

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-01720

THE CIRLOT AGENCY, INC.

Appellant

vs.

SUNNY DELIGHT BEVERAGES COMPANY

Appellee

Appeal of the Order of Dismissal of the Rankin County Circuit Court, Honorable William E. Chapman, Circuit Judge in The CirLOT Agency v. Sunny Delight Beverages Company, Cause No. 2008-102C

**BRIEF OF APPELLANT
THE CIRLOT AGENCY, INC.**

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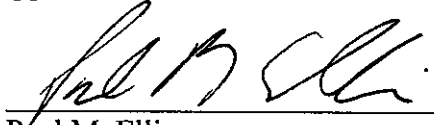
Appellee

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1. The Cirlot Agency, Inc., Appellant
2. Sunny Delight Beverages Company, Appellee
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STATEMENT OF ISSUES

- I. **Personal Jurisdiction - Mississippi Long-Arm Statute.** Under Mississippi's long-arm statute, a court has personal jurisdiction over a non-resident defendant when the defendant entered into a contract with a Mississippi resident and the contract was to be performed in whole or in part in Mississippi. Sunny Delight, an Ohio business, entered into a confidentiality agreement with The Cirlot Agency, a Mississippi business. Cirlot performed most of its contractual obligations in Mississippi. Did the trial court have personal jurisdiction over Sunny Delight pursuant to Mississippi's long-arm statute?

- II. **Personal Jurisdiction - United States Constitution.** Under the Due Process Clause of the United States Constitution, a single purposeful contact by a non-resident defendant with the forum state can establish personal jurisdiction when the plaintiff's cause of action arises from that contact. Sunny Delight (a) unilaterally contacted Cirlot in Mississippi and requested that it prepare a marketing proposal for Sunny Delight's new beverage product, (b) instructed Cirlot to sign a confidentiality agreement relating to same and sent the agreement to Mississippi where it was signed by Cirlot, and (c) caused Cirlot to invest hundreds of hours and spend thousands of dollars developing marketing strategies that were subject to the confidentiality agreement at Cirlot's offices in Mississippi. Sunny Delight ultimately hired another marketing firm, but implemented major components of Cirlot's marketing strategies in breach of the confidentiality agreement. Did the trial court have personal jurisdiction over Sunny Delight under the United States Constitution?

STATEMENT OF THE CASE

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

On April 22, 2008, The Cirlot Agency, Inc. (“Cirlot”) filed a lawsuit against Sunny Delight Beverages Company (“Sunny Delight”) for breach of contract in the Circuit Court of Rankin County, Mississippi. The Complaint alleged that Sunny Delight had entered into a contract to be performed in whole or in part in Mississippi and process was served pursuant to the Mississippi Long Arm Statute. On February 13, 2009, Sunny Delight filed a motion to dismiss for lack of personal jurisdiction. On October 4, 2010, the Circuit Court granted the motion to dismiss. Cirlot timely appealed.

B. Statement of Facts Relevant for Issues on Review.

From its world headquarters in Cincinnati, Ohio, Sunny Delight unilaterally sought out and contacted Cirlot, a family-run marketing agency located in Flowood, Mississippi. *See* R. at 15-16 at ¶4; R. at 62 at ¶3. Executives from Sunny Delight asked Cirlot to create a marketing proposal for the national launch of Sunny Delight’s new beverage product called “Elations.” *Id.* Cirlot agreed. R. at 62 at ¶¶ 2-3.

Sunny Delight then instructed Cirlot to sign a confidentiality agreement – a “Mutual Non-Disclosure Agreement” – to protect the parties’ exchange of information related to the marketing campaign (the “Confidentiality Agreement”). R. at 16 at ¶5; R. at 62 at ¶4. The Confidentiality Agreement prohibits the parties from disclosing this information to third parties and company employees not working on the project:

Each party agrees not to use any Confidential Information¹ of the other party for any purposes except to evaluate and engage in discussions concerning the [development of Sunny Delight’s new beverage]. Each party agrees not to disclose any Confidential Information of the other party to third parties or to the

¹ The Confidentiality Agreement defines “Confidential Information” as “any information disclosed by either party to the other party, either directly or indirectly, in writing, orally or by inspection of tangible objects . . .” R. at 20 at ¶2.

receiving party's employees, except to those employees who are required to have the information in order to evaluate and engage in discussions concerning the [development of Sunny Delight's new beverage] [T]he obligations of each receiving party hereunder shall survive five (5) years from the Termination Date.

