

Daugherty's motion should be denied because he waived his personal jurisdiction defense by having previously responded to Plaintiffs' complaint with a motion under Rule 12(e). Notwithstanding the waiver, the Court has personal jurisdiction over Daugherty under both the Kentucky long-arm statute and United States Constitution based on Daugherty's ongoing business relationship with Kentucky residents relating to the PrimeStreams service. Over the course of three years, Daugherty engaged in more than 400 transactions, totaling at least \$4.5 million, where Daugherty purchased Device Codes from Kentucky residents that he assisted in operating the PrimeStreams service. Daugherty is also properly found to have resold at least some of these Device Codes to customers in Kentucky because he refused to provide information concerning his customers in response to Plaintiffs' discovery and instead asserted his Fifth Amendment privilege against self-incrimination. Personal jurisdiction is therefore properly exercised over Daugherty.

II. LEGAL STANDARD

In order to defeat a Rule 12(b)(2) motion to dismiss, Plaintiffs must only make a *prima facie* case showing that personal jurisdiction exists. *See AlixPartners, LLP v. Brewington*, 836 F.3d 543, 548-49 (6th Cir. 2016) ("When the district court resolves a Rule 12(b)(2) motion solely on written submissions, the plaintiff's burden is 'relatively slight,' and 'the plaintiff must make only a *prima facie* showing that personal jurisdiction exists in order to defeat dismissal.'). When considering a motion to dismiss for lack of personal jurisdiction, the court must accept the allegations of the complaint as true. *Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991). "[T]he pleadings and affidavits submitted must be viewed in a light most favorable to the plaintiff, and the district court should not weigh 'the controverting assertions of the party seeking dismissal.'" *Air Prods. & Controls, Inc. v. Safetech Intern., Inc.*, 503 F.3d 544, 549 (6th Cir. 2007).

ARGUMENT

A. Daugherty Waived His Personal Jurisdiction Defense

The ability to challenge personal jurisdiction can be waived if not pled at the correct time. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 773 (6th Cir. 2003) (“A challenge to personal jurisdiction must be raised in the first responsive pleading or be waived.”); *Universal Settlements Intern., Inc. v. Nat’l Viatical, Inc.*, No. 1:07-cv-1243, 2009 WL 1606648, at *1 (W.D. Mich. June 8, 2009) (finding defendant waived Rule 12(b)(2) defense by omitting it from a previously filed Rule 12(b)(6) motion). “A party waives any defense listed in Rule 12(b)(2)-(5) by omitting it from a motion in the circumstances described in Rule 12(g)(2).” Fed. R. Civ. P. 12(h)(1)(A). Under Rule 12(g)(2), “a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ. P. 12(g)(2).

Before seeking dismissal for lack of personal jurisdiction, Daugherty responded to Plaintiffs’ complaint by filing a motion for more definite statement under Fed. R. Civ. P. 12(e). (Doc. 22.) Daugherty did not preserve the defense of lack of personal jurisdiction in his original response to the complaint. (*Id.*) Thus, by filing a Rule 12(e) motion without asserting the defense to personal jurisdiction, Daugherty waived that defense. *See, e.g., Joseph C. Blanks, P.C. v. Stemme AG*, No. 9:19-cv-244, 2020 WL 13064658, at *2 (E.D. Tex. Dec. 17, 2020) (denying Rule 12(b)(2) motion as waived where defendant previously filed a Rule 12(e) motion); *Clark v. Assocs. Commercial Corp.*, 149 F.R.D. 629, 632 (D. Kan. 1993) (same); *CS Capital Corp. v. Local Sr. Servs.*, No. 11-cv-02357-WYD-MEH, 2012 WL 6152889, at *5 (D. Colo. Aug. 15, 2012) (finding defendant waived right to challenge personal jurisdiction by filing a motion under Rule 12(e) without raising lack of personal jurisdiction as a defense).

B. The Court Has Personal Jurisdiction Over Daugherty

Daugherty does not dispute that Plaintiffs’ programming was captured and retransmitted without authorization on the PrimeStreams service. (Doc. 1, Pls.’ Compl. ¶¶ 1, 7, 13-18; *see* Doc. 31.) Nor does Daugherty challenge Plaintiffs’ allegations that the PrimeStreams service was monetized through the sale of Device Codes that he and co-defendant Scroggins sold to resellers and end users for purposes of providing access to the PrimeStreams service. (Compl. ¶¶ 19-22, *see* Doc. 31.) Therefore, such allegations are accepted as true for purposes of this motion. *Matthews*, 935 F.2d at 1460.

