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Internet Law Update

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By Cecily Anne Snyder and Patrick T. O'Regan, Jr.\*

DEFENDANT STILL AMENABLE TO SERVICE OF PROCESS IN SPITE OF WILLFUL AND OBSTRUCTIONIST ATTEMPTS TO AVOID SERVICE

Brach's filed a complaint against Keller and Candy Sites alleging, among other things, cybersquatting, trademark infringement, federal false designation, and unfair competition under the Lanham Act. [Brach's Confectioners, Inc. v. Keller, 2003 U.S. Dist. LEXIS 16817 (N.D. Ill. 2003)] Keller had registered a variety of Internet domain names incorporating the name "Brach" including ebulkcandy.com, brachs.org, brachs.net, and others. Defendant Keller is CEO, president and/or the sole director and owner of defendant's Candy Sites he directs and controls the activities of the corporation and is, for all intents and purposes, essentially fungible with the corporation. Candy is sold on various websites including the ebulkcandy.com website. The interactive Web sites also include graphic images of Brach's trademarks.

After filing its complaint, Brach's attempted to serve Keller with the complaint both individually and in his capacity as an officer of Candy Sites. Keller repeatedly avoided service by engaging in a variety of conduct from refusing mail service to refusing to accept service through a car window. Keller subsequently filed a response to the complaint and a general appearance for purposes of entering a motion to dismiss and arguing his case on the merits.

The court first noted that "because this is a federal question case, Federal Circuit law rather than Seventh Circuit law is controlling, even in

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\* Cecily Anne Snyder is the Vice President of Legal Affairs at Imaging Therapeutics, Inc., Lexington MA. She handles a wide range of intellectual property matters, including developing market focused patent strategies. She can be reached at cecily@imatx.com. Patrick T. O'Regan, Jr., is a principal of O'Regan & O'Regan in Falmouth, MA. He works with local Cape Cod businesses handling a wide variety of both litigation and transactional matters. He can be reached at patrick@oreganlaw.com.  
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determining the question of whether the exercise of personal jurisdiction is proper.”<sup>1</sup>

### Personal Jurisdiction

Defendant Keller brought a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) that required plaintiff to provide sufficient evidence to establish a prima facie case for personal jurisdiction. The court noted that, because Keller was domiciled in New Jersey and had conducted only a portion of his business in Illinois, he was not subject to general jurisdiction.

Specific jurisdiction, however, enables the court to exercise personal jurisdiction over a non-resident defendant, such as Keller, on the basis of minimum contact with the forum under the International Shoe test. In this scenario, plaintiff is required to show that (1) defendant is amenable to service of process and (2) hailing defendant into court is consistent with the Fifth Amendment Due Process Clause.

### Amenability to Process

In addition to providing a general catch all, the Illinois long-arm statute enumerates acts sufficient to establish personal jurisdiction. These acts include doing business within the state or committing a tort within the state. The court noted that, “because the Illinois long-arm statute reaches as far as the limits of due process, the Court need not decide whether this case fits neatly into one of the enumerated acts within the statute. It need only decide whether the exercise of personal jurisdiction of Keller comports with due process.”

The court has discretion to determine if there was good cause for failure to effect service. In this case, Brach’s established that Keller actively sought to avoid service. The court noted that service “was effectively made by laying the summons and complaint at Keller’s feet.” The court concluded that it “cannot reward the obstructionist tactics of a willfully and technically, though not actually ignorant, defendant by finding him not amenable to process.”<sup>2</sup>

### Due Process

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The court next assessed whether haling the defendant into court comported with the Due Process Clause. The court noted that “since Keller actively engaged in selling candy to Illinois residents, he had purposefully availed himself of the privilege of conducting business in Illinois, and therefore, should reasonably anticipate being haled into court in Illinois.” This conclusion was reached in spite of the fact that there was evidence of only four purchases by Illinois consumers from Keller’s Web site. Because using the marks are related to the activity of selling candy in Illinois, the court concluded that Keller’s use of the marks “will have an impact and injure the plaintiff in Illinois where defendant and plaintiff both actively sell the plaintiff’s goods.”

Because Illinois had a strong interest in these claims and Keller had not made a compelling case that jurisdiction would be unreasonable, the court concluded that jurisdiction over Keller was reasonable.

#### Default Judgment

In response to Keller’s motion to dismiss, Brach brought a motion for default judgment. The court determined that Brach had perfected service on both Keller and Candy Sites by laying the copies of the summons and complaint “at Keller’s feet” (outside his car). Candy Sites, as a corporation, cannot be represented pro se and no response was made on its behalf. Therefore, the court granted the default judgment against Candy Sites.

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<sup>1</sup> *Id.*

<sup>2</sup> *Id.* at \*9.