R. at 20-21 at ¶¶3 & 9.

The Confidentiality Agreement recognizes that either party might suffer irreparable harm from the misuse of confidential information and permits either party to seek legal redress for even a threatened violation: "Each party agrees that any violation or threatened violation of this Agreement may cause irreparable injury to the other party, entitling the other party to seek injunctive relief in addition to all legal remedies." R. at 21 at ¶10.

Sunny Delight faxed the Confidentiality Agreement to Cirlot's office in Mississippi. R. at 16 at ¶5; R. at 62 at ¶4. Cirlot executed the Confidentiality Agreement in Mississippi and returned it to Sunny Delight. R. at 19.

Over several weeks, Sunny Delight's executives made numerous telephone calls and sent at least ten e-mails relating to the marketing campaign to Cirlot's representatives in Mississippi. R. at 16 at ¶¶5-7, 9; R. at 19-33; R. at 63 at ¶6. Cirlot spent hundreds of hours at its office in Mississippi developing marketing strategies for Sunny Delight. R. at 63 at ¶7. From its office in Mississippi, Cirlot contacted numerous third parties concerning the marketing campaign. *Id.* Unlike Sunny Delight, Cirlot upheld its obligations under the Confidentiality Agreement and did not disclose confidential information to third parties. *Id.* As further required by the Confidentiality Agreement, Cirlot safeguarded the confidential information disclosed by Sunny Delight from its employees who were not working on the project. R. at 63 at ¶5.

After Cirlot had invested hundreds of hours and thousands of dollars creating its marketing campaign for Sunny Delight, Sunny Delight asked Cirlot representatives to fly from Mississippi to Ohio to present their proposal. R. at 16 at ¶7-8; R. at 64 at ¶¶7-9. The proposal made by Cirlot disclosed the marketing strategies devised by Cirlot and constituted "Confidential

Information” under the Confidentiality Agreement.

Shortly after that meeting, Sunny Delight called Cirlot in Mississippi to inform the agency that Sunny Delight had decided not to use its marketing proposal. R. at 17 at ¶9; R. at 64 at ¶10. Cirlot later discovered, however, that Sunny Delight used several major components from Cirlot’s marketing proposal for the launch of Elations – misappropriating Cirlot’s work-product, which was confidential information under the Confidentiality Agreement. R. at 64 at ¶11. This misappropriation breached the Confidentiality Agreement.

SUMMARY OF THE ARGUMENT

The trial court has personal jurisdiction over Sunny Delight pursuant to Mississippi’s long-arm statute because Sunny Delight entered into a contract with Cirlot, a Mississippi business, which was performed in part by Cirlot in this state.

The exercise of personal jurisdiction over Sunny Delight also comports with the Due Process Clause of the United States Constitution. Sunny Delight unilaterally and purposefully directed its activities towards Cirlot in Mississippi, and this litigation is about the injuries that Cirlot suffered arising from those activities. Under well-established constitutional law, “a *single purposeful contact* is sufficient to satisfy the due process requirement of ‘minimum contacts’ when the cause of action arises from the contact.” *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1172 (5th Cir. 1985) (emphasis added). Furthermore, the exercise of specific personal jurisdiction over Sunny Delight is fair and reasonable based on the factors identified by the United States Supreme Court in the *Burger King* case. Sunny Delight (which bears the burden of proof on the issue) certainly cannot establish a “compelling case” that the exercise of specific personal jurisdiction is constitutionally unfair. Accordingly, the trial court has specific personal jurisdiction over Sunny Delight under the United States Constitution.

ARGUMENT AND AUTHORITIES

A. Standard of Review.

An appellate court reviews jurisdictional issues de novo and “sits in the same position as the trial court, ‘with all facts as set out in the pleadings or exhibits, and may reverse regardless of whether the error is manifest.’” *Knight v. Woodfield*, 50 So. 3d 995, 998 (Miss. 2011) (quoting *Horne v. Mobile Area Water & Sewer Sys.*, 897 So. 2d 972, 975 (Miss. 2004)).

