

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

PACWEST TRANSFERS, LLC

-and-

LAUREL POFFENROTH

-and-

JOSEPH MEUSE

Plaintiffs

v.

At Law No. CL05-9

IPO HOLDING COMPANY, INC.

Defendant

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

FACTS:

The facts in the proceedings between the parties are quite clear. IPO commenced an action against PacWest Transfer, LLC, Laurel Poffenroth and Joseph Meuse among other defendants on the claims of Breach of Fiduciary Duty, Civil Conspiracy, Conversion and Injunction Relief in October 2004 in the District Court for Clark County, Nevada. The three named defendants who are also the named plaintiffs in these proceedings, then filed the instant action in this Court on grounds of defamation and slander. IPO is a Nevada Corporation doing business in Nevada with no minimum contacts in Virginia. The three named plaintiffs in these proceedings have alleged a general defamation claim wherein the defendant, through its agent Paul Taylor, purportedly caused “false” press releases to

be issued making untrue statements of the plaintiffs. No where in the Complaint do the Plaintiffs allege that the defamation or slander were published or circulated in Virginia. Additionally, the Motion for Judgment filed in this Court parrots many of the same facts and circumstances and references the same business relationships entered into between all the parties. Finally, all of the parties have personally availed themselves of the jurisdiction of the District Court of Clark County, Nevada.

ARGUMENT

The Code of Virginia categorizes complaints alleged by the plaintiffs as Category B venue. The governing statute for venue is found at § 8.01-262 and states Category B or permissible venue lies in the following areas:

In any actions to which this chapter applies except those actions enumerated in Category A where preferred venue is specified, one or more of the following counties or cities shall be permissible forums, such forums being sometimes referred to as "Category B" in this title:

- 1. Wherein the defendant resides or has his principal place of employment or, if the defendant is a corporation, wherein its mayor, rector, president or other chief officer resides;*
- 2. Wherein the defendant has a registered office, has appointed an agent to receive process, or such agent has been appointed by operation of the*

law; or, in case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

3. Wherein the defendant regularly conducts substantial business activity, or in the case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

4. Wherein the cause of action, or any part thereof, arose;

5. In actions to recover or partition personal property, whether tangible or intangible, the county or city:

Further, 8.01-328.1 of the Code of Virginia defines when personal jurisdiction over a person may be exercised in relevant part:

A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

1. Transacting any business in this Commonwealth;

2. Contracting to supply services or things in this Commonwealth;

3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial

*revenue from goods used or consumed or services rendered, in this
Commonwealth;*

In the Motion for Judgment, the facts only allege that telephone calls were made by Taylor to the Plaintiffs and that two press releases were issued by the Defendant. Such conversations, even if taken as true, would not avail IPO to the jurisdiction of this Court. Instead of an action being dismissed when the trial court sustains an objection to the venue, the court must transfer the action to a proper forum, if there is one in the state, which is not the case in these proceedings, [§ 8.01-264, Code of Virginia](#) (1950). The fact that there may be a more convenient forum out of the state does not permit the action to be dismissed. [§ 8.01-265, Code of Virginia](#) (1950). However, in this case it is not merely a matter of convenience, but compulsory to the resolution of the Nevada claims that a Nevada Court litigate the merits of the claims brought in this action. Of course, where the objection goes not merely to the venue but to jurisdiction of the subject matter or the person, it is a substantial defense and may be pleaded in bar in Virginia [Moore v. Norfolk & W.R. Co., 124 Va. 628, 98 S.E. 635 \(1919\)](#) or be grounds for attacking the judgment, directly or collaterally. [Appeal and Error](#), §§ [♦ 66](#), [♦ 107](#), [♦ 332](#). In Virginia there still may be a dismissal on motion for either lack of jurisdiction or improper venue, but it is not an adjudication on the merits barring another action in the proper court. [§§ 8.01-257 to 8.01-267, Code of Virginia](#) (1950). To guard against abuse of the latitude afforded by the venue statutes, judges are vested with the discretion to change the location of the trial in favor of a location more convenient to the parties and witnesses, one free of any taint

of prejudice, or one which would better serve the ends of justice. [Norfolk & W. Ry. v. Williams](#), 239 Va. 390, 389 S.E.2d 714 (1990). Although various courts have held that venue is not a constitutional right per se and that a defendant has no absolute right to a change of venue by either statute or constitution, a defendant is, however, entitled to a fair trial in a fair tribunal as a basic requirement of due process, and it necessarily follows that motions for change of venue to escape a biased tribunal raises constitutional issues both relevant and essential. [United States v. Snow](#), 537 F.2d 1166 (4th Cir. 1976); [Holt v. Virginia](#), 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965), rev'g [Holt v. Com.](#), 205 Va. 332, 136 S.E.2d 809 (1964). The statute is liberally construed in the furtherance of justice and to the end that the right to a fair trial be not denied. [Newcomer v. Com.](#), 220 Va. 64, 255 S.E.2d 485 (1979). Moreover, statutes conferring the right to a change of venue are enacted with the view of according litigants a fair and impartial trial and, being in furtherance of justice, should be liberally construed so as not to defeat the right. [Ramsay v. Harrison](#), 119 Va. 682, 89 S.E. 977 (1916). A change of venue should be ordered when necessary to secure a fair trial, but since a fair trial is all that can be demanded, conditions which obtain when the trial is had, and not those which existed when the cause of action arose, are looked to. [Evans v. Com.](#), 161 Va. 992, 170 S.E. 756 (1933); [Greenfield v. Com.](#), 214 Va. 710, 204 S.E.2d 414 (1974); [Jefferson v. Com.](#), 214 Va. 747, 204 S.E.2d 258 (1974); [Greenfield v. Robinson](#), 413 F. Supp. 1113 (W.D. Va. 1976).

