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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91234111
Party	Plaintiff Cave Man Kitchens Inc.
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Signature	/Susan L. Stuart/
Date	03/20/2019
Attachments	Response to Board Inquiry 91234111.pdf(1063000 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CAVE MAN KITCHENS INC.	)	
	)	Opposition No. 91234111 (parent case)
Opposer,	)	Opposition No. 91235296
	)	Cancellation No. 92066099
	)	
v.	)	Mark: CAVE MAN
	)	Serial No. 87166881
CAVEMAN FOODS, LLC	)	Filing Date: Sep. 09, 2016
	)	Published: Apr. 11, 2017
Applicant.	)	
	)	Mark: CAVEMAN FOODS
	)	Serial No. 87087186
	)	Filing Date: Jun. 28, 2016
	)	Published: Mar. 21, 2017
	)	
	)	Mark: CAVE MAN & Design
	)	Serial No. 86169105
	)	Filing Date: Jan. 17, 2014
	)	Published: Apr. 04, 2017
	)	
	)	Mark: CAVE MAN & Design
	)	Serial No. 86169099
	)	Filing Date: Jan. 17, 2014
	)	Published: Apr. 04, 2017

Response to Board Inquiry

The parties continue to be engaged in a civil action which may have a bearing on this proceeding. Accordingly, Cave Man Kitchens Inc. ("Opposer") hereby requests that the Board maintain its suspension of this proceeding pending a final determination of the civil action. Trademark Rule 2.117. In support of this Response, Opposer submits herewith **Exhibit A**, which contains copies of documents filed by both Opposer and Applicant in the pending civil action in United States District Court, Western District of Washington. Opposer therefore respectfully requests the suspension of these proceedings pending determination of the civil action be maintained pursuant to Trademark Rule 2.117(a), 37 C.F.R. § 2.117(a).

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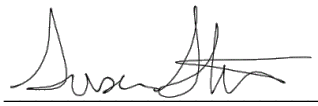
/

/

Date: March 20, 2019



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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing Response to Board Inquiry was served this March 20, 2019 by email to the following as Applicant's attorney of record:

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EXHIBIT A

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAVE MAN KITCHENS INC., Plaintiff, vs. CAVEMAN FOODS, LLC., Defendant.	Cause No. 18-cv-01274-RAJ PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS **Noted for Consideration: October 19, 2018** **ORAL ARGUMENT REQUESTED**

Plaintiff Cave Man Kitchens Inc., ("Cave Man Kitchens"), by and through undersigned counsel, hereby opposes Defendant Caveman Foods, LLC ("Caveman Foods") Motion to Dismiss.

INTRODUCTION AND BACKGROUND

This case is a continuation of related litigation originally filed in this Court on February 22, 2018 as Case No, 18-cv-00273 ("the February Action"). The basic dispute between the parties existed long before even that and dates back to at least April, 2017 when the parties initiated trademark opposition and cancellation proceedings in the United States Patent and Trademark Office. This is hardly an entirely new action or recently developed dispute.[1]

1 Caveman Foods' unsupported claims that Cave Man Kitchens' case is a "continuation of Plaintiff's opportunistic behavior designed to coerce a settlement payment from Defendant" are gratuitous and will not be addressed other than to say they are untrue.

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On April 26, 2018, Caveman Foods filed a Motion to Dismiss the February Action based on multiple grounds including but not limited to lack of standing, lack of personal jurisdiction and improper venue. (See 18-cv-00273, Docket Nos. 13 and 14.) In response to that motion, Cave Man Kitchens provided ample proof of Caveman Foods' contacts with this District, its activities in this district giving rise to the action, and its prior use of in this District of the marks in question. (18-cv-00273, Docket Nos. 18 and 18-1 through 18-5.) In addition, and to remove any doubt as to Cave Man Kitchen's ownership of the trademarks in question, Cave Man Kitchen's submitted a *nunc pro tunc* assignment from its predecessor in interest executed on May 30, 2018 and effective as of June 6, 2011, formally transferring the marks and their associated goodwill to Cave Man Kitchens.

On August 28, 2018, this Court granted the Motion to Dismiss *without prejudice* based on its conclusion that, despite the *nunc pro tunc* assignment, Cave Man Kitchens did not have standing on on its claim for Federal Trademark Infringement on February 22, 2018 when the case was originally filed. (18-cv-00273, Docket No. 23).

