IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-01720

THE CIRLOT AGENCY, INC.

Appellant

vs.

SUNNY DELIGHT BEVERAGES COMPANY

Appellee

On Appeal From The Circuit Court Of Rankin County, William E. Chapman, Circuit Judge, In The Cirlot Agency, Inc. v. Sunny Delight Beverages Company, No. 2008-102C

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the persons listed in the Certificate of Interested Persons in the Brief of Appellant The Cirlot Agency, Inc. are the persons who have an interest in the outcome of this case, except that Frost Brown Todd LLC is incorrectly identified as Frost Brown Todd LLP. Because that list is lengthy, it will not be repeated here. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Fred L. Banks, Jr.
Attorney of record for Sunny Delight Beverages Co., Appellee

REQUEST FOR ORAL ARGUMENT

Although the legal issues in this case are not taxing, this Court would benefit from oral argument. Throughout Appellant's brief, The Cirlot Agency, Inc. attempts to mischaracterize the facts and cloud the legal analysis. The give-and-take of oral argument would allow the Court to explore the relevant legal analysis and apply record facts with the live assistance of counsel. For this reason, Appellee Sunny Delight Beverages Co. respectfully requests oral argument pursuant to M.R.A.P. 34.

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INTRODUCTION

This case presents a claim that an advertising agency which is allowed to propose on work to an Ohio company, in Ohio, because that company was exposed to the agency's work in Ohio, may sue the company in Mississippi on the basis of a confidentiality agreement, the performance of which was not limited to Mississippi but applied world-wide, and where the claimed breach did not occur in Mississippi. The agency now brings an appeal that mischaracterizes the record, relies on factually distinguishable case law, overlooks relevant case law, and ignores the fatal flaws in its argument. Those flaws include (1) the only substantive discussion between the parties occurred **in Ohio**, (2) the Company's invitation to the agency to make a campaign proposal does not rise to the level of the constitutionally required "minimum contacts," and (3) the agency's claims do not arise from any forum-related activity by the company because any breach of the confidentiality agreement by the company would by necessity have occurred **outside** of Mississippi. The trial court correctly found that the court in Mississippi lacked personal jurisdiction and its order of dismissal should be upheld.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition Below.

The Plaintiff-Appellant, the Cirlot Agency Inc, ("Cirlot") brought this action against Defendant-Appellee Sunny Delight Beverage Co. ("Sunny Delight").

On February 13, 2009, Sunny Delight filed its Motion to Dismiss for Lack of Personal Jurisdiction. R. at 12-55. After the motion was fully briefed on March 16, 2009, Cirlot engaged on its course of delay. For example, shortly before a hearing on July 27, 2009, Sunny Delight served its responses to Cirlot's discovery requests. R. at 102-104 (regarding hearing date). The trial court indicated that Cirlot could serve additional discovery limited to jurisdiction. R. at 107-108. More than six months later, Cirlot finally served additional discovery requests on

Sunny Delight on February 8, 2010, the same day as a hearing before the trial court. *Id.* On April 5, 2010, Sunny Delight responded to Cirlot's additional discovery requests. R. at 114-15. Then, on August 23, 2010, Cirlot failed to appear for another hearing before the trial court, forcing rescheduling of the hearing to October 4, 2010. R. at 120-21. On August 24, 2010, more than four months after receiving Sunny Delight's responses to Cirlot's third set of discovery requests, Cirlot's counsel represented to Sunny Delight's counsel that Cirlot would agree to a dismissal of the case for lack of personal jurisdiction. R. at 160-69 at Ex. A. Cirlot's counsel even went so far as to ask Sunny Delight's counsel to draft a proposed order of dismissal. *Id.* Sunny Delight's counsel prepared and forwarded a proposed order of dismissal to Cirlot's counsel. *Id.* Then on September 13, 2010 – in a complete reversal of its position – Cirlot reneged and its counsel notified Sunny Delight's counsel that Cirlot had decided to "push forward with the hearing and an appeal if necessary." *Id.* On September 23, 2010, Cirlot filed its Supplemental Response to Sunny Delight's Motion to Dismiss. R. at 122-59. At the hearing on October 4, 2010, the trial court granted Sunny Delight's motion to dismiss. R. at 170.

Despite Cirlot's agreement to dismiss its complaint for lack of personal jurisdiction in Mississippi, Cirlot insisted on "push[ing] forward with the hearing" before the trial court, which resulted in Cirlot's defeat, and now persists in pursuing a groundless appeal. Cirlot's course of action has wasted the resources of the Mississippi judicial system and has caused Sunny Delight to incur more expense in defending an appeal of a case that never should have been filed in Mississippi.

