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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF INDIANA  
 INDIANAPOLIS DIVISION

HEALTHSMART FOODS, INC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:23-cv-00060-MPB-CSW
	)	
SWEET NOTHINGS, INC. et al,	)	
	)	
Defendant.	)	

**ORDER ON DEFENDANTS' MOTION TO DISMISS AND MOTION TO TRANSFER**

Plaintiff HealthSmart Foods, Inc., sued Sweet Nothings, Inc., and Beth Porter, (collectively "Defendants") alleging federal trademark infringement, unfair competition, and trademark dilution claims as well as common law claims and state law claims for unfair and deceptive trade practices, trademark infringement and unfair competition, trademark dilution and injury to business reputation. Now pending before the Court is Defendants' Motion to Dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) and failure to state a claim under Rule 12(b)(6). (Docket No. 12). Defendants also move the Court to transfer the case to the Northern District of California. (Docket No. 13). For the reasons detailed below, Defendants' Motion to Dismiss (Docket No. 12) for lack of personal jurisdiction is **DENIED**, Defendants' Motion to Dismiss for failure to state a claim is **GRANTED** in part and **DENIED** in part, and Defendants' Motion to Transfer (Docket No. 13) is **DENIED**.

**I. Background**

Plaintiff HealthSmart is an Indiana corporation that sells health food snacks, including but not limited to snack bars, snack bites, and candies. (Docket No. 51, Am. Compl., at ECF p. 1). Defendant Beth Porter is a California resident who is the co-founder of Defendant Sweet Nothings.

(*Id.* at ECF p. 23). Sweet Nothings is a Delaware corporation with its principal place of business in California. (*Id.* at ECF p. 6). Sweet Nothings sells health food snacks, including one of its most popular products—Nut Butter Bites—which is the subject of this lawsuit. (*Id.* at ECF p. 4).

HealthSmart has sold its health food snacks for the past six years under the distinctive trademark of the Sweet Nothings brand ("the Mark"), which is registered with the U.S. Patent and Trademark Office ("USPTO"). (*Id.* at ECF pp. 28–29). HealthSmart has consistently used the Mark to advertise its products nationally through its website, on Amazon, and in-store displays. (*Id.* at ECF pp. 1–2). Over a year after HealthSmart obtained registration of the Mark, Ms. Porter obtained federal registration of the same mark with the USPTO. (*Id.* at ECF p. 4). The USPTO twice rejected Ms. Porter's application due to likelihood of confusion with HealthSmarts' Mark. (*Id.*). In response, Ms. Porter eliminated similar uses from the application and submitted statements indicating that Sweet Nothings' goods would be exclusively frozen, contain fruit as a primary ingredient, and be filled with superfood items such as chia seeds, flax seeds, and dates. (*Id.*).

As early as November 11, 2022, HealthSmart ordered Defendants to cease and desist from any further use of the Mark. (*Id.* at ECF p. 22). Notwithstanding this demand, Defendants proceeded with manufacturing, producing, distributing, marketing, and selling its allegedly infringing goods. (*Id.*).

After a break down in settlement communications, HealthSmart filed the present action on April 13, 2023. (Docket No. 1, Compl.). According to HealthSmart, Sweet Nothings has not followed through with the statements it made to the USPTO—its Nut Butter Bites are not frozen, do not contain fruit as a primary ingredient, and are not filled with superfood items. (Am. Compl. at ECF p. 4). HealthSmart alleges that Defendants willfully used the Mark in association with confections and candy which are substantially similar to HealthSmarts' products. (*Id.*). Defendants'

conduct has resulted in confusion for the marketplace as Defendants have traded their allegedly infringing goods under the Mark in the same trade channels as HealthSmart, notwithstanding their statements to the USPTO stating they would not. (*Id.* at ECF p. 5). As a result, Defendants have reportedly benefited from the goodwill and commercial magnetism of HealthSmarts' Mark. (*Id.*). HealthSmart alleges that Defendants' conduct is unlawful as it is likely to cause consumer confusion, deceive the public regarding the source of the goods, and cause irreparable harm to HealthSmarts' brand. (*Id.*).

On April 6, 2023, Ms. Porter filed a lawsuit ("the California case") against HealthSmart in San Mateo Superior Court, California. (Docket No. 12-3, California Compl.). The complaint consists of California claims for fraud and unfair competition. (*Id.* at ECF pp. 7–10). According to Defendants, many of the defenses that Defendants will raise in the infringement case overlap with Ms. Porter's claims in the California case. (Docket No. 13, Defs.' Br., at ECF p. 2). Defendants also point to overlap in evidence and witnesses between lawsuits as support for transfer. (*Id.* at ECF p. 3).

## **II. Legal Standard**

### **a. Motion to Dismiss**

Federal Rule of Civil Procedure 12(b)(2) calls for dismissal of a claim where personal jurisdiction is lacking. When deciding a Rule 12(b)(2) motion, the court accepts all factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff if they weigh on personal jurisdiction. *Int'l Medical Grp., Inc. v. Am. Arbitration Ass'n*, 149 F. Supp. 2d 615, 623 (S.D. Ind. 2001). While the complaint need not include factual allegations concerning personal jurisdiction, if the defendant moves to dismiss under Rule 12(b)(2), the plaintiff "bears the burden of demonstrating the existence of jurisdiction." *Purdue Research Found. v. Sanofi-*

*Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003).

