVW, 2007 WL 2808559, at *17 (D. Ariz. Sept. 27, 2007).

Despite withering criticism, Frazier continues to offer the anti-war t-shirts over the Internet because he believes "the message is important" – not to harm the grieving families of deceased troops. Plaintiffs, however, object to Frazier's message and assert that the presence of their son's name on the t-shirts, along with the other fallen troops from throughout this country, has caused them emotional distress, warranting a lawsuit here in Tennessee. To further pressure Frazier, Plaintiffs amended their complaint to seek $40 billion in damages for a class of the heirs of every person whose name is printed on Frazier's t-shirts. Am. Compl. ¶ 5. Plaintiffs thus have filed what is essentially a strategic lawsuit against public participation (SLAPP) to suppress Frazier's constitutionally-protected free speech rights, even though Frazier did not cause their son's death nor is he alleged to have caused any actual severe injury to them. This court should reject Plaintiffs' attempt to silence Frazier and dismiss their complaint.

STATEMENT OF FACTS

Brandon Michael Read died on September 6, 2004 in Iraq from an IED explosion while serving in our country's armed forces. Compl. ¶ 2. Plaintiffs are Brandon Read's parents and estate, who are residents and citizens of the State of Tennessee. *Id.* ¶¶ 1-2. Dan Frazier and Lifeweaver are residents and citizens of the State of Arizona. *Id.* ¶ 1. Frazier sells anti-war shirts and related paraphernalia, such as bumper stickers and refrigerator magnets, on the website www.CarryaBigSticker.com. Compl. ¶ 3, Ex. C. The t-shirts at issue have the words "Bush Lied, They Died" superimposed on a background consisting of the names of more than 4,000 troops from throughout America who have died in the Iraq War. *Id.* Ex. C. The font used for the names is so small that the names cannot be read beyond arm's length. *Id.* Ex. C.

In direct response to criticism of Frazier's t-shirts, the State of Arizona passed legislation providing civil and criminal penalties for the unauthorized use of the name of an American

soldier. For example, the statute created civil liability for "'using the name . . . of any soldier without having obtained prior consent to the use by . . . [the soldier's immediate family member] . . . [for] (1) [a]dvertising for the sale of any . . . merchandise . . . [or] (3) [r]eceiving consideration for the sale of any . . . merchandise.'" *Frazier*, 2007 WL 2808559, at *2 (quoting Ariz. Rev. Stat. § 12-761). The Arizona federal district court ruled that the statute was an unconstitutional restriction of political speech, stating that "[t]he mere fact that Frazier sells the t-shirts does not transform them [from protected core political speech] into less-protected commercial speech." *Id.* at *12. This ruling occurred months before Plaintiffs filed their complaint on April 22, 2008. Plaintiffs later amended their complaint to seek more than $40 billion in damages for themselves and the heirs of every soldier whose name is printed on Frazier's t-shirts. Am. Compl. ¶¶ 2, 5.

Plaintiffs filed claims for negligent and intentional infliction of emotional distress based on the presence of their son's name on the t-shirts. However, Frazier's website never mentions Brandon Read nor is his name visible anywhere on the website. Compl. Ex. C. Plaintiffs do not allege in their complaint or amended complaint that Frazier operates the website outside of Arizona or that any t-shirts have been sold in Tennessee. Rather, they allege that by selling the t-shirt "by way of the internet," Frazier "'purposely availed themselves of the privilege of acting'" in Tennessee. *Id.* ¶ 7. Moreover, they allege that Frazier has "substantial enough connection" with this district because Frazier has "purposely entered the worldwide stream of commerce through the worldwide internet." *Id.* ¶ 7.

Plaintiffs also do not allege any actual serious or severe mental injury, or any other injury, to themselves. Instead, they assert that Frazier "knew or should have known, as reasonable persons, that the use of the name would cause the reasonable person emotional

distress." *Id.* ¶ 11. Additionally, they do not allege that they have ever bought or seen any of the t-shirts at all, let alone in Tennessee. Instead, they state that Plaintiff Robin Read "learned that the defendants" were selling the t-shirts. *Id.* ¶ 3.

ARGUMENT

This court should dismiss Plaintiffs' lawsuit for four reasons. First, this court lacks personal jurisdiction over Frazier. Fed. R. Civ. Pro. 12(b)(2). Dan Frazier and Lifeweaver are Arizona citizens. Plaintiffs do not allege that either Dan Frazier or Lifeweaver maintains a presence in or has traveled to Tennessee. Thus, they lack the continuous and systematic contacts with Tennessee necessary for this court to exercise general jurisdiction. Moreover, neither Dan Frazier nor Lifeweaver has purposefully directed commercial activities toward Tennessee that caused an injury in Tennessee. Therefore, this court lacks specific jurisdiction over them.

Second, Plaintiffs have failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Plaintiffs have asserted tort claims of negligent and intentional infliction of emotional distress. Their claims fail as a matter of law because they are unable to satisfy essential elements of either tort. For example, it is indisputable that Frazier did not cause Brandon Read's death, and Plaintiffs do not allege the requisite injuries.

Third, Plaintiffs have failed to show that the Eastern District of Tennessee is an appropriate venue for this action. Frazier neither resides in Tennessee nor are they subject to personal jurisdiction in Tennessee. Also, none of Frazier's activities alleged to give rise to this suit happened in Tennessee. *See* 28 U.S.C. § 1391(a). Therefore, the Eastern District of Tennessee is an improper venue for this action, and the complaint should be dismissed or, in the alternative, transferred to the District of Arizona.