B. The Circuit Court has personal jurisdiction over Sunny Delight under Mississippi’s Long-Arm Statute.

Sunny Delight is subject to personal jurisdiction under Mississippi’s long-arm statute, Miss. Code Ann. § 13-3-57, if it entered into a contract with a resident of this state to be performed in part by any party in this state.²

Sunny Delight, an Ohio corporation, entered into the Confidentiality Agreement with Cirlot, a Mississippi corporation. The agreement prohibits Cirlot from disclosing Sunny Delight’s confidential information to third parties or to its employees who were not working on the marketing campaign. Cirlot fulfilled these contractual obligations in part in Mississippi.

For example, the confidential discussions and exchange of information between Sunny Delight and Cirlot occurred in part in Mississippi, as that is where Cirlot is located. Cirlot did not disclose Sunny Delight’s confidential information to employees (all of whom work in Mississippi) who were not working on the marketing campaign. Nor did Cirlot disclose any such information to the numerous third parties that it contacted concerning the marketing campaign. Cirlot also created its marketing strategies and work-product in Mississippi. Accordingly, Cirlot

² Miss. Code Ann. § 13-3-57 provides:

[A]ny foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, . . . or who shall do any business or perform any character of work or service in this state, shall by such act be deemed doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

performed its obligations under the Confidentiality Agreement at least in part in Mississippi and Sunny Delight is therefore subject to personal jurisdiction under the contract prong of Mississippi's long-arm statute.

C. The Circuit Court has specific personal jurisdiction over Sunny Delight under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The exercise of personal jurisdiction over Sunny Delight must also satisfy the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This requirement is satisfied if Sunny Delight has "certain minimum contacts with [Mississippi] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

Specific personal jurisdiction exists when "the nonresident defendant's contacts with the forum state are directly related to the cause of action." *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 550 (Miss. Ct. App. 2000). Here, the trial court had specific personal jurisdiction over Sunny Delight.

1. Sunny Delight purposefully availed itself of a resident of this state establishing "minimum contacts" with the forum.

Few contacts are required to establish specific personal jurisdiction. Indeed, "[e]ven a *single purposeful contact* is sufficient to satisfy the due process requirement of 'minimum contacts' when the cause of action arises from the contact." *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1172 (5th Cir. 1985) (emphasis added). *See also Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990) ("It is well settled that specific jurisdiction may arise . . . incident to the commission of a single act directed at the forum."); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333 (5th Cir. 1982) (holding "very little purposeful activity within a state is necessary to satisfy the minimum contacts requirement").

To establish specific personal jurisdiction, a non-resident defendant must simply have

“fair warning” that a particular activity might subject him to a lawsuit in the forum state. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). In other words, the “defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This requirement is satisfied when the defendant “has ‘purposefully directed’ his activities at residents of the forum and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.” *Burger King Corp.*, 471 U.S. at 472 (citations omitted).

A non-resident defendant cannot escape personal jurisdiction by arguing it does not have an office or any employees in the forum state because “specific jurisdiction may arise without the nonresident defendant[] ever stepping foot upon the forum state’s soil.” *American Cable Corp.*, 754 So. 2d at 551. Instead, it is “the purposefulness of the decision that is important and not the physical presence of the defendant in the state.” *Id.* *See also In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972) (“A letter or a telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the defendant or its agents.”).

Courts have found that a non-resident defendant “purposefully availed” itself of the forum state – establishing the “minimum contact” necessary for specific personal jurisdiction – when the defendant unilaterally sought out and contacted the plaintiff in the forum state, engaged in discussions with the plaintiff, induced the plaintiff to enter into an agreement, and then breached that agreement. That is the exact factual scenario present in this case and Mississippi courts have decided a number of cases on this very basis.