Federal Rule of Civil Procedure Rule 12(b)(6) allows a defendant to move to dismiss a complaint that has failed to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990) (quoting *Triad Assocs., Inc. v. Chicago Hous. Authority*, 892 F.2d 583, 586 (7th Cir.1989)).

A plaintiff's complaint must contain "a short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this standard, a plaintiff need not include "detailed factual allegations," rather, a plaintiff must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 570 (2007). A claim is facially plausible if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). When considering a motion to dismiss for failure to state a claim, courts "take all of the factual allegations in the complaint as true," *Id.* at 678, and draw all reasonable inferences in the plaintiff's favor. *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

#### **b. Motion to Transfer**

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer a civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Transfer of venue is appropriate under Section 1404(a) when the moving party establishes that "(1) venue is proper in the transferor district; (2) venue and jurisdiction are proper in the transferee district; and (3) the transfer will serve the convenience of the parties, the convenience of the witnesses, and the interest of justice." *RCA Trademark Mgmt. S.A.S. v. VOXX Int'l Corp.*, No. 1:14-CV-88, 2014 WL 3818289, at \*2 (S.D. Ind. Aug. 4, 2014) (quoting *State*

*Farm Mut. Auto. Ins. Co. v. Bussell*, 939 F. Supp. 646, 651 (S.D. Ind. 1996)). The weight accorded each factor is committed to the sound discretion of the court. *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986).

### **III. Discussion**

#### **a. Personal Jurisdiction**

In cases involving both federal claims under the Lanham Act and state law claims, courts "look to the law of the forum for the governing rule" on personal jurisdiction "because the Lanham Act does not have a special federal rule for personal jurisdiction." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 800 (7th Cir. 2014), as corrected (May 12, 2014) (citations omitted). Under Indiana's long-arm statute, Indiana state courts may exercise personal jurisdiction on several prescribed bases, as well as "on any basis not inconsistent with the Constitutions of this state or the United States." Ind. R. Trial P. 4.4(A); see also *Advanced Tactical*, 751 F.3d at 800 (quoting *LinkAmerica Corp. v. Cox*, 857 N.E.2d 961, 967 (Ind. 2006) ("The Supreme Court of Indiana has held that Indiana's long-arm provision 'reduce[s] analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause.'")). For a court to exercise jurisdiction consistent with the Constitution, a non-resident defendant "generally must have certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Walden v. Fiore*, 571 U.S. 277, 283 (2014).

Personal jurisdiction can be either specific or general. A defendant is subject to general jurisdiction "when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Alternatively, a defendant is subject to specific jurisdiction when the

"controversy is related to or 'arises out of' a defendant's contacts with the forum . . . ."

*Helicopteros*, 466 U.S. 408, 414 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

Here, the question is whether Defendants' suit-related contacts render them subject to personal jurisdiction in Indiana.

**i. Sweet Nothings**

Defendants concede that Sweet Nothings has minimum contacts with Indiana. The parties disagree on: (1) whether Sweet Nothings' contacts with Indiana are weak and minimal, (2) whether third-party retailer contacts may be considered in the Court's personal jurisdiction analysis and, (3) whether the Court's exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice.

Sweet Nothings' contacts with Indiana are not "weak." The Seventh Circuit opinion *Illinois v. Hemi Grp. LLC*, is instructive on this point. 622 F.3d 754, 755 (7th Cir. 2010). In *Hemi*, the court affirmed the district court's exercise of personal jurisdiction over an out-of-state cigarette retailer. *Id.* at 760. The only connection between Hemi, the retailer, and Illinois, was the sale of 300 cigarette packets to a single agent. *Id.* at 755. In holding that such contacts satisfied due process, the court emphasized that through its website, Hemi "expressly elected to do business with the residents of forty-nine states," including Illinois, and thus "stood ready and willing to do business with Illinois residents." *Id.* at 758.

Here, Sweet Nothings' website requires purchasers to select a shipping address and includes Indiana among the "ship to" options. See *Id.* (concluding that a website offering a "ship to" option is significant because it indicates that an entity is "expressly elect[ing] to do business with the residents" of the state). By having this option available on its website, Sweet Nothing has purposely directed its conduct toward the Indiana market and has knowingly conducted

business with 125 Indiana resident-customers. Additionally, Sweet Nothings has also made its goods available through Amazon and reports that an additional 75 Indiana resident-consumers have purchased Nut Butter Bites on the platform.

Sweet Nothings' argument that it has "a very small number of sales to Indiana consumers" is unconvincing. The Supreme Court has warned courts to avoid "talismanic jurisdictional formulas" when assessing personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985). "The question is not whether the plaintiff purchased enough goods to subject the defendant to personal jurisdiction. The focus is whether [Sweet Nothings] purposefully directed its conduct at [Indiana]." *NBA Properties, Inc. v. HANWJH*, 46 F.4th 614, 625 (7th Cir. 2022). The Court finds that it has.

Next, Sweet Nothings argues that HealthSmart cannot rely on the unilateral activity of third-party retailers to support this Court's exercise of personal jurisdiction because, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Walden*, 571 U.S. at 291. In response, HealthSmart argues that sales of Nut Butter Bites from third-party retailers in Indiana is not the "unilateral activity of another party or a third person," but rather, is a concerted effort by Sweet Nothings to "enjoy the privilege of selling its products to Indiana consumers." (Docket No. 15, Pl.'s Br., at ECF pp. 9–10).