B. Statement Of Facts Relevant To The Issues Presented For Review.

Sunny Delight is a Florida corporation with headquarters in Ohio without offices or employees in Mississippi. R. at 34 at ¶3. In early 2007, Sunny Delight was planning the national launch of its Elations product. R. at 15 at ¶2. As part of the process, Sunny Delight

invited four firms, including Cirlot, to provide a public relations proposal for the Elations brand. R. at 15-16 at ¶4. Sunny Delight became aware of Cirlot because of Cirlot's activities **in Ohio** in connection with a book launch Cirlot organized **in Cincinnati.** *Id.* David Silver, Sunny Delight's Associate Brand Manager for Elations, either made a phone call or sent an email to Cirlot from Sunny Delight's headquarters in Cincinnati, Ohio, inviting Cirlot to offer a campaign proposal. *Id.* Contrary to Cirlot's mischaracterization of the record, the invitation by no means was an order or an instruction demanding that Cirlot do anything. It only invited Cirlot to consider making a proposal to Sunny Delight. *Id.*

Before any discussions occurred regarding the details of the Elations launch, Mr. Silver signed a Mutual Non-Disclosure Agreement that Cirlot claims is the contract at issue in this appeal. R. at 16 at ¶5; R. at 20-21. On February 5, 2007, Mr. Silver signed the agreement in Sunny Delight's offices in Cincinnati, Ohio and sent it to Cirlot by email for Cirlot's signature. R. at 16 at ¶5; R. at 21. On February 5, 2007, Cirlot signed the agreement and sent it via facsimile to Mr. Silver in Ohio on February 6, 2007. R. at 16 at ¶5; R. at 19-21. At no point did Mr. Silver or anyone from Sunny Delight travel to Mississippi to communicate with Cirlot. R. at 17 at ¶10.

The non-disclosure agreement was not a contract for services. R. at 16 at ¶5; R. at 20-21. Contrary to Cirlot's assertions in its brief on appeal, the agreement did not require or demand that Cirlot prepare a marketing campaign. *Id.* Rather, the purpose of the non-disclosure agreement was to allow the parties to hold discussions.[1] R. at 16 at ¶5; R. at 20 at ¶1. In connection with those discussions, the parties could disclose "confidential technical and business information that the disclosing party desires the receiving party to treat as confidential." R. at 20 at ¶1. The agreement allowed Sunny Delight and Cirlot to engage in discussions and required

[1] The non-disclosure agreement provides: "The parties are interested in **holding discussions** regarding the development of new product(s) (the "Project"). . . ." (Emphasis added.) R. at 20 at ¶1.

the parties to "take reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of the Confidential Information of the other party." R. at 20 at ¶3. The parties agreed "not to use any Confidential Information of the other party for any purpose except to evaluate and engage in discussions." R. at 20 at ¶3. In addition, the agreement provided, "Nothing herein shall obligate either party to proceed with any transaction between them, and each party reserves the right, in its sole discretion, to terminate the discussions contemplated by this Agreement concerning the Projects." R. at 20 at ¶5.

Significantly, the agreement specified, "This agreement shall be interpreted and enforced in accordance with the law of the State of Ohio (regardless of the choice of law principles of Ohio or any other jurisdiction)." R. at 21 at ¶11. Thus, Cirlot agreed that Ohio law – not Mississippi law – governed the non-disclosure agreement.

The communications between the parties were few. What Cirlot characterizes as "numerous telephone calls" and "at least ten e-mails" from Sunny Delight were in fact a few perfunctory communications that outlined for Cirlot the bare parameters of the project for which Cirlot was invited to bid. R. at 16 at ¶¶6-7; R. at 24-27. The few emails from Sunny Delight were sent from Sunny Delight's offices in Cincinnati, Ohio. R. at 17 at ¶10. Three of those consisted of a few short sentences giving Cirlot the most basic information about the project should it decide to make a proposal in Cincinnati: what the product was, the timeline, the budget, and the preliminary brand target. R. at 25-27. One email, consisting of one sentence, directed Cirlot to the Elations website. R. at 24. Three of the emails from Sunny Delight related to scheduling the meeting in Cincinnati in which Cirlot presented its proposal, and another thanked them for making the presentation. R. at 28-32. A one-sentence email forwarded the non-disclosure agreement. R. at 23. And another email was just a thank-you from Sunny Delight to Cirlot for a book Cirlot sent to Sunny Delight after the presentation in Cincinnati. R. at 33.

The alleged "numerous telephone calls" between the parties were at most three phone calls – one (which might have been an email) was a call to invite Cirlot to offer a campaign proposal for the Elations product. R. at 15-16 at ¶4. Consistent with the bare-bones emails, the second phone call was to discuss the goals of the marketing campaign. R. at 16 at ¶6. The third was to inform Cirlot that Sunny Delight had chosen another agency. R. at 17 at ¶9.

The only substantive discussion between the parties occurred on February 28, 2007, when Cirlot's representatives traveled to Sunny Delight's offices in Cincinnati, Ohio, to present their campaign proposal. R. at 17 at ¶8. Cirlot traveled to Cincinnati, Ohio, at its own expense. *Id.* At no time did Sunny Delight enter into a contract with Cirlot for services. R. at 17 at ¶9.