Fourth, Dan Frazier, individually, has not been served properly. Fed. R. Civ. Pro. 12(b)(5). Plaintiffs never served Dan Frazier personally; rather, they left a copy of the complaint with the registered agent for Lifeweaver. Federal Rule 4(c), however, requires that an individual defendant be personally served with a complaint. Therefore, this complaint should be dismissed as to Dan Frazier, or, in the alternative, service of process as to Dan Frazier should be quashed.

I. THIS COURT DOES NOT HAVE PERSONAL JURISDICTION OVER FRAZIER.

Plaintiffs bear the burden of establishing that this court has personal jurisdiction over Dan Frazier and Lifeweaver. *See Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir. 2002). Facing a properly supported motion to dismiss for lack of personal jurisdiction, a 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). Once presented with a properly supported motion and opposition, the court may decide the motion on the affidavits alone or permit discovery, or it may conduct an evidentiary hearing to resolve any factual questions. *Id.* If this court holds an evidentiary hearing, Plaintiffs must prove that the exercise of personal jurisdiction over Frazier is proper by a preponderance of the evidence. *See Mark Hanby Ministries v. Lubet*, Civ. No. 1:06-CV-114, 2007 WL 1004169, at *4 (E.D. Tenn. Mar. 30, 2007). Alternatively, if this court decides the issue on affidavits alone, Plaintiffs must, at a minimum, make a prima facie showing that personal jurisdiction exists to survive the motion. *Theunissen*, 935 F.2d at 1458. Because Plaintiffs cannot meet this burden, this court should dismiss the complaint with prejudice for lack of personal jurisdiction.

A federal court sitting in diversity jurisdiction must determine "whether personal jurisdiction exists over a nonresident defendant by applying the law of the state in which it sits." *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989). The Tennessee long arm statute allows the exercise of personal jurisdiction over nonresidents on

"[a]ny basis not inconsistent with the constitution of the United States." Tenn. Code Ann. § 20-2-214(a)(6). Tennessee's long arm statute has been interpreted as "coterminous with the limits on personal jurisdiction imposed by the due process clause." *Payne v. Motorists' Mut'l Ins. Cos.*, 4 F.3d 452, 455 (6th Cir. 1993). Thus, this court may not exercise personal jurisdiction over Frazier if doing so would be inconsistent with due process.

The Supreme Court has repeatedly held that due process requires a nonresident defendant 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.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The critical issue to the minimum contacts analysis is "whether 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Third Nat'l Bank*, 882 F.2d at 1089 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). "Jurisdiction may be based either on the conduct of the non-resident defendant which gave rise to the cause of action (specific jurisdiction), or all of the defendant's general contacts with the forum state provided those contacts were 'continuous and systematic' (general jurisdiction)." *Pope v. Hoelcher*, No. 304CV388, 2005 WL 1320242, at *3 (E.D. Tenn. May 26, 2005).

A. This Court Lacks General Personal Jurisdiction Because Frazier's Contacts with Tennessee Are Not "Continuous and Systematic."

General personal jurisdiction "is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.'" *Bird v. Parsons*, 289 F.3d 865, 873 (2002) (quoting *Third Nat'l Bank*, 882 F.2d at 1089). Plaintiffs have not alleged in their complaint that Frazier has an office in Tennessee, is licensed to do business here, has a Tennessee bank account, or directs business operations from

Tennessee. *Id.* at 874-75. Nor do Plaintiffs claim that Frazier has ever visited Tennessee or sold a product in Tennessee. *Id.* Indeed, merely selling a product to Tennessee residents is insufficient grounds to subject an out of state party to general jurisdiction in Tennessee. *See id.* at 875. Instead, Plaintiffs apparently argue that Frazier's website, by its mere availability on the Internet, provides jurisdiction here in Tennessee. Compl. ¶ 7. However, Frazier is located in Arizona, where it uploads, edits, and maintains the website, not Tennessee. Not surprisingly, courts have held that the maintenance of "a website accessible to anyone over the Internet is insufficient to justify general jurisdiction." *Bird,* 289 F.3d at 874. The fact that Frazier's website allows Internet users, including those in Tennessee, to purchase products over the Internet does not alter the analysis because this kind of activity does not approximate physical presence within Tennessee's borders. *Id.* Thus, this court lacks general personal jurisdiction because Frazier does not maintain "continuous and systematic" contacts with Tennessee.

B. This Court Lacks Specific Personal Jurisdiction Because Exercising Personal Jurisdiction Over Frazier Is Inconsistent with the Due Process Clause.

Specific personal jurisdiction exists only if a suit arises out of or is related to a defendant's specific contacts with the forum. This court, however, may not exercise personal jurisdiction over Frazier if doing so would offend due process. *Nationwide Mut'l Ins. v. Tryg Int'l Ins. Co., Ltd.,* 91 F.3d 790, 793 (6th Cir. 1996). The Sixth Circuit has established a three-part test that incorporates due process concerns to determine whether specific jurisdiction exists:

> First, 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 or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of personal jurisdiction over the defendant reasonable.

Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968); *see Third Nat'l Bank,* 882 F.2d at 1089-90; *Southeastern Milk Antitrust Litigation,* Civ. No. 2:08-MD-

1000, 2008 WL 2697775, at *5 (E.D. Tenn. May 28, 2008). Based on the facts Plaintiffs allege in their complaint, this court lacks specific jurisdiction in this case.

i. Frazier Has Not Purposefully Availed Themselves of the Privilege of Acting in or Causing a Consequence in Tennessee.

A plaintiff bears the burden of showing that a defendant "'purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253(1958)). Courts require a plaintiff to demonstrate that "the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Third Nat'l Bank*, 882 F.2d at 1090. The purposeful availment requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Id.* (citations omitted). This concern is especially apt in here, where Plaintiffs would have this court exercise jurisdiction over Frazier merely because they offer t-shirts for sale over the Internet – shirts Plaintiffs apparently have never purchased.

When relying on Internet activity to demonstrate purposeful availment with a forum, courts in the Sixth Circuit consider the level of interactivity of a website, a defendant's knowledge regarding the residency of those interacting with it, and the amount of business transacted through it. *See Neogen*, 282 F.3d at 883. A website must be "interactive to a degree that reveals specifically intended interaction with residents of the state" to constitute purposeful availment. *Neogen*, 282 F.3d at 890 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

Frazier's operation of the CarryaBigSticker.com website in Arizona is insufficient grounds to assert personal jurisdiction in Tennessee because Frazier "no more benefits from the

laws of [Tennessee] than from the laws of any other state." *Id*. Plaintiffs do not allege that Frazier interacted with any people in Tennessee through their website. More important, they do not claim that anyone in Tennessee purchased any t-shirts through the website (or that they suffered harm from such a purchase). Thus, there is no allegation that Frazier had any awareness as to the physical location of any people who viewed the website or the t-shirts. By contrast, in *Zippo*, the court found personal jurisdiction based on defendant's intentional interaction with forum residents because defendants "repeatedly and *consciously* chose to [perform services for] Pennsylvania residents[]" through the Internet. *Zippo*, 952 F. Supp. at 1126. (emphasis added). Specifically, the defendant had approximately 3,000 customers in Pennsylvania who had entered into contracts to receive an ongoing news service via the Internet, and it had entered into contracts with seven Internet access providers in Pennsylvania so that it could provide these services. *Id.* The complaint does not allege that Frazier knowingly or consciously performed services for Tennessee residents, let alone at a level remotely similar to the *Zippo* defendant.

Additionally, the mere fact that Frazier's website is commercial and interactive does not by itself evidence that they purposefully availed themselves of the privilege of doing business in Tennessee. *See Neogen*, 282 F.3d at 891 (expressing doubt over whether the features of defendant's interactive and commercial website alone were sufficient to justify the exercise of personal jurisdiction.). Like *Zippo*, the *Neogen* court sustained personal jurisdiction primarily based on the defendant's existing service contracts with forum residents and its expectation of continued business with them, including the provision of passwords to customers who entered into contracts. *See id*. at 890-91. Importantly, the court did not consider the website's advertisements for defendant's services as supporting personal jurisdiction. The court concluded that "[t]he proper test for personal jurisdiction is . . . whether the absolute amount of business

conducted by [defendant] in [the forum] represents something more than 'random, fortuitous, or attenuated contacts' with the state." *Id*. at 891-92. (quoting *Burger King*, 471 U.S. at 475). Thus, without specifically and consciously targeting Tennessee residents, the mere interactivity of CarryaBigSticker.com alone is insufficient grounds for a Tennessee court to sustain personal jurisdiction over Frazier.

In one of the few cases to quantify the amount of business needed to demonstrate purposeful availment, the Sixth Circuit held that personal jurisdiction was proper over a defendant who had allegedly accepted the online business of an estimated 4,666 Ohio residents. *Bird*, 289 F.3d at 874-75. As this court has stated, "activity via the Internet must be substantially more regular and pervasive to constitute purposeful availment of doing business within a given state." *Mark Hanby Ministries, Inc.*, 2007 WL 1004169, at *7 (quotations omitted). Here, unlike *Neogen* and *Bird*, Plaintiffs have not alleged sales or contacts in Tennessee or that Frazier conducted any business of any sort in Tennessee. Plaintiffs have not even alleged a "random, fortuitous, or attenuated contact" with Tennessee. Accordingly, Plaintiffs have not shown or even alleged that Frazier "specifically intended interaction" with Tennessee residents or that the absolute amount of business conducted through the website with Tennessee residents was substantial, regular, or pervasive. *Neogen*, 282 F.3d at 890; *see Mark Hanby Ministries, Inc.*, 2007 WL 1004169, at *7. Thus, there is no personal jurisdiction over Frazier in Tennessee.

Plaintiffs have similarly failed to show that Frazier caused a consequence in Tennessee under the "effects test" adopted by this circuit to determine whether allegedly intentional tortious activity constitutes purposeful availment of the forum. *See Cadle Co. v. Schlichtmann*, 123 F. App'x, 675, 2005 WL 293666, at *4 (6th Cir. Feb. 8, 2005). The Supreme Court established the effects test in *Calder v. Jones*, 465 U.S. 783 (1984). In that case, a California plaintiff brought

an action against the author and editor of a news article that allegedly defamed her. Although both defendants were residents of Florida and had little contact with California, the Supreme Court sustained personal jurisdiction because California was "the focal point both of the story and of the harm suffered." *Id*. at 789. The Court concluded that the defendants could reasonably anticipate being haled into court in California because their intentional actions were aimed at a California resident and the brunt of the harm would be felt there. *See id*. at 789-90. Thus, the *Calder* approach premises personal jurisdiction on the effects resulting from intentional targeting rather than "mere untargeted negligence." *Id*.