Sweet Nothings' reliance on *Walden* is misplaced. Sweet Nothings' connection to Indiana is not mere happenstance, nor is it the "result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *NBA Properties*, 46 F.4th 624 (quoting *Burger King Corp.*, 471 U.S. at 475). Thus, "[c]haracterizing the sales as unilateral is misleading . . . because it ignores several of [Sweet Nothings'] own actions that led up to and followed the sales." *Hemi*, 622 F.3d at 758.

Not only are Sweet Nothings' actions critical to their product endings up in Indiana retail stores, but Sweet Nothings has knowledge of the specific Indiana retail stores carrying its products. HealthSmart has submitted a screenshot of Sweet Nothings' website as an exhibit. The screenshot reveals that Sweet Nothings has identified the Indiana retailers selling their products and made it available to online consumers through an "Online Store Locator." (Docket No. 15-1). Defendants contend it is not meaningful whether Sweet Nothings is aware that its distributors will sell their products to Indiana residents. The Court disagrees. The Online Store Locator allows Indiana residents to locate retail establishments in their area that sell Sweet Nothings' products, including Nut Butter Bites. Simply put, not only does Sweet Nothings have knowledge that its products are sold to retail stores in Indiana, but it also uses that information to facilitate sales, and thus purposefully directs its activities toward Indiana.

Sweet Nothings also argues that HealthSmart has not satisfied its burden because it offers only one unauthenticated exhibit to support this Court's exercise of personal jurisdiction. While it is true that HealthSmart "bears the burden of demonstrating the existence of jurisdiction," the Court accepts as true the allegations in HealthSmarts' Complaint in determining whether it has established a prima facie case. *See Curry v. Revolution Lab'ys, LLC*, 949 F.3d 385, 392-93 (7th Cir. 2020). Sweet Nothings states that the HealthSmart exhibit submitted is not authenticated, but does not otherwise question the exhibit's authenticity. *Mauger v. Metro. Life Ins. Co.*, No. 3:21-CV-190, 2021 WL 2826792, at \*3 (N.D. Ind. July 7, 2021). "At this juncture, the difference is important. A court may consider a document that is unauthenticated but cannot consider a document charged as inauthentic." *Id.* Additionally, the unauthenticated exhibit is not used as a "stretch to create contacts" that support personal jurisdiction. *See Philpot v. Celebrity Cafe.Com, LLC*, No. 1:14-CV-01982, 2015 WL 5032144, at \*5 (S.D. Ind. Aug. 25, 2015). Rather, the



exhibit demonstrates Sweet Nothings' efforts to facilitate sales with Indiana resident-customers.

Defendants also argue that the exhibit is irrelevant because HealthSmart did not filter results on the Online Store Indicator to show only those retail stores where Nut Butter Bites were sold. This argument is trivial, as the exhibit clearly demonstrates that the Online Store Locator allows customers to search Indiana retailers that carry Nut Butter Bites. Further, the screenshot identifies retailers throughout Indiana actively carrying Sweet Nothings' products, confirming that Sweet Nothings has targeted Indiana's market.

Defendants argue that Indiana lacks a strong interest in adjudicating the dispute. Again, the Court disagrees. Indiana has a legitimate interest in providing a forum to its corporate citizen that alleges its trademark has been infringed. *See Wine & Canvas Dev., LLC v. Weisser*, 886 F. Supp. 2d 930, 942 (S.D. Ind. 2012) (holding that Indiana has an interest in adjudicating disputes involving its corporate citizen). Defendants also insist that adjudicating this dispute in Indiana would waste judicial resources. As HealthSmart points out, a multiplicity of lawsuits will occur whether or not this Court exercises personal jurisdiction over Sweet Nothings because HealthSmart has expressed that it will not remove the California case to federal court. Defendants remind the Court that California state courts have concurrent jurisdiction with federal courts over cases arising under the Lanham Act. While this is an accurate statement of law, HealthSmart has a legitimate interest in having a federal court adjudicate its federal claims.

This Court's exercise of personal jurisdiction over Sweet Nothings comports with traditional notions of fair play and substantial justice. Defendants' Motion to Dismiss for lack of personal jurisdiction is **DENIED** as to Sweet Nothings.

## **ii. Beth Porter**

Defendants contend that there is no basis for this Court to find specific personal

jurisdiction as to Ms. Porter. In response, HealthSmart argues that because Ms. Porter has personally participated in the creation of Sweet Nothings' website, marketing, and branding, she should be subject to personal jurisdiction in Indiana.

Ordinarily, "this court will accept as true any facts in the defendants' affidavits that do not conflict with anything in the record, either by way of [plaintiff's] complaint or other submissions." *Curry*, 949 F.3d at 393. Here, Ms. Porter's declaration statements conflict with HealthSmarts' Complaint. Per HealthSmart, Ms. Porter registered Sweet Nothings' trademark and directed the creation of Sweet Nothings' website. The declaration, however, outright denies Ms. Porter's participation in the creation of the website or management of Sweet Nothings' content. The Seventh Circuit has instructed that where there is factual conflict between the record and defendants' affidavit or declaration, the court should resolve the conflict in plaintiff's favor. *Id.* Accepting HealthSmarts' allegations as true, it is difficult to discern how these limited contacts demonstrate that Ms. Porter purposefully availed herself to the privilege of conducting activities specifically in Indiana. Because Ms. Porter does not have minimum contacts with Indiana, the Court turns to HealthSmart's argument that Ms. Porter is jointly liable with Sweet Nothings based on her personal involvement in the alleged infringement.