In *American Cable Corporation v. Trilogy Communications, Inc.*, 754 So. 2d 545, 548 (Miss Ct. App. 2000), American Cable Corporation (“American Cable”), a Florida corporation, contacted Trilogy Communications (“Trilogy”) in Mississippi to purchase products. When

American Cable failed to pay for the items, Trilogy filed suit and obtained a default judgment in Mississippi. *Id.* at 549. American Cable argued the default judgment should be set aside because the court lacked personal jurisdiction. *Id.* at 548. The circuit court ruled that it had personal jurisdiction and the Mississippi Court of Appeals affirmed. *Id.*

In reaching its decision, the Court of Appeals emphasized that American Cable “initiated the contacts” with Mississippi: “It was American Cable who contacted Trilogy and requested a credit line of \$50,000. . . . [and] then submitted a balance sheet to Trilogy along with a two-page trade reference sheet.” *Id.* at 550. The court found that American Cable had “purposefully availed” itself of Mississippi because while the “distinction of ‘who started it’ may appear minor, in fact this shows that [American Cable] reached out beyond its Florida home and itself initiated negotiations with [Trilogy] in Mississippi.” *Id.* In other words, “since American Cable in Florida initiated contact with a corporation in Mississippi, this action showed purpose.” *Id.* The court found this single, purposeful contact established specific personal jurisdiction under the United States Constitution. *See also Aultman, Tyner & Ruffin, Ltd. v. Capital Rubber & Specialty Co., Inc.*, No. 2:10cv223KS-MTP, 2011 WL 213471, at *9 (S.D. Miss. Jan. 21, 2011) (“Courts have continued to find that the initiation of contact by the defendant to be of considerable importance. In this instance, it was [the defendant’s agent] who initiated contact with [the plaintiff] in Mississippi, to secure their representation and such action is certainly ‘minimum contact’ for jurisdictional purposes.”) (internal citation omitted).³ *Compare Mason v. Shelby County Health Care Corp.*, 919 F. Supp. 235, 239 (S.D. Miss. 1996) (“For jurisdictional purposes . . . what is relevant to the court is the fact that Dr. Gavin *never initiated* any contact whatsoever with Mississippi that could potentially subject him to jurisdiction in this forum.

³ *Accord Scott & Scott Dev., Inc. v. Jersey Shore Steel Co.*, No. 1:07cv286-B-D, 2008 WL 4457853, at *1 (N.D. Miss. Sept. 30, 2008); *Tupelo Mfg Co., Inc. v. Cope Indus., Inc.*, No. 105cv1142006NBBSA, 2006 WL 924036, at *1 (N.D. Miss. Apr. 6, 2006).

Rather, he merely *received* a limited number of phone calls from persons in Mississippi. Such unilateral activity by others is insufficient to support this court's exercise of jurisdiction.") (first emphasis added).

Similarly, in *BankPlus v. Toyota of New Orleans*, 851 So. 2d 439, 442 (Miss. Ct. App. 2003), Karen Jarrell ("Jarrell") a Mississippi resident, entered into an agreement with Toyota of New Orleans ("Toyota") and BankPlus to purchase a new car. Jarrell was supposed to give Toyota the car she crashed and the insurance proceeds. *Id.* BankPlus agreed to release its lien on the wrecked car and to finance the remainder owing to Toyota on the new car. Toyota agreed to send the title to the new car to BankPlus in Mississippi. *Id.* BankPlus fulfilled its obligations, but Toyota failed to send the title to BankPlus. *Id.* BankPlus sued Toyota in Mississippi for breach of the deal, but the circuit court dismissed the case for lack of personal jurisdiction.

The Mississippi Court of Appeals reversed, holding Toyota had purposefully availed itself of Mississippi because it had entered into a contract with BankPlus in Mississippi and had "numerous conversations [with BankPlus] concerning the arrangement." *See id.* at 442-43. The court found Toyota's activities directed at a resident of this state satisfied the minimal requirements of specific personal jurisdiction. *Id.* at 444.