Slightly more than one hour after receiving this Court's August 28, 2018 Order, Cave Man Kitchens re-filed the case in this Court, alleging, truthfully and accurately, that it was, by then, the owner by assignment of the subject marks and, therefore, clearly has standing. This action was served on the registered agent for Caveman Foods fewer than forty-eight hours later.

In a transparent attempt to forum shop and have this action heard in the Northern District of California, Caveman Foods had prepared, long in advance

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of this Court's August 28, 2018 Order, a Complaint that mirrors the Complaint filed in this action but that does not accurately describe what this Court actually ordered. Without apparently actually reading this Court's Order, Caveman Foods filed that Complaint in the Northern District of California a mere thirty minutes before Cave Man Kitchens re-filed its case here. Caveman Foods did this apparently in the hope and expectation that Cave Man Kitchens would be asleep at the switch and thereby enable Caveman Foods to claim that its virtually simultaneously filed case was a "first filed case."

Caveman Foods argument that its California action was "first filed" is based entirely on the *thirty minute* difference between when Cave Man Kitchens re-filed the instant action here, and Caveman Foods filed its initial case in California. Given that the basic dispute between the parties[2] *was first raised in this Court in February 2018, more than six months earlier,* Caveman Foods' claim that its own case is somehow "first filed" is based entirely on a blatant attempt to ignore the *entire history* of this case other than the one hour period immediately following this Court's issuance of its August 28, 2018 Order.

The law is clear. Even if Caveman Foods electronically filed its clearly anticipatory and prepared-in-advance complaint in California a mere 30 minutes before Cave Man Kitchens re-filed its existing case here, the "first filed" rule is not absolute and subject to many exceptions, not the least of which is where, as here, the California action is anticipatory and clear forum shopping is at play.

Contrary to its claims, Caveman Foods is clearly engaging in procedural gamesmanship in a transparent effort to move this case away from where the

2 Caveman Foods concedes that the parties and issues here are substantially the same as those raised in its California action. Indeed, by virtue of its "Notice of Related Case" (Docket No. 18) Caveman Foods acknowledges, as it must, that the earlier action *filed in this Court on February 22, 2018,* is a "related case."

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relevant facts, witnesses and evidence are actually located, i.e., Kent, Washington. Caveman Foods' desire to move this case into a distant California venue where (1) Caveman Foods perceives it might receive beneficial treatment and where (2) Cave Man Kitchens will definitely be prejudiced by being forced to litigate far from home, is no secret. In the earlier February Action, Caveman Foods moved, as it once again does here, that the case be transferred to California. (18-cv-00273, Docket No. 13).

Furthermore, Caveman Foods' renewed claim that personal jurisdiction does not exist here is without merit. For reasons already stated to this Court in Plaintiff's opposition to the motion in the February Action, Caveman Foods has more than sufficient contacts with this forum to establish personal jurisdiction here.

ARGUMENT

I. Caveman Foods' Reliance On The "First Filed" Rule Is Misplaced

The law is clear that the "first-to-file" rule is not absolute and is discretionary with the court. The first-to-file rule applies when two complaints involving the same parties and issues are filed in two federal district courts. *Alltrade, Inc. v. Uniweld Products, Inc.,* 946 F.2d 622, 625 (9th Cir. 1991). It is a discretionary doctrine, one that permits the court overseeing the second-filed complaint to decline jurisdiction or the court overseeing the first-filed complaint to enjoin the later-filed action. *Id.*; *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 843 (9th Cir. 1986).

The Ninth Circuit has noted that, although no precise rule has evolved, "the general principle is to avoid duplicative litigation, and to promote judicial

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efficiency." *Barapind v. Reno,* 225 F.3d 1100, 1109 (9th Cir. 2000) (internal quotations and citations omitted). However, the rule "is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." *Pacesetter Sys., Inc. v. Medtronic, Inc.,* 678 F.2d 93, 95 (9th Cir. 1982); see also *Alltrade,* 946 F.2d at 627-28. Thus, a court "can, in the exercise of [its] discretion, dispense with the first-filed principle for reasons of equity." See *Alltrade,* 946 F.2d at 628. More specifically, "[t]he circumstances under which an exception to the first-to-file rule typically will be made include bad faith, anticipatory suit, and forum shopping." Id. (internal citations omitted).