As both parties point out, "in the absence of some special showing, the managing officers of a corporation are not liable for the infringements of such corporation, though committed under their general direction." *Dangler v. Imperial Mach. Co.*, 11 F.2d 945, 947 (7th Cir. 1926)). In the trademark context, personal liability is imposed when an officer "personally participates in the manufacture or sale of the infringing article . . . uses the corporation as an instrument to carry out his own willful and deliberate infringements, or . . . knowingly uses an irresponsible corporation with the purpose of avoiding personal liability." *4SEMO.com Inc. v. S. Illinois Storm Shelters*,

*Inc.*, 939 F.3d 905, 912–13 (7th Cir. 2019) (quoting *Dangler v. Imperial Mach. Co.*, 11 F.2d 945, 947 (7th Cir. 1926)).

The Seventh Circuit has affirmed that individual liability should be imposed where there is evidence of "deliberate conduct on the part of the officers to use the corporation merely to carry on the infringing and unfair practices." *General Motors Corp. v. Provus*, 100 F.2d 562, 564 (7th Cir. 1938). That Ms. Porter allegedly created Sweet Nothings' website and registered the mark in her name does not necessarily establish an intent to use Sweet Nothings as a "mere shell" for perpetuating wrongdoing. It is possible that Ms. Porter's conduct is typical of an executive officer. *See Dangler*, 11 F.2d at 947 (holding that an officer's "personal participation" in the infringement must be through "acts other than as an officer"). Alternatively, it is also possible that this is a situation, as HealthSmart contends, where an executive officer directed and controlled a brand "centered on [an] allegedly infringing identity" with the "intent to trade on its value." *Texas Roadhouse, Inc. v. Texas Corral Restaurants, Inc.*, No. 2:16-CV-28, 2017 WL 1197262, at \*4 (N.D. Ind. Mar. 31, 2017) (finding individual liability plausible where an officer was the domain name registrant for the entity's website and created content for the website).

At this stage, HealthSmart must only "establish a colorable or prima facie showing of personal jurisdiction before discovery [is] permitted." *Cent. States, Se. & Sw. Areas Pension Fund*, 230 F.3d at 946. The Court finds that it has. This determination is only preliminary. Ms. Porter "is entitled to have the issue of personal jurisdiction decided based upon an evidentiary hearing, not simply inferences drawn from documents." *Mitchel Grp., Inc. v. Zaiser*, No. 1:08-CV-629, 2009 WL 348774, at \*4 (S.D. Ind. Feb. 3, 2009). If Ms. Porter wishes to request evidentiary hearing, she shall so move by **December 27, 2023**. The Court requests that Magistrate Judge Wildeman conduct a pretrial conference to establish an appropriate schedule

for limited jurisdictional discovery.

**b. Claim Sufficiency**

**i. Failure to State a Claim Against Beth Porter**

Defendants contend that HealthSmart fails to state a claim against Ms. Porter because the Complaint is premised on conclusory allegations. According to Defendants, because HealthSmart did not explicitly allege that Ms. Porter participated in the manufacture or sale of the infringing goods, used the entity for her own deliberate infringements, or used the entity for the purpose of avoiding personal liability—HealthSmart's claims against Ms. Porter cannot survive its Motion to Dismiss. This argument is unpersuasive. The Complaint sets forth the following allegations—that Ms. Porter registered Sweet Nothings' mark, created its website, and directed its branding and content. These allegations could support a finding of personal liability. *See Texas Roadhouse, Inc.*, 2017 WL 1197262 at \*4 (holding that individual liability was plausible where the officer registered the domain name for the entity, created the website, and was responsible for generating content). HealthSmart's allegations are thus sufficient to withstand Defendants' Motion to Dismiss.

**ii. Count III**

According to Defendants, HealthSmarts' federal trademark dilution claim fails as a matter of law because the Mark is not famous. HealthSmart argues that it has sufficiently alleged facts supporting a finding of fame.

As an initial matter, Defendants are correct that HealthSmarts' federal dilution claim cannot proceed on the theory that it has achieved fame in a niche market. *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 509 F.3d 380, 384 (7th Cir. 2007) (holding that an amendment to Section 1125 "eliminated any possibility of 'niche fame,' which some courts had recognized before the amendment"). To succeed on its federal dilution claim, HealthSmart must prove: (1) the mark is

famous; (2) Defendants adopted the mark after the mark became famous; (3) Defendants diluted the mark; and (4) Defendants' use of the mark is commercial and in commerce. *See AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 811 (7th Cir. 2002). A mark is considered "famous" when it is "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A). Both parties correctly highlight the factors relevant to determining a mark's fame, namely: (1) the duration, extent, and geographic reach of any advertising and publicity of the mark; (2) the amount, volume, and geographic extent of sales of goods or services offered under the mark; and (3) the extent of the mark's actual recognition. 15 U.S.C. § 1125(c)(2)(A).