In *Medical Assurance Company of Mississippi v. Jackson*, 864 F. Supp. 576, 577 (S.D. Miss. 1994), a Mississippi doctor negligently left a sponge in a patient's abdomen during surgery. When the patient – a resident of Alabama – discovered the sponge, his Alabama attorney sent a demand letter to the doctor's insurance company in Mississippi. *Id.* The demand letter was "followed by a series of letters and telephone calls" by the patient's attorney to the insurance company. *Id.* Ultimately, the parties entered into a settlement agreement. *Id.* The patient accepted the settlement check, but refused to sign the release. *Id.* When the insurance company sued the patient and his attorney in Mississippi for breach of the settlement agreement,

the defendants argued the court lacked personal jurisdiction because they were never physically present in Mississippi when they negotiated or executed the agreement. *Id.* at 578.

Specifically, the patient argued that because he “never came to Mississippi in connection with the settlement negotiations or consummation of any settlement, he cannot be subject to suit [in Mississippi].” *Id.* at 579. His attorney likewise argued that he “cannot be brought to defend the action in [Mississippi] – and that he certainly never expected that he would be – since he never set foot in Mississippi and instead, conducted all negotiations with [the insurance company] from Alabama through the use of the mails and the telephone.” *Id.*

The district court rejected the defendants’ argument, noting “[i]t is well established that physical presence in the state is not a prerequisite to the valid exercise of personal jurisdiction.” *Id.* The court found “there is ample proof that defendants otherwise had sufficient contacts with Mississippi in connection with the transaction underlying this action for the court to exercise ‘specific jurisdiction.’” *Id.* Specifically, the court found the defendants had purposefully availed themselves of Mississippi because they (1) “initiated this transaction” with the Mississippi insurance company by sending the demand letter, (2) made several telephone calls and sent numerous letters to the plaintiff in Mississippi regarding the settlement, and (3) sent the release agreement to the plaintiff in Mississippi. *Id.*

Similar to the defendants’ actions in the above cases, Sunny Delight unilaterally sought out and contacted Cirlot in Mississippi, engaged in discussions with Cirlot, induced Cirlot to enter into an agreement, and then breached that agreement. Sunny Delight unilaterally contacted Cirlot in Mississippi to request that it create a marketing proposal for Sunny Delight’s new beverage product. It not only sent the subject Confidentiality Agreement to Cirlot in Mississippi, but also called, faxed, and e-mailed Cirlot in Mississippi over several weeks to discuss the marketing campaign and to exchange confidential information. Sunny Delight caused Cirlot to

invest significant time, money, and effort in Mississippi researching, developing, and refining its marketing strategies for Sunny Delight. Sunny Delight coaxed Cirlot from its home in Mississippi to Sunny Delight's corporate headquarters in Ohio to present its marketing proposal. Sunny Delight then misappropriated Cirlot's work product for its own financial gain in blatant violation of the Confidentiality Agreement. Because Sunny Delight's activities were purposefully directed at a resident of this state, they establish the "minimum contacts" with Mississippi necessary to satisfy specific personal jurisdiction under the United States Constitution.

Courts have also found "minimum contacts" when the non-resident defendant had far fewer and more attenuated contacts with the forum state than exist in this case. For example, in *Vig v. Indianapolis Life Ins. Co.*, 384 F. Supp. 2d 975, 980 (S.D. Miss. 2005), the court found specific personal jurisdiction over nonresident attorneys who did nothing more than draft a form opinion letter that they sent to a client in California, who in turn forwarded the letter to an individual in Mississippi, because the attorneys knew the letter would be sent to the individual in Mississippi. *Cf. Streber v. Hunter*, 221 F.3d 701, 718 (5th Cir. 2000) (holding Louisiana attorney "'purposefully availed' himself of Texas laws when he gave tax advice that he knew would be received by a Texas client, . . . and thus had 'minimum contacts'" with Texas).

In *Aultman, Tyner & Ruffin, Ltd. v. Capital Rubber & Specialty Co., Inc.*, No. 2:10cv223KS-MTP, 2011 WL 213471, at *9 (S.D. Miss. Jan. 21, 2011), the court found specific personal jurisdiction because the non-resident defendant had contacted the plaintiff, a Mississippi law firm, for representation, the plaintiff had sent invoices and received payment from the defendant's insurance company pursuant to an agreement between the parties, and the defendant had engaged in numerous discussions with the plaintiff regarding the representation. *See also Horne v. Mobile Area Water & Sewer System*, 897 So. 2d 972, 980 (Miss. 2004) (*Jackson*

involved making two telephone calls and writing two letters If *Jackson* had “minimum contacts,” then surely the present case has “minimum contacts.”).