Even if it is ignored that this dispute was first brought in this Court in the clearly related (indeed virtually identical) February Action, and even if the thirty-minute difference between when Caveman Foods filed its action in California and Cave Man Kitchens re-filed its case here somehow makes the California case the "first filed" case (and it should not), the various exceptions to the first-to-file rule are applicable here.

Caveman Foods cannot credibly argue that its California case is not "anticipatory." The February Action in this Court had been pending for more than six months before this Court issued its August 28, 2018 Order. The California case includes a complaint that runs more than seventeen pages, and the attachments alone run more than fifty pages. It is simply not believable either that Caveman Foods prepared its complaint and supporting documents in the roughly thirty minute period between issuance of this Court's August 28, 2108 Order and the filing of its California action, or that it had the documents

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ready to go and it is simply an amazing coincidence that it just happened to file on the same day, and within thirty minutes, of this Court's Order. Clearly Caveman Foods had anticipated and planned for filing an action in California as soon as this Court ruled, and the purpose of that rushed filing was to get the case in California rather than in this district and venue where it belongs.

Nor can Caveman Foods credibly claim that it is not "forum shopping" by engaging in such blatant procedural gamesmanship. Again, it is no secret that Caveman Foods desperately does not want this action proceeding here. That is made clear by the fact that it earlier moved for a transfer to the Northern District of California in the February Action and its renewed motion to transfer raised here.

Because Caveman Foods' California case is clearly anticipatory and filed for purposes of obtaining what it believes to be a more favorable forum, even if the California action is deemed to be "first-filed" (while ignoring that, as an admitted "related case," the February Action long predates any activity in California), the well-established exceptions to the first-to-file rule dictate against applying the rule under the circumstances here. For these reasons, this Court can and should allow this case to proceed and enjoin Caveman Foods from pursuing its clearly anticipatory and forum-shopped case in California.

II. Considering The California Case To Be "First Filed" Does Violence To The Intended And Proper Purpose Of The Rule

Contrary to Caveman Foods' apparent belief and hope, the "first-to-file" rule is not a gratuitously bestowed tool of procedural chicanery intended and designed to benefit clever counsel and their clients. Instead, the rule developed for the serious purpose of achieving judicial economy and justice. "When

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applying the first-to-file rule, courts should be driven to maximize economy, consistency, and comity." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.,* 787 F.3d 1237, 1240 (9th Cir. 2015), (internal quotation marks omitted). Here, granting Caveman Foods' motion achieves none of these goals.

This Court is already familiar with the parties, the claims and the procedural history of this case. Caveman Foods has already been served with now two complaints in this Court, motions with substantial evidence and information were provided to this Court not only in connection with the instant motion but in connection with the motion to dismiss and the opposition thereto filed in this Court between April and June, 2018, the parties have already exchanged their initial disclosures and have filed a status report with their respective views toward case management and discovery.

By contrast, *nothing* had been done in California in connection with the case there (other than filing) as of the time Caveman Foods filed its instant motion to dismiss here. Since that time, Cave Man Foods has filed a motion in the California case seeking a stay pending resolution of the instant motion in this case. Asking the California court to hold the California action in abeyance while the case proceeds here hardly results in any sort of "waste," "inefficiency" or breach of comity. Indeed, doing so avoids duplicative efforts by each court. By contrast, holding this case in abeyance while aksing the California court to start over literally from square one is a complete waste of the time, effort and resources that not only the parties but this Court have already put into this action. Indeed, the principles and purposes behind the first-to-file rule, namely "to maximize economy, consistency, and comity," are best served by

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recognizing this case for what it is – the true "first filed" action. To do otherwise is to ignore the history of what has taken place in this Court since February, 2018.

III. PERSONAL JURISDICTION IN THIS DISTRICT EXISTS

Caveman Foods reasserts the claim it made in the February Action that there is no personal jurisdiction over it in this District. In the February Action, Cave Man Kitchens provided more than ample evidence to establish that personal jurisdiction over Caveman Foods exists here. (See, 18-cv-00273 Docket Nos. 18, and 18-1 through 18-5.)