With respect to duration and geographical reach, HealthSmart contends that its mark has been exclusively and continuously promoted throughout the United States for six years. (Am. Compl. at ECF p. 28). Based on its national promotion, the Mark has become a "well-known symbol of HealthSmart and HealthSmarts' products before Defendants began using the Mark or offered the Infringing Goods for sale." (*Id.* at ECF pp. 28–29). HealthSmart also claims its annual sales and revenue from the Mark totaled approximately \$169,000 in 2022. Last, the "Mark has come to be recognized widely and favorably by the public and others as a product originating from HealthSmart. For example, a collection of 156 reviews on Google Shopping of HealthSmarts' variety pack of Sweet Nothings® chocolate candies garnered an average rating of 4.9 out of 5 stars." (*Id.* at ECF p. 10). The Mark now enjoys public and food/diet industry acceptance and association with HealthSmarts' brand. (*Id.* at ECF p. 11). These allegations are sufficient to state a claim. *Manley v. Boat/U.S., Inc.*, 75 F. Supp. 3d 848, 858 (N.D. Ill. 2014) (dilution claim survived where plaintiff alleged public recognition of its marks, longstanding presence in the industry, that it had over half a million members, that it benefited from a loyal customer base, that members and

non-members alike were accustomed to seeing its marks, and that it garnered media coverage).

At this juncture, HealthSmart has at least plausibly alleged its mark is famous. *See Annie Oakley Enterprises Inc. v. Rise-N-Shine LLC*, No. 120-CV-00638, 2021 WL 11963067, at \*2 (S.D. Ind. Mar. 23, 2021). The fact HealthSmart does not explicitly include the word "famous" in its Complaint does not warrant dismissal. "District judges must heed the message of Rule 8: the pleading stage is not the occasion for technicalities." *Luckett v. Rent-A-Ctr., Inc.*, 53 F.3d 871, 873 (7th Cir. 1995). The pertinent inquiry is not whether HealthSmart incorporated certain magic words into its Complaint, but whether HealthSmart sufficiently placed Defendants on notice as to the nature of the Complaint, specifically Count III. The Court finds that it did. Defendants' Motion to Dismiss Count III is **DENIED**.

### iii. Count IV

Defendants argue that HealthSmarts' state law claim for unfair and deceptive business practices is an improper shotgun pleading that fails to allege standing. In response, HealthSmart states that its state law claims have been sufficiently pled and that standing is satisfied by HealthSmarts' personal stake in the lawsuit and alleged injury.

A "shotgun pleading" is one in which a plaintiff takes advantage of Rule 10(b) by excessively incorporating their prior allegations into each successive count. *Martin v. Gorajec*, No. 1:12-CV-00460, 2013 WL 319783, at \*12 (S.D. Ind. Jan. 28, 2013). This tactic "can result in an unnecessarily long and confusing pleading and counts that contain irrelevant facts or defenses. It may prevent the opposing party from reasonably being able to prepare a response or simply make the burden of doing so more difficult." *Id.* Count IV, as drafted, clearly takes a shotgun pleading approach. HealthSmarts' Complaint consists of 120 paragraphs. Count VI incorporates by reference prior allegations, which includes 107 paragraphs. (*Id.*) (finding a complaint to be a

classic example of shotgun pleading where the plaintiff incorporated 115 previous paragraphs in its claim). Plaintiff's reliance on incorporating prior allegations, in addition to the thirteen state laws containing varying elements, make it challenging for Defendants to prepare a response specific to Count IV.

Defendants also argue that HealthSmart fails to allege standing. To the extent that Defendants argue that that Article III standing is lacking, the Court disagrees. HealthSmart claims they suffered injury when Defendants "passed off" their goods as those of HealthSmart and caused likelihood of confusion as to the source of HealthSmarts' goods. The court can redress HealthSmarts' alleged injuries by ordering the relief it requests—namely an injunction and money damages. *Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011). Thus, "[n]othing more is required for standing." *Id.*

To the extent that Defendants argue that HealthSmart lacks statutory standing, the Court agrees.<sup>1</sup> In contrast with Article III standing, statutory standing does not "implicate subject-matter jurisdiction." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.4 (2014). Accordingly, even though HealthSmart has satisfied Article III standing, this Court can refuse to hear this case if HealthSmart does not establish that its aggrievement, or the adverse effect upon it, "falls within the 'zone of interest' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 618 (7th Cir. 2015) (quoting *Air Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523–24 (1991)).

To satisfy statutory standing, HealthSmarts' Complaint must allege facts connecting the fourteen states listed under Count IV to the controversy. It does not. Rather, HealthSmart broadly

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<sup>1</sup> Defendants' brief cites a Georgia case in which the Court of Appeals affirmed dismissal based on plaintiff's failure to allege statutory standing. (Defs.' Br. at ECF p. 32).

alleges that "Defendants have been and are passing off their goods as those of HealthSmart, causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval of Defendants' services, causing a likelihood of confusion as to Defendants' affiliation, connection, or association with HealthSmart, and otherwise damaging the public." (Docket No. 51 at ECF pp. 29–30). With the exception of Indiana, HealthSmart's Complaint fails to allege that it suffered any harm in the remaining thirteen states so as to implicate those States' statutes and demonstrate that it is a member of the class intended to be protected by those statutes. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).

Although the Court must draw reasonable inferences in favor of HealthSmart, it will not make assumptions about where the Defendants have "passed off" their allegedly infringing goods in the absence of such allegations. Insight from a Fourth Circuit case brings this point full circle—HealthSmart does "not allege facts to show that they satisfied the statutory requirements of States other than [Indiana] . . . [c]onsequently . . . [Healthsmart] may not seek relief for their own injuries under those States' statutes." *Mayor of Baltimore v. Actelion Pharms. Ltd.*, 995 F.3d 123, 134 (4th Cir. 2021).