The Sixth Circuit interprets the *Calder* decision narrowly, looking to whether the alleged tortious conduct was expressly aimed at the forum state and whether the "forum state was the focus" of the allegedly tortious activities "out of which the suit arises." *The Scotts Co. v. Aventis S.A.*, No. 04-3569, 2005 WL 1869653, at *4 n.1 (6th Cir. Aug. 24, 2005). Both intentional targeting of the forum and causation of a harmful effect are required – merely causing some consequence in the forum does not necessarily satisfy the minimum contacts test. *Id.* n.1 Further, tortious conduct aimed at a forum *resident* fails to satisfy the test; the conduct must be aimed at the forum *state*. *See Mark Hanby Ministries, Inc.*, 2007 WL 1004169, at *8. For example, in *Reynolds v. Int'l Amateur Athletics Federation*, an Ohio plaintiff brought an action against a foreign entity alleging that its public announcement of plaintiff's positive test for steroid use caused plaintiff to lose several endorsement contracts. 23 F.3d 1110, 1117 (6th Cir. 1994). The Sixth Circuit refused to exercise personal jurisdiction, reasoning that the press release concerned activities that happened in Monaco, defendants did not circulate or publish the release in Ohio, Ohio was not the focal point of the release, and the plaintiff's professional reputation as an international athlete was not centered in Ohio. *Id.* at 1120. Other circuit courts

have rejected similar claims for allegedly tortious activity conducted over the Internet. *See Revell v. Lidov*, 317 F.3d 467, 473, 475 (5th Cir. 2002) (holding that publishing an article critical of plaintiff on a New York university's website was insufficient to confer personal jurisdiction over defendants in Texas because the "article contain[ed] no reference to Texas, nor . . . to the Texas activities of [plaintiff], . . . was not directed at Texas readers as distinguished from readers in other States," and defendant "did not even know [plaintiff] was a resident of Texas when he posted his article"); *Young v. New Haven Advocate*, 315 F.3d 256, 259, 263 (4th Cir. 2002) (holding that articles about housing Connecticut prisoners in a Virginia prison posted on two Connecticut newspapers' websites did not confer personal jurisdiction in Virginia where the newspapers did not intend to target a Virginia audience or the conduct of a Virginia warden).

In the instant case, Plaintiffs do not allege that Frazier targeted Tennessee or Plaintiffs or actively attempted to cause harm to anyone in Tennessee or to the State of Tennessee. Moreover, there is no allegation that Frazier was aware that Plaintiffs were Tennessee residents, until this action was threatened. *See Revell*, 317 F.3d at 475. Even if Frazier foresaw that a Tennessee resident might disagree with their message or products on CarryaBigSticker.com, that hypothetical risk does not evidence targeting Tennessee nor does it by itself support exercising personal jurisdiction in Tennessee. *See World-Wide Volkswagen*, 444 U.S. at 295. Additionally, Plaintiffs do not allege, nor could they, that Frazier printed Brandon Read's name on the t-shirts with the intent to cause harm in Tennessee because the t-shirts contain the names of more than 4,000 deceased troops from across the United States. Compl. ¶ 3. Plaintiffs' Tennessee residence thus does not confer personal jurisdiction over Frazier.

Additionally, there is no basis for personal jurisdiction in Tennessee because tortious conduct must be aimed at the forum state – rather than a resident – to satisfy the effects test. *See*

Mark Hanby Ministries, Inc., 2007 WL 1004169, at *8. The t-shirts make no reference to Tennessee, nor did Frazier target Tennessee consumers as distinguished from consumers in other states. *See Revell*, 317 F.3d at 473. Frazier included Brandon Read's name on the t-shirts based on events that occurred in *Iraq*, not Tennessee. *See Reynolds*, 23 F.3d at 1120. In sum, Frazier did not "manifest [an] intent to aim [the] website[] or the [t-shirts] at a Tennessee audience." *Young*, 315 F.3d at 263. Accordingly, Plaintiffs are impermissibly attempting to premise personal jurisdiction on "mere untargeted negligence," *Calder*, 465 U.S. at 789, and Frazier consequently could not have "reasonably anticipate[d] being haled into court [in Tennessee]." *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Plaintiffs have thus failed to prove that Frazier purposefully availed themselves by causing an effect in Tennessee.

Finally, contrary to Plaintiffs' assertions, Compl. ¶ 7, offering t-shirts for sale via the Internet does not by itself evidence purposeful availment of Tennessee. *See Bridgeport Music, Inc., v. Still N the Water Pub.*, 327 F.3d 472, 479-80 (6th Cir. 2003) (citing *Asahi Metal Industry Co., Ltd., v. Superior Court*, 480 U.S. 102, 112 (1987) (O'Connor, J.) (plurality opinion)). As Justice O'Connor explained, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112 (O'Connor, J.) (plurality opinion). Frazier therefore cannot be held responsible for an offense or injury to Plaintiffs indirectly resulting from Frazier's distribution of t-shirts to other consumers. The fact that anyone, anywhere in the world could purchase a t-shirt through the CarryaBigSticker.com website does not evidence purposeful availment without some other evidence of targeting Tennessee. *Bridgeport Music*, 327 F.3d at 481. Plaintiffs have thus failed to demonstrate that Frazier purposefully availed themselves of Tennessee by entering the stream of commerce through the Internet.

ii. The Claims Do Not Arise From Frazier's Activities Within Tennessee.