A. Legal Standards

The legal standards for assessing personal jurisdiction are well-established. "[I]n the absence of an evidentiary hearing, the plaintiff need only make 'a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" *Cray Inc. v. Raytheon Co.* 179 F.Supp.3d 977, (W.D.Wash. 2016) (quoting *Wash. Shoe Co. v. A-Z Sporting Goods, Inc.,* 704 F.3d 668, 671-72 (9th Cir. 2012) (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006))). "[U]ncontroverted allegations in the complaint must be taken as true, and conflicts between parties over statements in affidavits must be resolved in the plaintiff's favor." *Cray Inc. v. Raytheon Co.* 179 F.Supp.3d at 982. "The court must construe the pleadings and affidavits in the light most favorable to the plaintiff." *Id.* at 982, 983. "Washington's long-arm statute extends jurisdiction over a defendant to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment." *Wash. Shoe Co.* 704 F.3d 668 at 672.

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See Wash. Rev.Code § 4.28.185; *Shute v. Carnival Cruise Lines,* 113 Wash.2d 763, 783 P.2d 78, 82 (1989).

> As stated in clear terms by the Court of Appeals for the Ninth Circuit:
>
> We employ a three-part test to determine if a defendant has sufficient minimum contacts to be subject to specific personal jurisdiction:
>
> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Washington Shoe Co., 704 F.3d 668 at 672. Once the first two prongs of the test are met, the defendant (i.e. Caveman Foods) "must come forward with a "'compelling case' that the exercise of jurisdiction would not be reasonable." *Id. Citing CollegeSource, Inc. v. Academy-One, Inc.,* 653 F.3d 1066, 1076 (9th Cir. 2011) (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

B. Caveman Foods Has Purposely Availed Itself Of The Privilege Of Conducting Activities In This District

Cave Man Kitchens can satisfy the first of these prongs, i.e., purposeful availment, "by demonstrating that the defendant either purposefully availed itself of the privilege of conducting activities in the forum, or purposefully

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directed its activities at the forum." *Washington Shoe Co.,* 704 F.3d 668 at 672. This Court has repeatedly held that this prong can be satisfied without physical presence of a Defendant in this District and with only a small fraction of its business actually conducted in the District.

In *Getty Images (US), Inc. v. Virtual Clinics,* (W.D. WA. No. C13-0626JLR, September 9, 2013) (Exhibit A to accompanying Mann Declaration), this Court found personal jurisdiction proper against a Florida couple that had no physical presence in the Western District and had *only two* customers in the entire state of Washington. This Court found personal jurisdiction here even though the defendants claimed that, "these customers account for only 4% of their annual business, that they own no property in Washington, that they have no employees, no office, no mailing address, and no presence in Washington, do not pay taxes in Washington, are not licensed or regulated in Washington, and have no accounts or investments in Washington." *Id.* at p. 2.

Similarly, in *Microsoft Corp. v. Mountain West Computers, Inc.,* (W.D. WA. No. C14-1772RSM, July 22, 2015) (Exhibit B to Mann Declaration), this Court found personal jurisdiction over a defendant that had no contact with Washington other than to obtain a Microsoft program and "activate" that program from a location outside of Washington.

Here, and as established by the declarations provided by Caveman Foods itself, Caveman Foods has had far more "contact" with this District than the defendants in *Cray Inc. v. Raytheon Co., Getty Images (US), Inc. v. Virtual Clinics,* and *Microsoft Corp. v. Mountain West Computers, Inc.* By their own admission, approximately 10% of Caveman Foods sales are in Washington.

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(Declaration of Matthew Opperman, ¶ 13.) In addition, Caveman Foods, through its counsel, challenged Cave Man Kitchens' use of its "Cave Man" mark by sending a letter dated March 6, 2017 letter to Cave Man Kitchens' Trademark Counsel. (See Exhibit B to Declaration of Susan L. Stuart filed in connection with February Action, 18-cv-00273, Docket No. 18-2,, copy attached as Exhibit C to accompanying Mann Declaration.) Furthermore, Caveman Foods admits that it sells its products to Costco Wholesale Corporation, which itself is headquartered in Issaquah, Washington in this District. (Opperman Dec., ¶ 12.) The claim that "None of Caveman Foods warehouses are located in the state of Washington" (Opperman Dec., ¶ 10) is a red-herring – Caveman Foods does not deny that at least some of its products were shipped to Costco in Washington and, presumably, stored in a Costco warehouse there. Similarly, the claim that, "Caveman Foods does not direct the activities of its wholesalers and distributors" is a red-herring as well. What other purpose would Caveman Foods sell its products to wholesalers and distributors *other* than to have them sell and distribute the products to local retail purchasers?