The Federal Rules instruct the Court to freely grant leave to amend when justice so requires. Fed. R. Civ. P. 15(a). The Court finds leave appropriate where, as here, there is no indication of "undue delay, bad faith or dilatory motive on the part of the movant," *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), and where an amendment could sufficiently remedy the defect. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana*, 786 F.3d 510, 519-20 (7th Cir. 2015). Defendants' Motion to Dismiss Count VI is **GRANTED** and HealthSmart has until **December 27, 2023**, to amend its Complaint as to all state law claims raised under Count IV except for Indiana Code § 24-5-0.5-1.



**iv. Count VI**

For the reasons enumerated in the preceding subsection, Count VI cannot survive except as to Indiana Code § 24-2-13.5. Statutory standing is not satisfied where, as here, HealthSmart vaguely claims that Defendants' conduct dilutes and is likely to dilute the distinctiveness of HealthSmarts' Mark in thirty-eight separate states without including factual allegations connecting HealthSmarts' injuries to each of those states. Defendants' Motion to Dismiss Count VI is **GRANTED** and HealthSmart has until **December 27, 2023**, to amend its Complaint as to all state law claims raised under Count VI except for Indiana Code § 24-2-13.5.

**c. Transfer**

Section 1404(a) was enacted to prevent "the waste of time, energy and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). The statute gives the court discretion to "adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622). The relative weight of the convenience and fairness factors is not specified in Section 1404(a). Rather, "[t]he weighing of factors for and against transfer necessarily involves a large degree of subtlety and latitude, and, therefore, is committed to the sound discretion of the trial judge." *Coffey*, 796 F.2d at 219. Because Defendants moved to transfer the case, they bear the burden of establishing that the transferee forum is clearly more convenient than the transferor forum. *Id.* at 219–20. Importantly, transfer will not be justified if the result merely shifts the inconvenience from Defendants to HealthSmart. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

### **i. Plaintiff's Choice of Forum**

Defendants and HealthSmart contest whether this Court should give deference to HealthSmarts' choice of forum. Courts generally accord a plaintiff's choice of forum deference. *Chicago, R. I. & P. R. Co. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955). However, there are situations in which a plaintiff's choice of forum is diminished, including when the forum is not plaintiff's home forum. *U.S.O. Corp. v. Mizuho Holding Co.*, 547 F.3d 749, 752 (7th Cir. 2008). When a plaintiff does select their home forum, it is "reasonable to assume that the choice is convenient." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 236 (1981). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *In re National Presto Industries, Inc.*, 347 F.3d 662, 664 (7th Cir. 2003) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Here, HealthSmart is an Indiana corporation that has opted to litigate in its home state. HealthSmarts' choice of forum is thus accorded deference.

Defendants also argue that this is a case where the plaintiff's choice of forum is of reduced value because it lacks significant contacts with the underlying cause of action. *See Ellis Corp. v. Team Textile Corp.*, 574 F. Supp. 170, 173 (N.D. Ill. 1983). The Court disagrees. In *Ellis Corp.*, this Court found that plaintiff's choice of forum offered less value because the alleged injury occurred predominately in Texas. *Id.* In contrast, here, HealthSmart alleges it suffered injury in Indiana based on Defendants' sale of infringing products in the state and deception of Indiana consumers. Defendants' brief consistently emphasizes that little evidence regarding consumer confusion will come from Indiana given that sales of Nut Butter Bites total less than \$7,000 in sales. While the Court acknowledges that Indiana sales make up a small portion of Sweet Nothings overall Nut Butter Bite sales, the facts alleged in HealthSmarts' Complaint largely took place and created injuries in Indiana—thus establishing legitimate contacts with the underlying

cause of action. *Contra CMG Worldwide, Inc. v. Upper Deck Co.*, No. 1:08-CV-761, 2008 WL 4690983, at \*3 (S.D. Ind. Oct. 22, 2008).

**ii. Convenience of the Parties**

Defendants inform the Court that Ms. Porter lives in California and would be greatly inconvenienced if required to travel to Indiana. Defendants also point out that of Sweet Nothings' thirteen employees, more are based in California than any other state. Defendants contrast this burden with the burden to HealthSmart, who, they argue, is already required to travel to California to defend against Ms. Porter's suit. While it is true that HealthSmart must defend itself in the California case, HealthSmart argues that giving this fact consideration would allow Defendants to take advantage of Ms. Porter's tactical "first filing" to justify transfer. Further, HealthSmart highlights that all its officers and employees reside in Indiana, and its connections to Indiana will be relevant to a counterclaim or affirmative defense related to cancellation of the Mark.

When assessing the convenience of the parties, courts are directed to consider the parties' residences as well as their capacity to bear the cost of litigating in the designated forum. *S.C. Johnson & Son, Inc. v. Buzz Off Insect Shield, LLC*, No. 05-C-1046, 2005 WL 1838512, at \*4 (N.D. Ill. July 28, 2005). Transfer is not appropriate in cases when the practical effect would be to merely shift the burden from the defendant to the plaintiff. *Beller v. MacDermid, Inc.*, 2002 WL 31045377, at \*6 (S.D. Ind. Sept. 9, 2002); see also *Heller*, 883 F.2d at 1294.