Rather, Daugherty disputes having any ownership interest or control in DSI or the PrimeStreams service, presumably claiming to be a mere reseller of Device Codes. (Doc. 31.) Daugherty’s argument is not only contrary to the evidence, but immaterial because Daugherty’s conduct in transacting for the purchase and sale of Devices Codes with Kentucky residents is sufficient standing alone to exercise personal jurisdiction under Kentucky’s long-arm statute and the United States Constitution.

1. Jurisdiction Is Proper Under The Kentucky Long Arm Statute

Kentucky’s long-arm statute provides for personal jurisdiction over a non-resident defendant who “transacted *any* business in this Commonwealth.” Ky. Rev. Stat. § 454.210(2)(a)(1) (emphasis added). The phrase “any business” has been liberally interpreted such that “even the slightest transaction” is sufficient to satisfy the statute. *Hall v. Rag-O-Rama, LLC*, 359 F.Supp.3d 499, 506-07 (E.D. Ky. 2019) (Bunning, D.) (finding the acts of calling, emailing, and mailing Plaintiff in Kentucky relating to an ongoing business relationship was “plainly sufficient under the

Sixth Circuit’s ‘slightest transaction’ test.”¹); *Eat More Wings, LLC v. Home Mkt. Foods, Inc.*, 282 F. Supp. 3d 965, 970 (E.D. Ky. 2017) (holding that emails knowing sent to a Kentucky resident asking for samples of products, which was in turn fulfilled, constituted transacting business in Kentucky); *Power Invs., LLC v. Becker*, No. 5:18-466-DCR, 2018 WL 4390722, at *3 (E.D. Ky. Sept. 14, 2018) (finding that defendants transacted business in Kentucky “because they called, texted, and sent e-mails to a Kentucky resident and asked him to wire money, which he did from Kentucky.”); *Stockton Mortg. Corp. v. Bland*, No. 3:22-cv-00036-GFTV, 2022 WL 3437227, at *5 (E.D. Ky. Aug. 16, 2022) (finding that undisputed allegations that defendant employed people licensed to make loans in Kentucky and adverted that he employs licensed loan officers for Kentucky constitutes transacting business in Kentucky); *see also Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 56 (Ky. 2011) (explaining that the Kentucky long-arm statute should be liberally construed in favor of exercising jurisdiction). Daugherty transacted business in Kentucky for several reasons.

First, Daugherty conducted business in Kentucky by engaging in hundreds of transactions with Kentucky residents for the purchase of Device Codes. Account records obtained from one of Daugherty’s payment processors (Zelle) and one of his banks (Chase) show that Daugherty purchased Device Codes from his co-defendants Scroggins and DSI, as well as from an individual named Brian Poynter (“Poyntner”)². (*Id.* ¶¶ 7-9, Exs. 6, 8.) Specifically, Daugherty made over 400 separate payments to Scroggins, DSI, and Poynter, totaling more than \$4.5 million, between 2019-

¹ In *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, the Sixth Circuit was interpreting Michigan’s long-arm statute which has identical “transacting any business” language to Kentucky’s long-arm statute. 768 F.3d 499, 504-05 (6th Cir. 2014).

² Poynter is believed to also be a co-owner of the PrimeStreams service based on, among other things, monthly payments associated with the PrimeStreams service being equally distributed between DSI and Poynter. (Eichhorn Decl. ¶ 7, Ex. 5.)

2022 via checks, wires, and Zelle.³ (*Id.* ¶¶ 8-9, Exs. 6, 8.) Scroggins, DSI, and Poynter are all residents of Kentucky. (*Id.* ¶ 7, Ex. 4; Compl. ¶¶ 4, 6.) It is not required that Daugherty be physically present in Kentucky to have transacted business in the state; rather, Daugherty purchasing Device Codes to the PrimeStreams service from Kentucky residents constitutes “transacting *any* business in the Commonwealth.” *See Citizens Nat. Bank of Paintsville v. MCNB Bank & Trust Co.*, No. 7:12-cv-102-KKC, 2013 WL 3894006, at *7 (E.D. Ky. July 26, 2013) (“Jurisdiction cannot be avoided simply because the defendant was never physically present in the forum state.”); *First Nat. Bank of Louisville v. Shore Tire Co.*, 651 S.W.2d 472, 473 (Ky. 1982) (“We have no difficulty in concluding that the placing of an order by a non-resident with a Kentucky resident constitutes the ‘transaction of any business’ in this state.”); *see also Becker*, 2018 WL 4390722, at *3 (finding non-resident defendants transacted business in the state “because they called, texted, and sent e-mails to a Kentucky resident and asked him to wire money, which he did from Kentucky”).