Words actionable at common law may be sued on in a common-law action in any jurisdiction where the defendant may be found [James v. Powell, 154 Va. 96, 152 S.E. 539 \(1930\)](#). IPO is a corporation doing business in the state of Nevada. Simply because the Plaintiffs in this action are Virginia residents, does not give rise to jurisdiction by Virginia Courts. Especially when the Plaintiffs voluntarily consented to the jurisdiction of a Nevada court litigating a cause of action germane to the defamation case before this Court. Further, where the action rests upon a statute and the words were spoken or published exclusively in a state other than that in which the action was brought, the plaintiff must prove as a fact that a like statute was in force in such other state. [Davis v. Heflin, 130 Va. 169, 107 S.E. 673 \(1921\)](#). In this case, clearly there are no facts plead in the Motion for Judgment that allege the defendant came into the Commonwealth of Virginia and published defamatory statements. Whether a claim of defamation even exists in a Nevada Court or whether the facts in these pleadings would invoke statutory rights in Nevada is for the determination of a Nevada Court. Therefore, the defamation claim is not properly plead and a dismissal of the action on these grounds is appropriate.

Although the Plaintiff never used the word “Libel” in its motion for judgment, it did make allegations of a false press release. The law in Virginia on the tort of libel is quite clear. Libel is committed not where the words are formulated, but where they are heard or read by third persons. The mere writing of the words does not render the author liable; hence the completion of the offense depends upon the conditions existing at the place where the writing is received. [Hackney v. Com., 186 Va. 888, 45 S.E.2d 241 \(1947\)](#). See

[Haskell v. Bailey, 63 F. 873 \(4th Cir. 1894\)](#). The rule as to venue of an action of libel is that a civil action based upon a writing contained in a newspaper may be instituted in any county in which the paper is circulated, although not the place where the paper is printed and although the county in which the action is instituted is distant from where the parties reside or have their domicile. Although the Plaintiffs have not specifically plead a libel action against the defendant, even had they, there are no allegations contained in the pleadings that the publication was read by third parties in Virginia.

The Virginia statute provides that a court may exercise personal jurisdiction over "a person, who acts directly, or by an agent, as to a cause of action arising from the person's . . . causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state. . . ." [§ 8.01-328.1, Code of Virginia](#) (1950). The Defendant concedes that minimum contacts can be established even where the defendant has never physically entered the forum state. [Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 \(E.D. Va. 1975\)](#). However, in the facts before this Court, the Defendant not only has never physically entered this state, but also has never transacted business in this state so as to avail itself of the jurisdiction of any Court in Virginia. The Plaintiffs are relying solely on Virginia's Long-Arm statute to gain jurisdiction in these proceedings. When jurisdiction is sought

pursuant to the Virginia long-arm statute, a two-step inquiry is required: First, it must be determined whether the statutory language permits service of process on the nonresident defendant; and second, it must be determined whether the exercise of personal jurisdiction under the statute is consonant with the due process clause of the United States Constitution. These two steps are interrelated, however, as the Virginia long-arm statute is a deliberate and conscious effort on the part of the General Assembly of Virginia to assert jurisdiction over nonresident defendants to the extent permissible by the due process clause. [Associates Fin. Servs. Co. v. McPeck, 222 Va. 176, 278 S.E.2d 847 \(1981\)](#). The Due Process clause generally protects a defendant from being summoned before a Court in a state where a defendant never had minimum contacts, which is precisely the scenario in the case related to IPO. IPO is a Nevada corporation doing business in Nevada with no authority to transact business in Virginia either express or implied by the Virginia State Corporation Commission.