This case involves HealthSmart, an Indiana corporation that has opted to litigate in its home state where its principal place of business is located, its officers and employees reside, and its mark was developed and designed—a connection which is relevant to its anticipated affirmative defenses. This is not a case where the plaintiff has made the forum state more convenient on its own making, rather than based on its presence in the state. See *Master Cutlery, Inc. v. Pac. Sol.*

*Mktg., Inc.*, No. 1:13-CV-00819, 2013 WL 6440270, at \*6 (S.D. Ind. Dec. 9, 2013). Here, if the Court transfers the case, the inconvenience will shift to HealthSmart, and if the Court does not transfer the case, the inconvenience will remain with Defendants. Thus, while Defendants have legitimate reasons to prefer litigating in California, weighing this factor in favor of transfer would merely shift the inconvenience from Defendants to HealthSmart. This reality does not support transfer.

"[W]hen considering the convenience of the parties, courts also consider the parties' abilities to bear the expense of trial in a particular forum." *Grange Mut. Cas. Co. v. Hallmark Specialty Ins. Co.*, No. 1:14-CV-00823, 2015 WL 5552660, at \*3 (S.D. Ind. Sept. 16, 2015) Defendants have not mentioned an inability to bear the expense of trial in Indiana. Thus, this factor is neutral in the Court's analysis.<sup>2</sup>

### iii. Convenience of the Witnesses

The Defendants' argument regarding the convenience of witnesses centers on their capacity to build a defense against HealthSmarts' thirty-eight state law claims. Defendants paint California as a convenient forum for non-party witnesses by insisting that they will need to amass evidence from all over the country. This argument is moot now that the Court has dismissed HealthSmarts' state law claims except for Indiana Code § 24-5-0.5-1 and Indiana Code § 24-2-13.5. The fact that only Indiana state law claims remain now supports denying transfer.

Defendants also argue that the experts they will retain "will likely be based in California." (Defs.' Br. at ECF p. 17). Importantly, "[t]he convenience of expert witnesses is not a factor courts consider in deciding a transfer motion," given that expert witnesses, like counsel, are "paid

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<sup>2</sup> Defendants also argue that the fact that HealthSmart has previously litigated an unrelated case in California weighs in favor of transfer. Defendants cite to no support. In the absence of case law to the contrary, the Court is not persuaded by Defendants' argument.

individuals . . . whose job it is to be present in court." *Tama Plastic Indus. v. Pritchett Twine & Net Wrap, LLC*, No. 1:11-CV-783, 2012 WL 3966322, at \*7 (S.D. Ind. Sept. 11, 2012); *Boyd v. Snyder*, 44 F. Supp. 2d 966, 971 (N.D. Ill. 1999). Here, the Court is particularly hesitant to consider the convenience of Defendants' expert witnesses given that Defendants do not provide the location and names of the experts they believe "will likely be based in California." *Tama Plastic Indus.*, 2012 WL 3966322, at \*7 (holding that consideration will not be given to "prospective experts"). Thus, the fact that Defendants' prospective expert witnesses are in California is immaterial to the Court's analysis.

"When weighing the relative convenience of witnesses, courts assign greater weight to the location of non-party witnesses because securing their testimony may require use of compulsory processes and because they are more likely to be inconvenienced by having to travel." *Commissioning Agents, Inc. v. Long*, 187 F. Supp. 3d 980, 988 (S.D. Ind. 2016). When arguing that the convenience of non-party witnesses supports transfer, the moving party must "provide sufficient detail about the testimony" that would weigh against transfer. *Fetter v. Fetter*, No. 423-CV-00019, 2023 WL 4269855, at \*5 (S.D. Ind. June 29, 2023).

The only non-party witnesses that Defendants identify are their distributors. Two of Defendants' thirteen distributors are in California, and the eleven remaining distributors' locations are unknown. It is not clear to the Court why specifically the distributors in California must be called as opposed to a distributor closer to Indiana. Even if the California distributor's testimony is necessary, Defendants do not claim that the California distributor would not be willing to travel to Indiana. *See Commissioning Agents, Inc.*, 187 F. Supp. 3d at 988. The Court finds this factor to be neutral.

#### iv. Location of Material Events and Material Evidence

Defendants argue that most of the alleged wrongdoing has occurred in California. This wrongdoing includes Defendants' advertising and marketing methods. Also, files and business records would come from Defendants, whose corporate offices are in Northern California.

Defendants cite several out-of-circuit cases for the proposition that, in intellectual property cases, the site of material events should be the alleged infringer's place of business. The Court also finds compelling in-circuit cases instructing courts to hone the location of decision making and events behind Defendants' alleged infringement, as well as the location of the development, manufacture, and sale of the allegedly infringing mark. *See Master Cutlery*, 2013 WL 6440270, at \*5; *see also Somero Enterprises, Inc. v. Ligchine Int'l Corp.*, No. 1:20-CV-02356, 2021 WL 5748516, at \*3 (S.D. Ind. Feb. 10, 2021) (noting that the material events giving rise to the action included the development, manufacture, and sale of the infringing patent).