Second, Daugherty transacted business in Kentucky by selling Device Codes to purchasers in Kentucky. Daugherty sold Device Codes through Facebook and web domains including firesticksteve.com and fssswebhosting.com, thereby reaching a national audience of purchasers. (Eichhorn Decl. ¶¶ 4, 6, Ex. 3.) Indeed, Daugherty sold more than \$6.9 million worth of Device Codes according to the records obtained from just one of his payment processors, Zelle. (*Id.* ¶ 6, Ex. 3.) Plaintiffs are unable to identify the exact location of each purchaser because the Zelle records fail to identify the purchasers’ addresses or phone numbers. (*Id.*) Moreover, Daugherty asserted the Fifth Amendment privilege against self-incrimination when responding to Plaintiffs’

³ Daugherty also wrote checks to Dscroggs Media LLC which is believed to be an informal business created by Scroggins to collect payments relating to the PrimeStreams service. (Eichhorn Decl. ¶ 9.)

discovery requests, which if answered would have likely identified the location of each purchaser. (*Id.* ¶ 10, Ex. 9.) The Court should draw an adverse inference that at least part of Daugherty's abundant number of sales were made to purchasers in Kentucky. *See, e.g., Hoxie v. Drug Enf't Admin.*, 419 F.3d 477, 483 (6th Cir. 2005) (explaining that adverse inferences may be drawn from a litigant's decision to invoke the Fifth Amendment in a civil case); *see also In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 66-68 (D.D.C. 2000) (finding defendant's assertion of Fifth Amendment privilege warranted striking his affidavit submitted in support of motion to dismiss for lack of personal jurisdiction and resolving motion without considering affidavit, to remedy potential distortion arising from assertion of privilege).

Third, Daugherty's claim that he never had any ownership interest or control in the PrimeStreams service or DSI is contrary to the evidence. On January 14, 2022, resellers of the PrimeStreams service were provided with two options when paying for Device Codes: wire transfer to DSI, or by making check payable to DSI and mailing that check to Daugherty. (*Id.* ¶ 11, Ex. 10; Compl. ¶ 21.) Evidence further reveals that Daugherty was depositing checks made payable to DSI directly into DSI's bank account. (Eichhorn Decl. ¶ 12, Ex. 11.) Daugherty provides no explanation why he would be receiving checks made payable to DSI and depositing checks directly into DSI's bank account if he had no ownership interest or other involvement with the operation of this entity or the PrimeStreams services. Furthermore, Daugherty has not been truthful when it comes to identifying the persons having ownership in or control over DSI or PrimeStreams. In response to Plaintiffs' first set of interrogatories asking Daugherty to "identify each person or entity involved in the PrimeStreams service, including in its ownership, creation, operation, management, sales, and acquisition and transmission of television channels," Daugherty stated that Scroggins was the sole owner of the PrimeStreams service. (Eichhorn Decl. ¶ 10, Ex.

9.) Failing to identify Poynter's involvement with the PrimeStreams service despite making over 200 payments to Poynter for Device Codes confirms that Daugherty was not being truthful when responding to this interrogatory. (*Id.* ¶ 8, 10, Ex. 6.) Such evidence further supports a finding that Daugherty transacted business in Kentucky.