Plaintiffs also fail to satisfy the second element of the *Southern Machine* test, which requires that Plaintiffs' cause of action "arise from" Frazier's contacts with Tennessee. *Southern Machine Co.*, 401 F.2d at 381. A cause of action "arises from" a defendant's actions if the claim has a "substantial connection" with the defendant's in-state activities. *Third Nat'l Bank*, 882 F.2d at 1091 (citing *Southern Machine*, 401 F.2d at 384 n.27). Conversely, where the operative facts of the controversy are not related to the defendant's contact with the state, the cause of action does not arise from that contact and a finding of personal jurisdiction is inappropriate. *Id.*

Plaintiffs do not allege, nor do they present any evidence, that their tort claims arise from Frazier's random Internet-based "contacts" with Tennessee. Rather, Plaintiffs only allege that they "learned" that Brandon Read's name appears on Frazier's t-shirts. Compl. ¶ 3. They do not claim that they have ever visited the CarryaBigSticker.com website or that they have purchased a t-shirt through the website or even seen an image. Moreover, Brandon Read's name is not visible in any product image available on the CarryaBigSticker.com website. *Id.* Ex. C. Even if Plaintiffs saw an image of the t-shirt through some secondhand source, simply placing an article into the stream of commerce does not create contacts with Tennessee, and thus cannot constitute the contacts from which Plaintiffs' claims arise. Additionally, viewing information on a website is a passive activity, and as such it cannot be a basis for personal jurisdiction. *See Zippo Mfg. Co.*, 952 F. Supp. at 1124. Plaintiffs' complaint is not based on any consequence or activity arising from Frazier's contacts with Tennessee (*i.e.*, t-shirt sales); instead, Plaintiffs object to the mere *availability* of Frazier's t-shirts on an Arizona website. Compl. ¶¶ 5, 7-8. Thus, Plaintiffs' causes of action do not arise from Frazier's activities in Tennessee.

iii. The Connection Between Frazier and Tennessee Is Not Substantial Enough to Render the Exercise of Personal Jurisdiction Reasonable.

The third *Southern Machine* element requires Plaintiffs to show that Frazier has such substantial connection with Tennessee that the exercise of jurisdiction over Frazier would be reasonable. *Bird*, 289 F.3d at 877-78 (citing *Southern Machine*, 401 F.2d at 381). Analyzing this factor, this court must consider Plaintiffs' interest in obtaining relief, Tennessee's interest in the lawsuit, the several states' shared interest in furthering fundamental substantive social policies, and Frazier's burden. *See Asahi*, 480 U.S. at 113 (O'Connor, J.) (plurality opinion).

First, as discussed more fully below, Plaintiffs fail to allege an actual injury and, as a matter of law, have no interest in obtaining relief. Second, Tennessee's interests in judicial economy and justice far outweigh its interest in hearing a case where no actual injury has been alleged upon any Tennessee resident. Although a few Tennessee residents may disagree with and in fact wish to stifle Frazier's protected political speech, Tennessee should have no interest in silencing political speech. Third, the shared interest of the several states also weighs against this court exercising personal jurisdiction over Frazier. All states have a shared interest in promoting free political speech, one of our nation's most valued fundamental rights, during a time when political discussion of the Iraq War is widespread. Tennessee should not allow its courts to be used for forum shopping to undermine the core value of free speech, especially when an Arizona court has already ruled that Frazier's speech is protected. *See Frazier v. Boomsma*, CV 07-08040-PHX-NVW, 2007 WL 2808559 (D. Ariz. Sept. 27, 2007). Last, Frazier will face a significant burden if subjected to a lawsuit in Tennessee. Again, Plaintiffs have not alleged any t-shirt sales in Tennessee, yet they seek to hale Dan Frazier and Lifeweaver, Arizona residents with no connection to Tennessee and with no officer, agent or employee in Tennessee, to Tennessee to defend this lawsuit based solely on Frazier's Internet website. Thus, the exercise of personal jurisdiction is unreasonable in light of the tenuous connection between Frazier and

Tennessee. For all these reasons, this court should dismiss this case with prejudice under Rule 12(b)(2) for lack of personal jurisdiction over Frazier.

II. THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM BECAUSE THEY DO NOT ALLEGE NECESSARY ELEMENTS OF THEIR TORT CLAIMS.

In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court clarified the pleading standard necessary to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6). The Court held that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969. A court does not simply accept as true a plaintiff's legal conclusions; rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

A plaintiff must provide sufficient factual allegations so that the defendant will have "fair notice" of not only the type of legal claim being brought, but also the factual "grounds on which the claim rests." *Id.* n.3. This court has explained that "[a]lthough this standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements. In practice, a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Drinkard v. Tenn. Dep't of Children's Servs*., No. 2-08-CV-005, 2008 WL 2609166, at *1 (E.D. Tenn. June 26, 2008).