C. The Claim Arises Out Of Defendant's Forum-Related Activities

With respect to the second prong, namely whether "the claim...arises out of or relates to the defendant's forum-related activities," this, too, is satisfied.

Cave Man Kitchens' Complaint alleges Trademark Infringement (Count I), False Designation of Origin (Count II), State Trademark Infringement (Count III) and State Common Law Unfair Competition (Count IV). Paragraph 17 of the Complaint alleges that Caveman Foods adopted it "Caveman" mark with knowledge of Plaintiff and its prior use of the mark. Accordingly, the damages

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experienced by Cave Man Kitchens will be felt in this District where Cave Man Kitchens resides. This Court has long recognized that the "Expressly aimed at the forum state" element of the test can be shown "when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Getty Images (US), Inc. v. Virtual Clinics, quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,* 223 F.3d 1082, 1087 (9th Cir. 2000). As in *Getty Images* and *Mountain West Computers,* the fact that the effects of the alleged infringement will be felt by the plaintiff in this District helps establish personal jurisdiction here.

As alleged in paragraph 71 of the Complaint and Exhibit E attached thereto, one of Defendant's products, *offered for sale in this District,* was of inferior quality and offered under the "Caveman" name, which, as alleged, would, if confused with products offered by Cave Man Kitchens, harm the reputation of Cave Man Foods.

On its face, the Complaint alleges activities by Caveman Foods that infringe Cave Man Kitchens' rights in this District and cause harm here. On the face of the allegations made in the Complaint, the claims here arise out of Caveman Foods' activities here.

D. The Case Should Not Be Dismissed For Lack Of Personal Jurisdiction

As demonstrated above, the first two prongs of the relevant test are satisfied by Cave Man Kitchens' complaint and the evidence presented therein. Caveman Foods has not made a credible showing, as it must, that it would be unreasonable to maintain the action here. Nor can it. The Western District of

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Washington is as well qualified and able to adjudicate this matter as any district court in California or elsewhere that Defendant might suggest. Nor would it be grossly unfair for Caveman Foods to litigate the matter here, given its apparent election to distribute its products throughout the United States and do business on a national level. Indeed, while purporting to address the seven-factor inquiry into "unreasonableness," Caveman Foods effectively argues only that it would be more "convenient" for it to litigate in California rather than here because its documents and witnesses are located there. A careful review of what Caveman Foods says with respect to each of the seven factor shows that each of the factors is at best neutral, while the ones that purport to favor Caveman Foods do so only because California is Caveman Foods' legal back yard. Given that Counts III and IV of Cave Man Kitchens' Complaint based, respectively, on common law unfair competition, require application of substantive Washington law, it makes far more sense for a district court located in Washington, and already familiar with Washington State law, to make decisions in this regard than a district court located elsewhere and less familiar with such substantive law.

Should the Court be inclined to credit Caveman Foods' claim that no personal jurisdiction exists, Cave Man Kitchens respectfully requests that it be given a reasonable opportunity to conduct jurisdictional discovery before making a final decision in that regard.

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IV. VENUE IS PROPER IN THIS DISTRICT AND SHOULD NOT BE CHANGED.

Caveman Foods has not demonstrated, as it must, that transferring this case to California is *clearly* more convenient than keeping the matter here. As Plaintiff, Cave Man Kitchens clearly has the right to select which of the available "proper" venues in which to file. The selected venue, namely the Western District of Washington, is not only proper, it is eminently reasonable given that Plaintiff resides here.

As in all cases involving parties from different states and districts, perfect convenience for all cannot be achieved, and no matter where a matter is heard, someone will need to travel or otherwise be inconvenienced. Given that the background facts regarding the initial adoption of the Cave Man Kitchens mark and its subsequent transfers to the current Cave Man Kitchens plaintiff will be at issue (indeed, defendant's instant motion relates largely to such issues), the fact that the relevant activities over the last several decades took place in this District, rather than California, make it likely that relevant documentation, witnesses, and other evidence is here, rather than there. Similarly, instance of actual confusion (which have taken place) have occurred in this District, and the witnesses to such acts are located here, not in California. Finally, ease of transportation for out-of-state witnesses does not clearly favor California given that Seattle is a modern, up-to-date city, with electrical power, running water and a large, easily accessible international airport, just like the big cities of California.