Cirlot laments that it spent "hundreds of hours" developing its proposal and "invested hundreds of hours and thousands of dollars creating its marketing campaign . . ." Appellant Br. at 3. The non-disclosure agreement required no such undertaking. R. at 20-21.

In summary, Cirlot came to Sunny Delight's attention because of Cirlot's work on a book launch in Cincinnati, Ohio. R. at 15-16 at ¶4. Throughout its brief interactions with Sunny Delight, Cirlot knew it was dealing with an Ohio company. Cirlot knew it was under no obligation to make a campaign proposal for the new Elations product. Certainly, the non-disclosure agreement did not require Cirlot to develop any proposal at all. R. at 20-21. Cirlot understood that, if the parties disputed the non-disclosure agreement, Ohio law would govern. R. at 21 at ¶11. And Cirlot certainly knew that its presentation of its proposal – the only substantive discussion that occurred between Cirlot and Sunny Delight – occurred in Ohio. R. at 17 at ¶8; R. at 28-31.

SUMMARY OF ARGUMENT

The trial court correctly ruled that it did not have personal jurisdiction over Sunny Delight pursuant to Mississippi's long-arm statute or the United States Constitution.

The contract prong of the long-arm statute does not confer personal jurisdiction over Sunny Delight because the non-disclosure agreement merely allowed Cirlot and Sunny Delight to hold discussions and did not require either party to perform a service in Mississippi. The only substantive discussion between the parties occurred in Ohio. Furthermore, the non-disclosure agreement made no reference to Mississippi and referred to only one state – Ohio – in requiring that its terms be interpreted and enforced according to the laws of Ohio.

The exercise of personal jurisdiction also violates the Due Process Clause of the United States Constitution. Sunny Delight's invitation to Cirlot to present a campaign proposal is not the type of minimum contact that demonstrates purposeful availment necessary to exercise personal jurisdiction. Especially fatal to Cirlot's argument is that Cirlot's complaint did not arise out of any activities by Sunny Delight in Mississippi. If Sunny Delight breached the non-disclosure agreement (which it did not), such a breach would by necessity have occurred outside of Mississippi and there is no assertion to the contrary. Finally, the five-factor "fairness" analysis tips resoundingly in favor of Sunny Delight and demonstrates that the exercise of personal jurisdiction over Sunny Delight would be constitutionally unreasonable. Dismissal of Cirlot's complaint should be affirmed.

ARGUMENT

A. Standard Of Review.

An appellate court reviews issues of personal jurisdiction de novo.[2] A review of the record pleadings, motions, briefs, affidavits, and exhibits demonstrates that Mississippi courts do not have personal jurisdiction over Sunny Delight.

[2] *Horne v. Mobile Area Water & Sewer Sys.*, 897 So.2d 972, 975 (Miss. 2004), *cert. denied*, 544 U.S. 922 (2005).

B. The Trial Court Correctly Granted Sunny Delight's Motion To Dismiss Because The Exercise Of Personal Jurisdiction Over Sunny Delight Violates Mississippi's Long-Arm Statute.

Personal jurisdiction is determined as of the time Cirlot filed its complaint.[3] The Court must first determine whether the Mississippi long-arm statute applies and, if not, the analysis ends and the Court may not exercise jurisdiction.[4] Even if jurisdiction is appropriate under the long-arm statute, the Court must decide whether the exercise of personal jurisdiction would offend the Due Process Clause of the United States Constitution.[5] If so, the Court cannot exercise personal jurisdiction.

Cirlot argues that the "contract prong" of the long-arm statute justifies personal jurisdiction and relies on information exchanged in a few perfunctory emails and phone calls between the parties. Appellant Br. at 5-6. But Cirlot cites no case in which personal jurisdiction was based on a confidentiality agreement that merely allowed the parties to hold discussions.[6] R. at 20 at ¶1. In fact, the only substantive discussion that was held between the parties occurred when Cirlot presented its product campaign proposal to Sunny Delight in Ohio. R. at 17 at ¶8.