Plaintiffs assert both negligent infliction and intentional infliction of emotional distress claims for alleged injuries arising from Frazier's operation of a website that sells t-shirts. Frazier does not question that Brandon Read's death has caused serious emotional distress to Plaintiffs. However, neither Frazier's website nor the t-shirts sold through it caused that distress. As discussed immediately below, Plaintiffs cannot allege or prove basic elements of either claim.

A. Plaintiffs Fail to State a Claim for Negligent Infliction of Emotional Distress Because Frazier Did Not Cause Read's Death, Plaintiffs Did Not Witness Read's Death, and Plaintiffs Did Not Suffer Severe Emotional Injury from Observing Read's Death.

The tort of negligent infliction of emotional distress allows a bystander who witnessed another person's death or serious physical injury to bring a claim against a defendant whose negligence allegedly caused the death or serious physical injury. The Tennessee Supreme court recently laid out the four required elements of the cause of action:

> (1) the actual or apparent death or serious physical injury of another caused by the defendant's negligence, (2) the existence of a close and intimate personal relationship between the plaintiff and the deceased or injured person, (3) the plaintiff's observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered, and (4) the resulting serious or severe emotional injury to the plaintiff caused by the observation of the death or injury.

Eskin v. Bartee, 262 S.W.3d 727, 739 (Tenn. 2008).

Plaintiffs fail to allege and cannot establish the first element of this tort. According to the Tennessee Supreme Court,

> persons seeking to recover damages for the negligent infliction of emotional distress [must] establish that the defendant's negligent conduct was the *cause-in-fact* of both the victim's death or injury and the plaintiff's emotional injuries and that the victim's death or injury and the plaintiff's emotional injuries were the "proximate and foreseeable results of [the] defendant's negligence."

Id. at 736 (quoting *Ramsey v. Beavers*, 931 S.W.2d 527, 531 (Tenn. 1996)) (emphasis added). Brandon Read was killed in Iraq. Frazier had no role in his death or in the distress his death has caused, and Plaintiffs do not allege otherwise. Plaintiffs therefore fail to meet the first element of this tort as a matter of law.

Plaintiffs also cannot allege or satisfy the third element. Plaintiffs indisputably did not witness the death of their son, as Brandon Read was far from Tennessee when tragically killed in

the war. The use of his name on a t-shirt does not satisfy this element. Therefore, Plaintiffs fail to allege or satisfy the third element of the claim.

Additionally, Plaintiffs fail to allege any injury to themselves in their complaint, thereby ignoring the requisite fourth element of their claim. The Tennessee Supreme Court has held that a plaintiff's claim must assert a "serious or severe emotional injury," which must be supported by expert medical or scientific proof. *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996). Despite this heightened burden, Plaintiffs allege only a hypothetical injury: that Frazier's conduct "would cause the reasonable person emotional distress." Compl. ¶ 11. They do not allege that they ever visited Frazier's website or saw one of the t-shirts. Rather, Plaintiffs base their emotional injuries on merely having "learned that" Frazier operates a website. *Id.* ¶ 3. Because Plaintiffs never assert their *own* severe emotional injury in the complaint, let alone that such injury resulted from observing Brandon Read's death, they fail to satisfy the fourth element of the claim. For these reasons, the negligent infliction of emotional distress claim must fail as a matter of law.

B. Plaintiffs Fail to State a Claim for Intentional Infliction of Emotional Distress Because Frazier's Conduct Was Not Outrageous and Because Plaintiffs Do Not Allege that They Have Suffered a Severe Mental Injury.

Plaintiffs likewise assert a claim for intentional infliction of emotional distress.[1] According to the Tennessee Supreme Court, "[t]o state a claim for intentional infliction of emotional distress, a plaintiff must establish that: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized

[1] Plaintiffs also assert a claim for "outrageous conduct," which is identical to a claim for intentional infliction of emotional distress under Tennessee law. *Bain v. Wells*, 936 S.W.2d 618, 622 n.3 (Tenn. 1997) ("Intentional infliction of emotional distress and outrageous conduct are not two separate torts, but are simply different names for the same cause of action."). Frazier therefore treats both claims as one for intentional infliction of emotional distress.

society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff." *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 51 (Tenn. 2004).

Plaintiffs fail to allege the first element of the tort. In Paragraph 11 of their complaint, Plaintiffs aver that Frazier "knew or should have known . . . that the use of such name would cause the reasonable person emotional distress." Paragraphs 12 and 13, which attempt to state claims for intentional infliction of emotion distress as well as outrageous behavior, incorporate the *negligence* standard of Paragraph 11. But, under Tennessee law, "in so far as outrageous conduct is concerned, the subject of negligence has no place. Negligence is characterized by inadvertence. A negligent or inadvertent act will not give rise to a claim of outrageous conduct." *Johnson v. Woman's Hospital*, 527 S.W.2d 133, 138 (Tenn. Ct. App. 1975). Because Plaintiffs do not allege that Frazier acted intentionally or recklessly, they fail to satisfy the first element of an intentional infliction of emotional distress claim.[2]

More important, Plaintiffs' claim fails because Frazier's alleged conduct is not outrageous as a matter of law. The Tennessee Supreme court has emphasized that

> it is not sufficient that a defendant "has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress." A plaintiff must in addition show that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community."