Finally, personal jurisdiction is proper under KRS § 454.210(2)(b) because Plaintiffs' claims arise from Daugherty's contacts with Kentucky. *See Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 58 (Ky. 2011) (interpreting 'arising from' to mean that the "cause of action must have originated from, or came into being, as a result of" defendant's conduct satisfying the Kentucky long-arm statute). The central issue of Plaintiffs' FCA claims is the unauthorized retransmission of Plaintiffs' programming to users of the PrimeStreams service through the sale of Device Codes and therefore the claims arise from the very same acts providing this Court with personal jurisdiction over Daugherty under KRS § 454.210(2)(A). (Compl. ¶¶ 1, 12-22, 25, 29.) Daugherty purchased Device Codes from Kentucky residents and resold those Device Codes to users of the PrimeStreams service. (Eichhorn Decl. ¶¶ 6-9.) Daugherty also processed payments from the sale of Device Codes through Kentucky entity, DSI. (*Id.* ¶ 12; Compl. ¶ 7.) Moreover, Plaintiffs' DMCA claims are sufficiently connected to Plaintiffs' FCA claims, because the PrimeStreams service, or at least of component therefore, is primarily designed and produced for the purposes of circumventing Plaintiffs' security measures which in turn allows Defendants to acquire Plaintiffs' programming and retransmit such programming through the sale of Device Codes. (Compl. ¶¶ 38-39.) Plaintiffs' claims therefore arise from Daugherty's wrongful acts in Kentucky. *See Jude v. First Nat. Bank of Williamson*, 259 F. Supp. 2d 586, 597 (E.D. Ky. 2003) (applying pendent jurisdiction where each claim asserted by plaintiffs arose from the same underlying transaction).

C. Jurisdiction Is Proper Under The United States Constitution

“Personal jurisdiction over an out-of-state defendant arises from “certain minimum contacts with [the forum] such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Air Prods. & Controls, Inc. v. Safetech Intern., Inc.*, 503 F.3d 544, 549 (6th Cir. 2007). The minimum contacts requirements for exercising specific personal jurisdiction over Daugherty are satisfied because: (1) Daugherty purposefully availed himself of the privilege of acting in Kentucky or causing a consequence there; (2) Plaintiffs’ claims arise out of Daugherty’s activities in Kentucky; and (3) Daugherty has not shown that exercise of personal jurisdiction would be unreasonable. *See S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968) (setting forth constitutional requirements for establishing specific jurisdiction).

1. Daugherty Purposefully Availed Himself Of The Privilege Of Conducting Business In Kentucky

Daugherty has sufficient minimum contacts to support personal jurisdiction if Daugherty “purposefully availed himself of the privileges acting in the forum state or causing a consequence in the forum state.” *Id.* Daugherty need not be physically present in the forum to find purposeful availment, rather “where a defendant has created continuing obligations between himself and the residents of the forum, he manifestly has availed himself of the privilege of conducting business there.” *Air Prods.*, 503 F.3d at 551.

Daugherty purposefully availed himself of the Kentucky forum through his ongoing business relationship with Kentucky residents. As established above, over the span of three years, Daugherty engaged in more than 400 separate transactions with Scroggins, DSI, and Poynter for the purchase of Device Codes, knowingly sending more than \$4.5 million to them in Kentucky. (Eichhorn Decl. ¶¶ 7-9, Exs. 6, 8.) Indeed, Daugherty issued more than 80 checks to Scroggins and DSI, made at least 11 wire transfers to DSI at its bank in Kentucky, and processed additional

payments for this Kentucky entity that are not included in the \$4.5 million calculation. (*Id.* ¶¶ 9, 12, Exs. 8, 11.) Daugherty’s contacts with Kentucky were not random or fortuitous; rather, Daugherty reached into Kentucky on a systematic and persistent basis. Moreover, had Daugherty responded to Plaintiffs’ discovery requests rather than asserting the Fifth Amendment, evidence would likely show that Daugherty sold Device Codes to residents in Kentucky, had a consistent stream of communication with Scroggins and Poynter, and even traveled to Kentucky for business. (*Id.* ¶ 10.)

Therefore, Daugherty purposefully availed himself of the forum state. *See Air Prods.*, 503 F.3d at 551 (finding defendant who purchased goods from Ohio entity for multiple years purposefully availed itself of the privilege of the Ohio forum); *First Nat. Bank of Louisville v. Shore Tire Co., Inc.*, 651 S.W.2d 472, 474 (Ky. 1982) (finding an ongoing business relationship sufficient to satisfy the minimum contacts test where defendants made several purchases over than span of a year from in-state seller totaling approximately \$454,983); *Small Stuff Inc. v. Ayers*, No. 0:06-cv-92-HRW, 2006 WL 8446058, at *3 (E.D. Ky. Nov. 30, 2006) (finding an ongoing business relationship sufficient to satisfy minimum contacts where defendant contacted plaintiff’s Kentucky office multiple times, paid invoices to Kentucky, and had good delivered through Kentucky).