The fact that the agreement required Cirlot to keep newly learned information to itself is not nearly the level, type, nature, or scope of activity required to establish performance of a contract sufficient to subject an out-of-state party to jurisdiction. In *Cappaert v. Preferred Equities Corp.*, the United States District Court for the Southern District of Mississippi found that a security agreement between a Mississippi plaintiff and a Nevada defendant was

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[3] *Estate of Jones v. Phillips*, 992 So.2d 1131, 1137 (Miss. 2008) (citing *Sorrells v. R&R Custom Coach Works, Inc.*, 636 So.2d 668, 671 (Miss. 1994)).
[4] *See Peterson v. Test Int'l, E.C.*, 904 F.Supp. 574, 576 (S.D. Miss 1995); *Phillips*, 992 So.2d at 1137.
[5] *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).
[6] Cirlot does not argue that the "doing business" prong of the long-arm statute applies and thus has abandoned any attempt to persuade this Court to overturn the trial court on that basis. Even if Cirlot were to attempt to argue on appeal that the "doing business" prong provides jurisdiction, such argument would be contrary to the facts and case law. R. at 45-47 and cases cited therein; Suppl. R. at 5-7 and cases cited therein.

insufficient to invoke the contract prong of the Mississippi long-arm statute.[7] The court noted that Mississippi courts "have required more activity in Mississippi than is present here" in analyzing the contract prong of the long-arm statute.[8] The court held that the requirement of at least part performance of a contract had not been met, despite negotiations by email and phone between the parties in their respective states, despite plaintiff's execution of the agreement documents in Mississippi, and despite a provision in the security agreement that required collateral to be delivered to plaintiffs in Mississippi in the event of default.[9] Tellingly, the security agreement at issue in *Cappaert* provided that its terms would be governed by the laws of Nevada, not Mississippi.[10]

Similarly, in *Peterson v. Test Int'l*, the plaintiff, a Mississippi resident, flew to Algeria pursuant to an employment contract with an out-of-state defendant.[11] The plaintiff claimed that the flight was part performance of the employment contract because, unless he traveled to the jobsite, he would be in breach of the employment contract.[12] The U.S. District Court for the Southern District of Mississippi applied the long-arm statute and found that "the mere fact that contractual ramifications might result" if plaintiff did not arrive at the job site in Algeria did not establish part performance of the contract in Mississippi.[13] Thus, even though a breach of the employment contract may have resulted if the plaintiff failed to perform a duty required by the contract, the court found that more was required to constitute part performance of a contract under the Mississippi long-arm statute.[14] The court also found no jurisdictional significance in

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[7] 613 F.Supp. 264, 265-66 (S.D. Miss. 1985).
[8] *Id.* at 266.
[9] *Id.*
[10] *Id.* at 265.
[11] 904 F.Supp. at 576-77.
[12] *Id.* at 576-77.
[13] *Id.* at 577.
[14] *Id.*

the fact that the draft employment contract was sent to plaintiff in Mississippi for signature and that plaintiff signed the contract in Mississippi.[15]

Likewise, in *Christian Tours, Inc. v. Homeric Tours, Inc.*, the court found that the contract prong of the Mississippi long-arm statute did not provide a basis for personal jurisdiction even though the Mississippi plaintiff and out-of-state defendant entered into an air travel contract via a series of phone calls, letters and fax transmittals with funds transferred by the Mississippi plaintiff to the defendant.[16] Some of the plane tickets were delivered to plaintiff in Mississippi.[17] Nevertheless, the court found that the contract at issue was silent with regard to where the plane tickets would be delivered, and therefore there was no contract to be performed in whole or part in Mississippi.[18]

As *Cappaert*, *Peterson* and *Christian Tours* make clear, merely contracting with a Mississippi resident is insufficient to establish the contract prong of the long-arm statute.[19] Nor does the contract prong of the statute provide jurisdiction premised upon a plaintiff's location when a contract was formed.[20] Indeed, courts require more than communication between the parties and their execution of an agreement while they were physically present in their respective states for the long-arm statute to apply.[21] Thus, Cirlot misguidedly relies on a few minimal communications in which Sunny Delight explained only the barest information about the Elations project, arranged a date on which Cirlot would make its presentation in Cincinnati, Ohio, and thanked Cirlot for the gift of a book after Cirlot's presentation in Ohio. R. at 24-33.

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[15] *Id.*
[16] No. 3:99CV-79-B-A, 2000 U.S. Dist. LEXIS 4594, at *1, 5-6 (N.D. Miss. 2000), *aff'd*, 239 F.3d 366 (5th Cir. 2000).
[17] *Id.* at *5-6.
[18] *Id.* at *8.
[19] *See, e.g., Christian Tours*, 2000 U.S. Dist. LEXIS 4594, at *5-7; *McLaurin v. Nazar*, 883 F.Supp. 112, 114-15 (N.D. Miss. 1995) (*citing Colwell Realty Inv., Inc. v. Triple T Inns of Arizona, Inc.*, 785 F.2d 1330, 1334 (5th Cir. 1986)), *aff'd*, 71 F.3d 878 (5th Cir. 1995).
[20] *Cappaert*, 613 F.Supp. at 266-67.
[21] *Id; see also Peterson,* 904 F.Supp. at 577; *Christian Tours*, 2000 U.S. Dist. LEXIS 4594, at *5-7.