Lourcey, 146 S.W.3d at 51 (quoting *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999)). Frazier maintains a politically-themed website and sells t-shirts and other memorabilia carrying political messages. Frazier's behavior cannot be characterized as "extreme in degree" under Tennessee law because, as the Arizona district court noted, it is an exercise of protected core

[2] Paragraph 14 of the complaint states that Frazier acted "willfully, wantonly, and without any remorse or feelings for the persons and/or entities affected" in support of Plaintiffs' request for punitive damages. Paragraph 14 does not mention intentional infliction of emotional distress and is not incorporated or referred to in paragraphs 12 or 13.

political speech. Indeed, Frazier's acts are precisely those that a civilized society should support and the First Amendment protects. This conduct in no way resembles any of the conduct that Tennessee has heretofore deemed outrageous. *See, e.g.*, *Leach v. Taylor*, 124 S.W.3d 87, 89 (Tenn. 2004) (funeral director made graphic and false statements about the treatment of decedent's body, including the claim that donor services had taken decedent's private parts directly to decedent's adult children). Plaintiffs' disagreement with Frazier's political views does not transform those views from protected expression to conduct that is "outrageous" or "utterly intolerable in a civilized community." Plaintiffs have therefore failed to satisfy the second element of an intentional infliction of emotional distress claim.

Although the third element requires serious mental injury, Plaintiffs fail to allege *any* injury at all to themselves, as noted above. This court has noted that "Tennessee requires a serious or severe mental injury in order to make out a claim for intentional infliction of emotional distress." *Evans v. City of Etowah*, Civ. No. 1-06-CV-252, 2008 WL 918515, at *12 (E.D. Tenn. Apr. 3, 2008) (granting summary judgment for defendants where plaintiff alleged indefinite "emotional upheaval, migraine, as well as physical injuries caused by the [d]efendant's actions"). The Tennessee Supreme Court has explained:

> Although the plaintiff is generally not required to present expert testimony to validate the existence or severity of a mental injury, we emphasize that the evidence must establish that the plaintiff's mental injury is serious or severe. It is only where [the mental injury] is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress is so severe that no reasonable [person] could be expected to endure it.

Miller, 8 S.W.3d at 615 n.4. Because Plaintiffs do not allege an actual injury to themselves, much less the required serious or severe mental or emotional injury, they do not satisfy the third

element of the claim. For these reasons, Plaintiffs' intentional infliction of emotional distress claim fails as a matter of law.[3]

III. THE EASTERN DISTRICT OF TENNESSEE IS AN IMPROPER VENUE FOR THIS ACTION.

A plaintiff bears the burden of proving that venue is proper. *Gone to the Beach, LLC v. Choicepoint Servs., Inc.*, 434 F. Supp. 2d 534, 536-37 (W.D. Tenn. 2006). A court may examine facts outside the complaint but must draw all reasonable inferences and resolve factual conflicts in favor of the plaintiff. *Id*. If a defendant prevails on a Rule 12(b)(3) challenge, the district court has the discretion to decide whether the action should be dismissed or transferred to an appropriate court. *See* 28 U.S.C. § 1406(a).

The District of Arizona has already ruled that Frazier's t-shirts are protected as core political speech. Rather than file their suit in the court that has already addressed issues related to Frazier's t-shirts, Plaintiffs have come to this court doubtless hoping for a friendlier outcome. This court, however, is not the proper venue for this case. Under federal law,

> [a] civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the

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[3] Plaintiffs also state that Frazier's use of Brandon Read's name without their permission constitutes a "violation of certain Tennessee and federal common law and statutory enactments" and a "flagrant disregard of the laws of many jurisdictions." Compl. ¶¶ 6, 10. It is unclear to which jurisdictions Plaintiffs refer, especially considering that the District of Arizona held that an Arizona law targeting the use of names on Frazier's t-shirts was an unconstitutional content-based restriction of Frazier's First Amendment rights. Plaintiffs cite no state or federal statutes or cases, and they allege no specific claims arising from Frazier's use of their late son's name among a list of the several thousand troops killed in Iraq. Thus, Plaintiffs do not state a claim upon which relief can be granted. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (requiring a complaint to "contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory" (quotation omitted)).

> action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). Plaintiffs may not rely on section 1391(a)(1) to argue that the Eastern District of Tennessee is a proper venue because neither Dan Frazier nor LifeWeaver resides here. Plaintiffs also may not rely on section 1391(a)(3) because both Dan Frazier and LifeWeaver reside in the District of Arizona, a district where the action may be brought. Thus, to establish venue, Plaintiffs must demonstrate under section 1391(a)(2) that substantial activities giving rise to the action occurred in the Eastern District of Tennessee.

No legally relevant events or omissions whatsoever, much less substantial activities or omissions giving rise to Plaintiffs' complaint, occurred in the Eastern District of Tennessee. Brandon Read died in Iraq. Compl. ¶ 2. Dan Frazier and LifeWeaver reside in Arizona, not Tennessee. Frazier operates and maintains its business from its base in Arizona. Compl. Ex. C. The District of Arizona has already decided a case concerning the legality of Frazier's t-shirts. Plaintiffs do not allege, while they were in Tennessee, that they ever visited Frazier's website or purchased a t-shirt. The only "event" that Plaintiffs allege which may have occurred in the Eastern District of Tennessee is a hypothetical injury to a "reasonable person," not themselves, based on Plaintiffs having "learned that" Frazier operates a website that sells the t-shirts. Compl. ¶¶ 3, 11. This "injury" is not sufficient to establish venue here. *Cf. Gomberg v. Shosid*, No. 1-05-CV-356, 2006 WL 1881229 (E.D. Tenn. July 6, 2006) (holding that defendants' negligent actions, which subjected plaintiffs to injury in Tennessee, constituted substantial activities).