Here, Defendants highlight that HealthSmarts' corporate office is in California and Ms. Porter resides in California. Although it is not expressly stated, it would be reasonable to infer that decision-making relevant to HealthSmarts' Complaint was made at these locations in California. Further, Defendants state that two of an unknown number of Defendants' distributors are also located in California. While these facts reveal that some "material events" likely occurred in California, the Court will not assume that material decision-making occurred exclusively in California in the absence of facts to that end. *See Master Cutlery*, 2013 WL 6440270, at \*5 (situation of material events weighed in favor of transfer where defendant's brief was explicit that the business decisions relevant to the allegations in the Complaint were made in California). Accordingly, this factor weighs slightly in favor of transfer.

Regarding the accessibility of evidence, Defendants claim that much of the relevant

evidence is in California. However, "[g]iven the relative ease in transferring documentary evidence electronically," courts ordinarily "consider this factor to be neutral in the decision to transfer." *Commissioning Agents*, 187 F. Supp. 3d at 989. The result may be different where physical evidence is at issue, but here, the Court is not aware that either party intends to admit physical evidence currently located in California. *Grange*, 2015 WL 5552660, at \*3. The location of material evidence is neutral.

#### **v. Interests of Justice**

The Court's analysis takes into consideration judicial efficiency, including "such concerns as ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case." *Heller*, 883 F.2d at 1293. The principal focus of this factor is the "efficient functioning of the courts." *Coffey*, 796 F.2d at 221.

With respect to docket congestion, Defendants' brief states that it takes 77 percent longer on average for civil cases to reach disposition in the Southern District of Indiana than it does in the Northern District of California. This statement is inaccurate. If the median time from filing to disposition of a civil case is 7.5 months in California, and 13.3 months in Indiana, the accurate mathematical statement would be that it takes 44 percent, not 77 percent, longer on average for a civil case to reach disposition in the Southern District of Indiana. While defense counsel's calculations are misleading, the difference between 7.5 months and 13.3 months is notable. The Court finds that while "the transfer of the case [itself] has the potential to cause additional delay," the difference in docket congestion slightly weighs in favor of transfer. *Rolls-Royce N. Am. Techs. Inc. v. Dynetics, Inc.*, No. 119-CV-04302, 2019 WL 6170063, at \*4 (S.D. Ind. Nov. 19, 2019).

A previous patent infringement case is instructive on the Court's efforts to try related litigation together. In *Master Cutlery*, months after the initial patent infringement lawsuit had been

filed, the defendant filed a separate suit in California alleging similar claims. The Court concluded that transfer would promote efficiency because "both cases concern[ed] the parties' rights" to the allegedly infringing products. *Master Cutlery*, 2013 WL 6440270, at \*4. In contrast with the present case, *Master Cutlery* involved many of the same issues present in the case before the Southern District. Here, although the California case involves the same parties, the issues present are California state law consumer fraud claims. Accordingly, there is not the same risk of "inconsistent judgments regarding validity and infringement of the patents" because the California case will not address the parties' patent infringement claims. *Id.* Additionally, while the *Master Cutlery* court concluded that consolidation of the cases would promote judicial efficiency, it is not likely that consolidation would occur here because HealthSmart has expressed that it will not remove the California case to federal court. Consequently, regardless of whether transfer is granted or denied, separate lawsuits would be pending in state court and federal court, meaning judicial resources would not be spared through transfer.

The last factor assessed by the Court is its familiarity with the applicable law. The Court is confident in its ability to interpret and apply the federal laws at issue here. With respect to the state laws implicated, only claims under Indiana Code § 24-5-0.5-1 and Indiana Code § 24-2-13.5 remain. Because this Court is more familiar with Indiana law than a California federal court would be, this factor weighs against transfer.

In sum, upon considering the convenience and interest of justice factors, the Court finds that these factors weigh against transfer. Defendants have not carried their burden of establishing that the Northern District of California is clearly a more convenient forum than the Southern District of Indiana. The Court finds significant the deference accorded to HealthSmarts' choice of forum, Indiana's interest in adjudicating a dispute involving its corporate citizen, the Court's



familiarity with applying Indiana law, and the presence of HealthSmarts' employees and officers in Indiana.

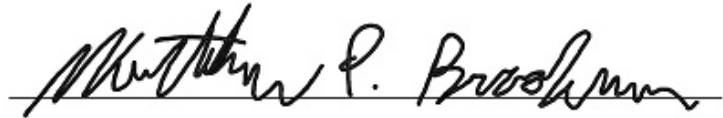
**IV. Conclusion**

The Court **DENIES** Defendants' Motion to Dismiss (Docket No. 12) for lack of personal jurisdiction as to Defendant Sweet Nothings and **DENIES** Defendants' Motion as to Defendant Beth Porter. If Ms. Porter wishes to request evidentiary hearing on the issue of personal jurisdiction, she shall so move by **December 27, 2023**. The Court **DENIES** Defendants' Motion to Dismiss Count III and **GRANTS** Defendants' Motion as to Count IV and Count VI.

HealthSmart has until **December 27, 2023**, to amend its Complaint as to all state law claims raised under Count IV except for Indiana Code § 24-5-0.5-1 and all state law claims raised under Count VI except for Indiana Code § 24-2-13.5 The Court **DENIES** Defendants' Motion to Transfer (Docket No. 13).

**SO ORDERED.**

Date: 11/28/2023

A handwritten signature in black ink, reading "Matthew P. Brookman", written over a horizontal line.

Matthew P. Brookman, Judge  
United States District Court  
Southern District of Indiana

Served electronically on all ECF-registered counsel of record.