Moreover, courts require more than the possibility that "contractual ramifications might result" if Cirlot failed to perform some duty under the non-disclosure agreement.[22] The non-disclosure agreement was limited only to confidentiality, required no services from Cirlot, did not require any performance at all in Mississippi, and in fact did not make any reference to Mississippi. R. at 16 at ¶5; R. at 20 at ¶¶1, 3-5; R. 21 at ¶11. The non-disclosure agreement referred to only one state – Ohio -- and required that its terms be interpreted and enforced according to the laws of Ohio. R. at 21 at ¶11. Cirlot cannot extend the contract prong of the long-arm statute to these facts.

In a further misguided attempt to force alleged "facts" to fit the contract prong of the statute, Cirlot tries to shoehorn into the non-disclosure agreement various activities that Cirlot allegedly undertook to prepare for its later sales pitch to Sunny Delight in Cincinnati, Ohio. Cirlot asserts that it contacted "numerous third parties" concerning its marketing campaign and "created its marketing strategies and work-product in Mississippi." Appellant Br. at 5. The non-disclosure agreement called for no such activity. R. at 16 at ¶5; R. at 20-21. Thus, Cirlot's claim that the agreement was performed in Mississippi by virtue of its having undertaken any of those activities is flawed. It is well-established that a plaintiff's unilateral activities to prepare for a special relationship with an out-of-state potential customer are insufficient to subject the customer to jurisdiction under Mississippi's long-arm statute.[23]

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[22] *Peterson*, 904 F.Supp. at 577.

[23] *See Reed-Joseph Co. v. DeCoster*, 461 F.Supp. 748, 750-51 (N.D. Miss. 1978) (finding that the plaintiff's activities performed in Mississippi were done merely "to place itself in a position to make the sale" to the defendant, and that such unilateral activities, even accompanied by phone communications and correspondence between the parties, did not justify the exercise of personal jurisdiction in Mississippi); *see also Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985) (explaining that "an exchange of communications between a resident and a nonresident in developing a [future] contract is insufficient of itself to be characterized as purposeful activity" to justify personal jurisdiction); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (jurisdiction is improper if grounded in the unilateral activity of the plaintiff).

Therefore, the contract prong of Mississippi's long-arm statute does not support the exercise of personal jurisdiction over Sunny Delight, and the trial court's dismissal of Cirlot's Complaint should be affirmed.

C. The Trial Court Correctly Granted Sunny Delight's Motion To Dismiss Because The Exercise Of Personal Jurisdiction Over Sunny Delight Violates Constitutional Due Process Guarantees.

Even if personal jurisdiction were proper under the Mississippi long-arm statute, the trial court properly dismissed Cirlot's complaint because exercising personal jurisdiction over Sunny Delight would violate the Due Process guarantees of the United States Constitution. Cirlot's contention that Mississippi courts have specific personal jurisdiction over Sunny Delight is contrary to the facts and to case law.[24] The trial court did not err in finding that the exercise of specific jurisdiction would be unconstitutional. R. at 170.

Specific personal jurisdiction is permissible only if Sunny Delight purposely availed itself of the privilege of conducting activities in Mississippi, and the cause of action arose out of those activities.[25] Even if Sunny Delight had sufficient minimum contacts with Mississippi (which it does not), the exercise of personal jurisdiction would be constitutionally unreasonable.[26]

"Purposeful availment," the constitutional touchstone of personal jurisdiction, is present only 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" and where "the defendant 'deliberately' has engaged in significant activities within a State" so that it is not

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[24] In its Appellant Brief, Cirlot makes no argument that general personal jurisdiction exists over Sunny Delight in Mississippi. Therefore, Cirlot has abandoned such argument on appeal. M.R.A.P. 28(a)(3).
[25] *See Freudensprung v. Offshore Technical Servs, Inc..*, 379 F.3d 327, 343 (5th Cir. 2004) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)); *Sorrells*, 636 So.2d at 674-75.
[26] *See Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998).

unreasonable to anticipate being haled into court there.[27] The purposeful availment requirement ensures that an out-of-state defendant will not be forced to appear in a foreign jurisdiction solely as a result of random, fortuitous or attenuated contacts or of the unilateral activity of another party or third person.[28] "Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the forum from activities outside it, and the relationship between the cause of action and the contacts, relate to whether it can be said that the defendant's actions constitute 'purposeful availment.'"[29]

The trial court did not have specific personal jurisdiction over Sunny Delight because the crucial element of purposeful availment is utterly lacking, Cirlot's cause of action did not arise from forum-related activities, and exercising personal jurisdiction would be unreasonable.

1. The Trial Court Correctly Found That Sunny Delight Did Not Purposefully Avail Itself Of The Privilege Of Acting In Mississippi.