Finally, Plaintiffs' residence in the Eastern District of Tennessee alone does not constitute the requisite substantial activities to establish proper venue under section 1391(a)(2). *See* 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL

PRACTICE AND PROCEDURE: JURISDICTION 3D § 3805, at 146-47 (2008) ("[T]he current general venue statutes no longer take a plaintiff's residence into account in specifying where a case may be brought."). Because no legally relevant activities or omissions, much less substantial ones, occurred in the Eastern District of Tennessee, this district is an improper venue. Thus, the complaint should be dismissed without prejudice or alternatively transferred to the District of Arizona at the discretion of this court. *See* 28 U.S.C. § 1406(a).

IV. THIS COURT SHOULD DISMISS THE CASE AGAINST DAN FRAZIER BECAUSE HE WAS NEVER PROPERLY SERVED WITH THE COMPLAINT.

Plaintiffs' complaint against Dan Frazier should be dismissed under Rule 12(b)(5) because they did not properly serve him original process as required by Rule 4. A plaintiff in a civil action must serve a defendant with a summons and complaint within 120 days of the filing of the complaint. Fed. R. Civ. P. 4(c), (m). Unless otherwise provided by federal law, an individual may be served by delivering a copy of the summons and complaint to the individual personally at the individual's dwelling or usual place of abode, or by delivering a copy of each to an agent authorized by appointment or federal law to receive service of process for the individual. *Id.* (4)(e)(2). Failure to timely deliver both the summons and the complaint, without a showing of good cause, provides grounds for dismissal of the action. *Id.* 4(m). If good cause is not shown, the court must either dismiss the action without prejudice or order that service be made within a specified time. *Id.* If good cause is shown, the court must extend the service time for an appropriate period to allow the plaintiff to properly serve the defendant. *Id.*

Courts interpreting Rules 4 and 12(b)(5) have held that failure to serve a defendant both a summons and complaint without good cause is grounds for dismissal. *See, e.g., Leisure v. Ohio*, No. 00-4569, 2001 WL 700866 (6th Cir. June 11, 2001). Defendant's actual knowledge of a lawsuit cannot substitute for proper service of original process. "The fact that a copy of the

complaint was mailed to the defendants cannot substitute for proper service of process, as actual knowledge of a lawsuit will not cure defective service of process." *Id.* at *1; *see also Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 623-24 (6th Cir. 2004) (affirming dismissal for inadequate service of process where plaintiff failed to show that the defendant's limited agent was acting as agent for purposes of Rule 4(h)(1)).

A district court has the discretion to determine whether good cause is shown for a plaintiff's failure to properly serve a defendant. *See Taylor v. Stanley Works*, No. 4-01-CV-120, 2002 WL 32058966, at *6 (E.D. Tenn. July 16, 2002) (granting plaintiffs additional time for service of process where plaintiffs made numerous unsuccessful attempts to effect service on the defendant). "[A] defendant's actual notice of the complaint and lack of prejudice to the defendant are insufficient to demonstrate good cause." *Id.* This court has considered the following factors under a good cause analysis:

> (1) whether a significant extension of time is required; (2) whether an extension of time would cause actual prejudice to the defendant . . . ; (3) whether the defendant had actual notice of the lawsuit; (4) whether dismissal of the complaint without prejudice under Rule 4(m) would substantially prejudice the plaintiffs . . . ; and (5) whether the plaintiffs have made diligent, good faith efforts to effect proper service of process.

Id. at *7.

Plaintiffs served the registered agent of Lifeweaver, Stephanie Gliege, for both Dan Frazier and Lifeweaver. Pls.' Summons to Dan Fraser (Apr. 22, 2008). Dan Frazier, however, did not authorize Ms. Gliege to accept service of process on his behalf. Moreover, Dan Frazier's knowledge of the suit in his capacity as the owner of LifeWeaver does not satisfy Rule 4(e). Plaintiffs failed to make diligent, good faith efforts to serve Dan Frazier personally with a copy of the complaint and summons. Thus, Dan Frazier was not personally served with a copy of the original complaint specifically directed to him as required by Rule 4(e). Accordingly, this court

should dismiss this suit without prejudice for insufficient service of process, or, in the alternative, quash service as to Dan Frazier.

CONCLUSION

This court should grant Frazier's motion to dismiss the complaint with prejudice for lack of personal jurisdiction because Frazier does not have minimum contacts with Tennessee. Moreover, this court should dismiss with prejudice Plaintiffs' tort claims under Rule 12(b)(6) because Frazier did not cause Brandon Read's death and Plaintiffs did not witness his death. Nor was Frazier's conduct outrageous. Furthermore, Plaintiffs have not alleged an actual injury to themselves. Additionally, this court should dismiss the complaint without prejudice for improper venue because no substantial events or omissions occurred in the Eastern District of Tennessee. Alternatively, the court should transfer the case to the District of Arizona. Finally, this court should dismiss the complaint against Dan Frazier individually or, in the alternative, quash service of process because he was never properly served with the complaint.

Dated this the 17th day of December, 2008.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2008, a copy of the foregoing Memorandum in Support of Motion to Dismiss was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/Erica Taylor Greene