2. Plaintiffs’ Claims Arise Out Of Daugherty’s Activities In Kentucky

The ‘arising out of’ requirement is satisfied where “a defendant’s contacts with the forum state are related to the operative facts of the controversy.” *CompuServe v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996). This standard is a lenient one and the cause of action need not “formally” arise from the defendant’s contacts. *Crouch v. Honeywell Inter., Inc.*, 682 F. Supp. 2d 788, 794 (W.D. Ky. 2010). As explained above, Daugherty’s acts of purchasing Device Codes from Kentucky residents, reselling those Device Codes to users of the PrimeStreams service, and

processing payments from the sale of those Device Codes through Kentucky entity, DSI, are sufficiently related to Plaintiffs' claims for jurisdictional purposes. (Eichhorn Decl. ¶¶ 6-9, 12.)

3. Exercising Jurisdiction Over Daugherty Is Reasonable

The last prong to satisfy specific personal jurisdiction requires that “the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make exercise of jurisdiction over the defendant reasonable.” *Mohasco*, 401 F.2d at 554. Because the first two prongs of specific jurisdiction are satisfied, it can be inferred that the exercise of jurisdiction over the non-resident defendant would be reasonable. *See Aristech Chem. Int'l v. Acrylic Fabricators*, 138 F.3d 624, 628 (6th Cir.1998) (“This circuit has already observed that where the first two criteria are satisfied, only the unusual case will not meet this third criterion.”). Daugherty bears the burden of establishing a “compelling case” that exercising jurisdiction over him would be unreasonable. *Air Prods.*, 503 F.3d at 554 (“[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”) (quotations omitted). Factors to consider when determining whether jurisdiction is unreasonable are: “(1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff’s interest in obtaining relief; and (4) other states’ interest in securing the most efficient resolution of the policy.” *Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir. 2005).

First, Daugherty does not even argue – much less prove – that defending this case in Kentucky would be burdensome. (Doc. 31.) The fact that Daugherty may have to travel to Kentucky, which borders his home state of Illinois, is insufficient to show that exercising jurisdiction over Daugherty is unreasonable. *See, e.g., Aristech*, 138 F.3d at 628 (permitting personal jurisdiction in Kentucky over Canadian resident). Indeed, Daugherty received millions of

dollars from his operation of the PrimeStreams service and therefore Daugherty can certainly afford the cost of traveling from Illinois to Kentucky to defend this action. (Eichhorn Decl. ¶ 6.)

Second, Kentucky has an interest in adjudicating matters involving unlawful business activities taking place within its borders. *See Smith v. Swaffer*, 566 F.Supp.3d 791, 807 (N.D. Ohio 2021) (holding that Ohio had an interest in adjudicating allegations of fraud arising from investments solicited within the state). While Illinois also has an interest in adjudicating this suit because Daugherty is a citizen of the state, “this interest does not override the other factors suggesting that personal jurisdiction in [Kentucky] is reasonable.” *Bird v. Parsons*, 289 F.3d 865, 876 (6th Cir. 2002).

Finally, Plaintiffs have a substantial interest in obtaining relief, which will best be accomplished by having a consolidated action with Daugherty and his co-defendants, both of which are located in Kentucky. (Compl. ¶¶ 4, 6.) Moreover, Plaintiffs’ have an interest in their choice of forum. *Hall v. Rag-O-Rama, LLC*, 359 F.Supp.3d 499, 513 (E.D. Ky. 2019).

Daugherty does not present a “compelling case” that exercising jurisdiction over him would be unreasonable. The Court should therefore find that Daugherty has substantial enough connections with Kentucky to make personal jurisdiction reasonable.

III. CONCLUSION

Daugherty waived his right to challenge this Court’s personal jurisdiction by filing a Rule 12(e) motion for more definite statement without preserving the defense of lack of personal jurisdiction. Moreover, Daugherty’s contacts with Kentucky that give rise to Plaintiffs’ claims satisfy the Kentucky long-arm statute and demonstrate that Daugherty purposefully availed himself of the Kentucky forum. Requiring Daugherty to defend this action is not unreasonable. Accordingly, Daugherty’s motion to dismiss for lack of personal jurisdiction should be denied.

Dated: December 9, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served through the Court's ECF system on December 9, 2022, which will send notification to all counsel of record.

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