In determining whether purposeful availment exists, courts consider "the factors of prior negotiations, contemplated future consequences, terms of the contract, and the parties' actual course of dealing."[30] During the entire short-lived interactions between Cirlot and Sunny Delight, no one from Sunny Delight ever traveled to Mississippi. R. at 17 at ¶10. The parties' limited interactions contemplated nothing more than Cirlot making a pitch to Sunny Delight for the national Elations campaign – a pitch that Cirlot was under no obligation to make. R. at 16 at ¶5; R. at 20-21. Cirlot presented its proposal in Cincinnati, Ohio – not Mississippi. R. at 16-17 at ¶¶7-8; R. at 28-30. Other than this one face-to-face meeting in Ohio, the minimal communications between the parties occurred in a few brief emails and phone calls, some of

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[27] *Burger King v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (emphasis in original).
[28] *Id.* at 474-75.
[29] *Hydrokinetics, Inc. v. Alaska Mech., Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984).
[30] *Stuart*, 772 F.2d at 1193; *see also Colwell Realty*, 785 F.2d at 1334.

which Cirlot initiated, and spanning only the course of a few weeks. R. at 16 at ¶¶6-7, 9-10; R. at 23-33.

Cirlot's contention that "a single purposeful contact" is sufficient to satisfy the purposeful availment requirement is based on tort cases that are factually inapposite to this case, an alleged breach of a non-disclosure agreement.[31] Appellant Br. at 6. Even if those cases were applicable, they involved activities in Mississippi from which the cause of action arose – an element of the constitutional analysis that Cirlot cannot establish.[32]

Cirlot ignores well-established case law holding that phone calls, emails and other communications in development of an agreement are not enough to establish purposeful availment.[33] In an attempt to avoid well-settled law, Cirlot describes the interactions with Sunny Delight in inflammatory terms that mischaracterize the record. As even a cursory review of the record shows, Cirlot's contention that Sunny Delight "induced" Cirlot to enter into the non-disclosure agreement and "coaxed" Cirlot to present its marketing proposal in Cincinnati is

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[31] *Bullion v. Gillespie*, 895 F.2d 213 (5th Cir. 1990), involved a Texas plaintiff who sued a California doctor for medical malpractice. The plaintiff enrolled in the doctor's experimental treatment program, in which defendant directly shipped an experimental drug to plaintiff by mail and plaintiff made payments to defendant. *Id.* at 215. Defendant also maintained regular phone contact with plaintiff and administered to other patients in Texas as well. *Id.* at 217. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985), involved a wrongful death and personal injury action resulting from a car wreck. The car at issue was sold to a Mississippi resident by an Alabama car dealer. *Id.* at 1164. Before the wreck, the Mississippi resident traveled to Alabama several times for brake repairs, and the Alabama dealer sold and shipped a master brake cylinder to a Mississippi dealership in an attempt to fix the brakes. *Id.* at 1165, 1171. The plaintiffs contended that a defect in the cylinder caused the accident. *Id.* at 1172. And in *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333-34 (5th Cir. 1982), the plaintiff's cause of action for defamation arose from the allegedly defamatory phone call from an Indiana resident to a U.S. attorney in Mississippi.

[32] *See infra*, Section C.2.

[33] *Stuart*, 772 F.3d at 1193-94 (finding that parties' negotiations by letter and telephone, whether originating inside or outside the forum state, were insufficient to support a finding of specific jurisdiction); *Colwell Realty*, 785 F.2d at 1334 (agreeing with the district court that "telephone contacts . . . are insufficient to establish jurisdiction"); *Renoir v. Hantman's Assocs.*, 230 Fed.Appx. 357, 360 (5th Cir. 2007) ("An exchange of communications in the course of developing and carrying out a contract also does not, by itself, constitute the required purposeful availment . . . ."); *Cappaert*, 613 F.Supp. at 267 (finding no purposeful availment when negotiations occurred by correspondence and telephone, documents were executed in the parties' respective states, defendant never traveled to Mississippi, and defendant made no payments to plaintiff in Mississippi).

without support in the record. R. at 15-17 at ¶4-8; R. at 20-21; R. at 23-33; Appellant Br. at 7, 11. As the record shows, the events were simply this: Impressed by Cirlot's work on a book launch in Cincinnati, Ohio, Sunny Delight invited Cirlot to make a marketing campaign proposal for a new product. R. at 15-16 at ¶4. The parties signed a non-disclosure agreement allowing them to hold discussions but not requiring any services from Cirlot and not requiring Cirlot to prepare and submit a marketing proposal. R. at 16 at ¶5; R. at 20-21. In a few minimal emails and a phone call, Sunny Delight provided the bare-bones parameters of the project for which Cirlot was invited to bid. R. at 16 at ¶¶6-7; R. at 17 at ¶10; R. at 24-27. Cirlot was under no obligation, via the non-disclosure agreement or otherwise, to prepare a proposal. R. at 16 at ¶5; R. at 20-21. Cirlot presented its marketing campaign in Cincinnati, Ohio. R. at 16-17 at ¶¶7-8; R. at 28-31. Such interactions do not demonstrate purposeful availment.