Also, in the *American Cable Corp.* case, the Mississippi Court of Appeals stated a “minimum contact” is established if the defendant purposefully caused the plaintiff to engage in business activity in the forum state: “What we find to be an accurate and quite relevant statement of the guiding principle is this ‘when a nonresident defendant takes purposeful and affirmative action, the effect of which is to cause business activity, foreseeable by the defendant in the forum state, such action by the defendant is considered a minimum contact for jurisdictional purposes.’” *American Cable Corp.*, 754 So. 2d at 551-52 (quoting *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982)).

Sunny Delight had substantially more purposeful contact with a Mississippi resident than the defendants had in the above cases. The courts found “minimum contacts” in those cases, and those precedents compel the conclusion that the present case has “minimum contacts” sufficient to support an exercise of specific jurisdiction over Sunny Delight.

2. The exercise of personal jurisdiction over Sunny Delight by a Mississippi court does not offend “traditional notions of fair play and substantial justice.”

“When a plaintiff makes its *prima facie* case that the defendant has ‘minimum contacts’ with the forum state, the burden of proof shifts to the defendant to show that the exercise of jurisdiction would be unreasonable.” *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 473 (5th Cir. 2006). To satisfy this burden, the defendant must “present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Burger King Corp.*, 471 U.S. at 477. Once the plaintiff establishes minimum contacts, though, “the interests of the forum and the plaintiff justify even large burdens on the defendant.” *Wien Air Alaska, Inc.*

v. Brandt, 195 F.3d 208, 215 (5th Cir. 1999). Indeed, it “is rare to say the assertion is unfair after minimum contacts have been shown.” *Id.*

The fairness inquiry consists of five factors: “(1) the burden on the nonresident defendant, (2) the forum state’s interests, (3) the plaintiff’s interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies.” *Luv N’ care, Ltd.*, 438 F.3d at 473.

Under the first factor, “staging a defense in a foreign jurisdiction is almost always inconvenient and/or costly . . . [so] this factor is only meaningful where a party can demonstrate some kind of special or unusual burden.” *ITL Int’l, Inc. v. Constenla, S.A.*, No. 1:10cv467LG-RHW, 2010 WL 4537931, at *7 (S.D. Miss. Nov. 2, 2010) (quoting *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994)). Sunny Delight is a multi-billion dollar corporation with worldwide operations. A 900-mile trip from Cleveland, Ohio, to Canton, Mississippi, should pose no “special or unusual burden.” *See American Cable Corp.*, 754 So. 2d at 552 (“The burden upon [defendant] does not appear substantial, as it is not a great distance from Florida to Mississippi.”). Accordingly, the first factor does not weigh in favor of either party.

Under the second factor, “[t]he purpose of the inquiry is not to compare the forum’s interest to that of some other jurisdiction, but to determine the extent to which the forum has an interest.” *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 151 (1st Cir. 1995) (emphasis omitted). Mississippi has an interest in protecting a Mississippi company from harm caused by the misappropriation and breach of contract by a non-resident defendant. *See, e.g., Wright v. Davis*, No. 3:08cv97-DPJ-JCS, 2008 WL 4999165, at *4 (S.D. Miss. Nov. 19, 2008) (“Mississippi has a substantial interest . . . in providing a forum for the redress of injuries to its citizens.”). Thus, the second factor weighs in favor of Cirlot.

The third factor – the plaintiff’s interest in securing relief – “requires the court to accord a degree of deference to the plaintiff’s choice of forum.” *ITL Int’l, Inc.*, 2010 WL 4537931, at *8 (quoting *Sawtelle v. Farrell*, 70 F.3d 1381, 1395 (1st Cir. 1995)). Cirlot has an interest in securing relief in this state because it is a Mississippi business and a substantial number of witnesses and other evidence are located here. Accordingly, the third factor weighs in favor of Cirlot.