Admittedly, the Virginia "long-arm" statute [§ 8.01-328.1, Code of Virginia](#) (1950) is a deliberate and conscious effort on the part of the General Assembly to assert jurisdiction over nonresident defendants to the extent permissible by the due process clause. It is designed to provide redress in Virginia courts against persons who inflict injuries upon or incur obligations to those entitled to legitimate protection. However, in making such provision, the statute must be fair and reasonable give to the defendant proper notice of the claim against him, and provide him an adequate and realistic opportunity to appear and be heard in his defense. The statute gives a court the right to exercise personal

jurisdiction over a person who acts directly as to a cause of action arising from that person having an interest in, using, or possessing real property in Virginia. [International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 \(1945\)](#). While jurisdiction will exist with respect to a cause of action arising from the business transaction if, by one act, the nonresident can be said to have engaged in some purposeful activity in Virginia. This principle does not imply that any single act within the State of Virginia is sufficient to establish jurisdiction under the "transacting business" provision. Rather, it is the quality, and not the quantity, of the acts that determines whether the transaction of business has occurred. [Brown v. ABC, 704 F.2d 1296 \(4th Cir. 1983\)](#). A foreign corporation is not "transacting business" in Virginia within the meaning of the statute, where it has been a resident of a foreign state for all of its existence, has never been a resident of Virginia, has never engaged in any business in Virginia, and does not presently have and has never had an authorized agent in Virginia. [Chedid v. Boardwalk Regency Corp., 756 F. Supp. 941 \(E.D. Va. 1991\)](#).

Under the Virginia long-arm statute, a court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's causing tortious injury in Virginia by an act or omission outside Virginia if he regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in Virginia. The meaning of this provision has been the subject of some confusion and conflicting interpretation. [Ragouzis v. Ragouzis, 10 Va. App. 312, 391 S.E.2d 607 \(1990\)](#) The

inclusion of the first stated basis, "regularly does business," has been somewhat anomalous since well before the expansion of in personam jurisdiction occasioned by the landmark cases where "doing business" was a general predicate for in personam jurisdiction making a defendant amenable to suit even on a cause of action unrelated to the business conducted in the state. Thus, if a defendant was found to be regularly doing business in Virginia, he would be subject to personal jurisdiction here under traditional concepts on any and all causes of action without the need of the long-arm statute. Therefore, from a historical perspective the meaning of this provision is far from clear. [Ragouzis v. Ragouzis, 10 Va. App. 312, 391 S.E.2d 607 \(1990\)](#). This requirement should be satisfied by any deliberate, continuing contact with the state, such as regular advertising, distribution of catalogs or knowing distribution of goods in the state. At a minimum, the plaintiff must prove that the defendant maintained some sort of ongoing interactions with the forum state. It is also important to keep in mind that the tortious injury must be caused by the act or omission outside the state and not by the persistent course of conduct within. [Ragouzis v. Ragouzis, 10 Va. App. 312, 391 S.E.2d 607 \(1990\)](#). Engaging "in any other persistent course of conduct" in Virginia is a more amorphous basis than the preceding two and there is a paucity of decisional law to guide the court in determining its meaning. "Persistent" is the key word in this provision since it prescribes the kind of conduct necessary to support jurisdiction. [Bowers v. Wurzburg, 202 W. Va. 43, 501 S.E.2d 479 \(1998\)](#). "Persistent" has been defined as (1) refusing to give up or let go; persevering obstinately, (2) insistently repetitive or continuous or (3) enduring. [United States v. Pierre Point Shipping & Inv. Co., 655 F. Supp. 1379 \(E.D. Va.](#)

[1987](#)). The word "other" is also significant in that it refers to regularly doing business or soliciting business as persistent courses of conduct, thereby giving an indication by example of what that phrase is intended to mean. [Pappas v. Steamship Aristidis, 249 F. Supp. 692 \(E.D. Va. 1965\)](#).

The Virginia long-arm statute is a single act statute requiring only one transaction in Virginia to confer jurisdiction on its courts. [§ 8.01-328.1, Code of Virginia](#) (1950). It is manifest that the purpose of the statute is to assert jurisdiction over nonresidents who engage in some purposeful activity in Virginia to the extent permissible under the due process clause. [Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 \(E.D. Va. 1975\)](#). Additionally, the acts conferring jurisdiction under the long-arm statute must coincide with the acts giving rise to the substantive claim. [Associates Fin. Servs. Co. v. McPeck, 222 Va. 176, 278 S.E.2d 847 \(1981\)](#). However, the General Assembly, in enacting the long-arm statute, did not impliedly prescribe that a wrongful act, omission, or misrepresentation made outside the state should be considered a continuing wrong occurring within the state. [Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339 \(E.D. Va. 1986\)](#). Therefore, the alleged defamatory statements made by IPO against the Plaintiffs occurred outside of the state and, are not enough to confer personal jurisdiction over the Defendant. The Plaintiff has failed to properly plead, nor could they plead any fact or combination of facts that would otherwise invoke the Virginia long-arm statute over the Defendant. Further, the claims brought against the Defendant are compulsory counterclaims to the action pending in Nevada and this Court should abstain

from involving itself in ongoing litigation where the likelihood of inconsistent judgments is substantial.

CONCLUSION

For the following reasons, the defendant, IPO Holding Company, Inc., respectfully moves this Court to dismiss these proceedings and to grant the defendant its costs and attorney fees expended to date.

RESPECTFULLY SUBMITTED,
IPO HOLDING COMPANY, INC.

By _____
Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was mailed this 4th day of March 2005 to:

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