Cirlot relies on cases in which many more substantial contacts with Mississippi were present than exist here. *American Cable Corp. v. Trilogy Communications, Inc.* involved the sale of goods and defendant's failure to pay.[34] The defendant negotiated a line of credit from plaintiff, made a series of orders for goods, agreed to pay plaintiff in the forum state, and made partial payment for the goods, which were delivered.[35] Those facts are a far cry from the interaction between Cirlot and Sunny Delight, in which no negotiations took place and no goods or services were purchased or contemplated. R. at 16-17 at ¶¶5-9; R. at 20-21. Sunny Delight contacted Cirlot to invite Cirlot to submit a proposal, Cirlot presented its proposal in Ohio, and the parties' short-lived interaction never reached the negotiation stage. R. at 15-16 at ¶4; R. at 16-17 at ¶7-9. Also, unlike the parties in *American Cable Corp.*, no money changed hands. R. at 17 at ¶¶8-9. Cirlot traveled to Ohio for its presentation at its own expense. R. at 17 at ¶8.

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[34] 754 So.2d 545 (Miss. Ct. App. 2000).
[35] *Id.* at 548, ¶¶2-4, 14.

Moreover, *American Cable Corp.* undercuts Cirlot's disregard for the Ohio choice of law provision in the non-disclosure agreement. The Court of Appeals in *American Cable Corp.* found the choice of law provision in the invoices sent by the plaintiff and accepted by the defendant should "properly be considered" as a meaningful factor in determining jurisdiction.[36] Thus, the choice of law provision establishing Ohio law as governing the non-disclosure agreement must be considered in determining that personal jurisdiction is improper in Mississippi.

Cirlot relies on other factually distinguishable cases in which the defendants' contacts with Mississippi were directly related to the cause of action, and were much more substantial than here. *Aultman, Tyner & Ruffin, Ltd. v. Capital Rubber & Specialty Co.*[37] There, an out-of-state defendant contracted for legal services from a Mississippi law firm, such services were rendered by firm attorneys in Mississippi as well as traveling to Louisiana from Mississippi, invoices were sent from Mississippi to defendant for payment, and defendant's insurance company made payments on defendant's behalf to plaintiff in Mississippi. The litigation arose out of defendant's failure to make full payment.[38] No such detailed interactions, requiring services to be rendered and payments made, occurred between Cirlot and Sunny Delight. R. at 16-17 at ¶¶5-9.

In *BankPlus v. Toyota of New Orleans*, on which Cirlot also relies, the nonresident defendant's contacts with Mississippi were much more substantial and numerous than existed here.[39] The plaintiff, a Mississippi bank, negotiated with the defendant, a Louisiana car

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[36] *Id.* at 550-51, ¶¶15-18; *see also Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1069 (5th Cir. 1992) (finding a choice of law provision to "indicate rather forcefully" that the defendant did not purposely avail itself of the forum state), *cert. denied*, 506 U.S. 867 (1992).
[37] No. 2:10cv223KS-MTP, 2011 WL 213471 (S.D. Miss. Jan. 21, 2011).
[38] *Id.* at *1, 11.
[39] 851 So.2d 439 (Miss. Ct. App. 2003).

dealership, to finance a Mississippi resident's purchase of a Toyota Avalon.[40] The bank agreed to release its lien on the title of a wrecked Camry that was part of the transaction.[41] The bank released its lien on the Camry and mailed the title and $16,995 to the car dealership.[42] The dealer accepted the Camry title and cashed the check but never forwarded title to the Avalon to the bank, and then paid to have the wrecked Camry towed from Mississippi to Louisiana.[43] The bank asserted tort and contract claims. On these facts, the court found substantial contacts with Mississippi warranting the exercise of personal jurisdiction.[44] No such substantial contacts with Mississippi occurred here.

Similarly, unlike the parties' dealings in *Medical Assurance Co. of Mississippi v. Jackson*,[45] which involved negotiations, offers, and counteroffers via numerous phone calls and letters culminating in an allegedly breached settlement agreement in which money was paid, there were no negotiations between Cirlot and Sunny Delight or money exchange. R. at 17 at ¶¶9. The interaction between Sunny Delight and Cirlot never reached the negotiation stage. *Id.* No contract was ever negotiated or executed requiring Cirlot to perform services. *Id.* Quite simply, Cirlot's presentation for the Elations campaign did not make the cut, and the fleeting interactions with Sunny Delight ended.[46] R. at 17 at ¶¶9-10.