The fourth factor – the interest of the interstate judicial system in the efficient administration of justice – requires the Court to “look at the location of the witnesses, where the wrong underlying the lawsuit occurred, what forum’s substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation.” *ITL Int’l, Inc.*, 2010 WL 4537931, at *8 (quoting *AST Sports Science, Inc. v. CLF Distrib. Ltd.*, 514 F.3d 1054 (10th Cir. 2008)). While the substantive law of Ohio would likely apply to this litigation pursuant to the choice-of-law provision in the Confidentiality Agreement and Sunny Delight likely committed its wrongful conduct there, the witnesses and evidence are located in both Mississippi and Ohio and there is no apparent threat of piecemeal litigation.⁴ Accordingly, this fourth factor likely does not weigh in favor of either party.

The fifth factor – the shared interest of the several states – requires the Court to consider the interests of the other potential jurisdictions. *See, e.g., Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987). Because Ohio substantive law likely applies to this litigation,

⁴ Although the Confidentiality Agreement includes a choice of law provision, “[c]hoice of law analysis is entirely different from analysis of minimum contacts. Choice of law does not depend upon minimization of contacts, but rather upon maximization of contacts. Even though a defendant may have availed itself of Mississippi so that personal jurisdiction is proper, it does not necessitate the application of Mississippi law.” *Zurich American Ins. Co. v. Goodwin*, 920 So.2d 427, 432 (Miss. 2006). *See also Gundle Lining Const. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 206 (5th Cir. 1996) (“At the outset, we note that the plaintiffs misapprehend the very nature of this contractual provision. *The provision contemplates a choice of law not forum.* Hence, despite plaintiffs’ protestations to the contrary, the provision of itself does not evince [plaintiffs’] anticipation of being haled into a Texas court.”) (quoting *Stuart v. Spademan*, 772 F.2d 1185, 1195 (5th Cir. 1985)). Accordingly, any choice of law question is irrelevant to the jurisdictional analysis before this Court.

Sunny Delight is located in Ohio, and some of the witnesses and other evidence are located there, Ohio likely has a shared interest in this litigation. Accordingly, it must be conceded that both Ohio and Mississippi have a shared interest in the litigation.

In sum, two of the above factors likely weigh in favor of Cirlot, and three favor neither Cirlot nor Sunny Delight. Under these circumstances, Sunny Delight cannot satisfy its heavy burden of proving the exercise of specific personal jurisdiction over it is constitutionally unfair.

CONCLUSION

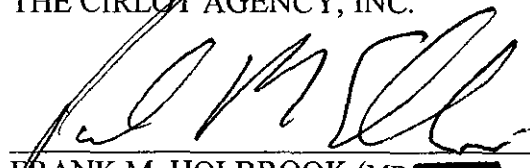
For the foregoing reasons, Cirlot respectfully requests this Court to reverse the trial court's Order dismissing Cirlot's lawsuit against Sunny Delight for lack of personal jurisdiction.

THIS, the 21st day of March, 2011.

Respectfully submitted,

THE CIRLOT AGENCY, INC.

By:


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CERTIFICATE OF SERVICE

I, Paul M. Ellis, hereby certify that I have this day caused a true and correct copy of the foregoing Brief of Appellant to be delivered by United States mail, postage prepaid, to the following:

Honorable William E. Chapman

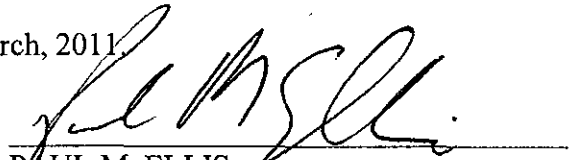
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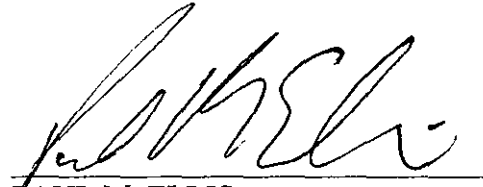
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CERTIFICATE OF FILING

I, Paul M. Ellis, certify that I have had hand-delivered the original and three copies of the Brief of Appellant and an electronic diskette containing same on March 22nd, 2010 addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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