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[40] *Id.* at 442, ¶¶2-4.
[41] *Id.* at 442, ¶¶4-5.
[42] *Id.* at 442, ¶5.
[43] *Id.* at 442, ¶6 and at 444-45, ¶¶18, 22.
[44] *Id.* at 444, ¶20.
[45] 864 F.Supp. 576, 577-79 (S.D. Miss. 1994).
[46] Also, the interactions between Cirlot and Sunny Delight are nothing like the events in *Vig v. Indianapolis Life Ins. Co.*, 384 F.Supp.2d 975 (S.D. Miss. 2005), on which Cirlot relies. There, the out-of-state defendant attorneys sent a letter containing legal advice to its California trust client, but also included the Mississippi plaintiffs as addressees on the letter. *Id.* at 980. By no means can substantive tax advice be equated with a simple email or phone call from Sunny Delight inviting Cirlot to offer a marketing proposal, if Cirlot so wished, or a non-disclosure agreement that simply allowed Sunny Delight and Cirlot to hold discussions. Thus, the "contact" that occurred in *Vig* is distinguishable and inapplicable here.

The trial court properly dismissed Cirlot's complaint because the crucial purposeful availment requirement did not exist.

2. The Trial Court Correctly Found That Cirlot's Complaint Did Not Arise Out Of Any Activities By Sunny Delight In Mississippi.

Cirlot overlooks the fatal flaw to its argument: It cannot establish that its breach of contract claim arose out of Sunny Delight's contacts with the forum.[47] Cirlot's claim arose from the alleged breach of the non-disclosure agreement, which, if that occurred, by necessity occurred outside of Mississippi because Sunny Delight has no offices or employees in Mississippi. R. at 9-10 at ¶¶2, 5, 7; R. at 34 at ¶3. Nor is there any allegation or evidence that any alleged breach occurred in Mississippi. Therefore, Cirlot cannot satisfy the second requirement of specific jurisdiction. The trial court properly dismissed Cirlot's complaint on this basis as well.

3. The Exercise Of Personal Jurisdiction Would Be Unreasonable.

Even if Cirlot could establish the required minimum contacts with Mississippi, which it cannot, the exercise of personal jurisdiction would be constitutionally unreasonable. "The exercise of jurisdiction must be reasonable in light of the circumstances."[48] An analysis of the circumstances and the five fairness factors weighs in favor of a finding of unreasonableness.

First, the burden on Sunny Delight of litigating in a court nearly 600 miles away from Cincinnati, Ohio, is substantial. Sunny Delight has spent considerable time and money in more than two years of defending against Cirlot's baseless claim, a burden made all the more offensive in light of Cirlot's reneging on the agreement to dismiss its complaint for lack of personal jurisdiction. R. at 160-69 at Ex. A. Forcing Sunny Delight to litigate in Mississippi, where

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[47] *Sorrells*, 636 So.2d at 673-74 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)); *Freudensprung*, 379 F.3d at 343.

[48] *ITL Int'l, Inc. v. Constenla, S.A.*, No. 1:10CV467 LG-RHW, 2010 WL 4537931, at *6 (S.D. Miss. Nov. 2, 2010).

Sunny Delight has no offices or employees, is a great burden especially considering that no witnesses other than Cirlot are located in Mississippi.[49] This factor weighs in favor of Sunny Delight.

The second and third factors - the forum state's interest and Cirlot's interest in securing relief – are severely undercut by explicit language of the non-disclosure agreement, which specified that the agreement must be interpreted and enforced in accordance with Ohio law. R. at 21 at ¶11. Plaintiff's interest is further reduced to nothing by its own activities in Ohio – organizing the book event in Cincinnati, Ohio that attracted Sunny Delight's attention, and traveling to Cincinnati, Ohio to present its proposal. R. at 15-17 at ¶¶4, 7-8. Thus, these factors weigh in Sunny Delight's favor.

The fourth and fifth factors – the interstate judicial system's interest in effective resolution of controversies and the states' shared interest in furthering fundamental social policies – also tip toward Sunny Delight. Cirlot offers a list of criteria by which to gauge the fourth factor, and the list favors Sunny Delight. Appellant Br. at 14. Other than Cirlot, all of the witnesses are outside Mississippi. The alleged breach of the non-disclosure agreement, if it occurred, by necessity had to occur outside Mississippi. The substantive law of Ohio governs the non-disclosure agreement. Finally, Cirlot concedes that Ohio has an interest in the litigation and that Ohio law governs the non-disclosure agreement. Appellant Br. at 14-15. Therefore, these factors tip in favor of Sunny Delight as well.

Because the reasonableness factors all weigh in favor of Sunny Delight, the trial court properly ruled that it could not exercise personal jurisdiction over Sunny Delight. The trial court properly dismissed Cirlot's complaint.

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[49] *See, e.g., American Cable Corp.*, 754 So.2d at 552 (finding that the burden on the out-of-state defendant was not substantial because most of the witnesses were not located within defendant's home state).

CONCLUSION

For the foregoing reasons, Sunny Delight Beverages Co. respectfully requests this Court to affirm the trial court's Order dismissing The Cirlot Agency, Inc.'s complaint for lack of personal jurisdiction.

THIS the 21st day of April, 2011.

Respectfully submitted,

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