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CONCLUSION

Caveman Foods' motion to dismiss should be denied for the reasons set forth above. The admittedly "related" February Action filed long before the California Action is the true first-filed case, and in any event, Caveman Foods' clear anticipatory filing, as well as its clear forum shopping, are more than enough for this court to exercise its discretion to permit this case to proceed. The level of sales activity in this District that Caveman Foods admits to on its own is enough to demonstrate that personal jurisdiction exists and that venue is proper here. Accordingly, Caveman Foods motion should be denied in its entirety. At the very least, Cave Man Kitchens should be accorded an opportunity to conduct limited jurisdictional discovery and/or file an Amended Complaint should this Court believe the pleadings are in any way deficient. Such action by this Court is respectfully requested.

Dated October 15, 2018

Respectfully submitted,

/s/ Philip P. Mann

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Attorneys for Plaintiff Cave Man Kitchens Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record registered with the CM/ECF system.

Date: October 15, 2018 /s/ *Philip P. Mann*

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAVE MAN KITCHENS INC.,

Plaintiff,

v.

CAVEMAN FOODS, LLC,

Defendant.

Case No. 2:18-cv-01274-RAJ

DEFENDANT'S REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS IN FAVOR OF FIRST-FILED ACTION AND FOR LACK OF PERSONAL JURISDICTION; OR ALTERNATIVELY TRANSFER FOR FORUM NON CONVENIENS

NOTE ON MOTION CALENDAR: OCTOBER 19, 2018

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Defendant Caveman Foods, LLC ("Defendant") respectfully submits this Reply in further support of its Motion to Dismiss in Favor of First-Filed Action and for Lack of Personal Jurisdiction; Or Alternatively Transfer For Forum Non-Conveniens (the "Motion") the Complaint of Plaintiff, Cave Man Kitchens ("Plaintiff").[1]

I. INTRODUCTION

This dispute arises out of a shakedown-by-lawsuit in which Plaintiff sought to extract a monetary payment from Defendant by seeking to enjoin Defendant from using "Caveman," which is the brand name for Defendant's packaged snack foods. Plaintiff filed suit against Defendant in February 2018 (the "February Action") speciously claiming that Defendant's CAVEMAN marks on packaged snack foods were likely to cause consumer confusion with Plaintiff's single restaurant location called "Cave Man Kitchens" and infringed Plaintiff's federal trademark registration for CAVE MAN KITCHENS (the "Cave Man Kitchens Registration"). Through a costly investigation, Defendant discovered that Plaintiff's allegations of trademark ownership were false – the Cave Man Kitchens Registration was owned by a different entity also called Cave Man Kitchens, Inc., which apparently attempted to defraud its creditors, including the State of Washington, when it filed for bankruptcy, declared that it did *not* own any intellectual property, and then had its bankruptcy petition dismissed for failing to pay its taxes. That entity was then dissolved by the State of Washington for failing to file required disclosures. Defendant moved to dismiss the February Action and was lured into providing Plaintiff an extension of time to oppose the motion by claiming Plaintiff needed time to put together a settlement proposal, when in fact Plaintiff used the time to procure a *nunc pro tunc* assignment of the Cave Man Kitchens Registration from the dissolved entity in hopes of maintaining Plaintiff's settlement leverage. The February Action was appropriately dismissed for lack of subject matter jurisdiction when

[1] Capitalized terms not otherwise defined herein have the same meaning as those in Defendant's Motion to Dismiss in Favor of First-Filed Action and for Lack of Personal Jurisdiction; or Alternatively Transfer for Forum Non Conveniens. Dkt. No. 13.

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Defendant revealed these facts. Defendant then filed the California action for malicious prosecution and declaratory relief of non-infringement.

Plaintiff's Opposition concedes that the California action was filed before the present duplicative action but argues (without any supporting authority) that the present action is the "true first-filed action" because it is a continuation of the February Action. Plaintiff's argument is without merit because (1) the first-to-file analysis is based on the first court to have subject matter jurisdiction, which the Court in the February Action expressly ruled did not exist in that action; and (2) a dismissed action is terminated and has no effect on the priority of filing of other related actions.

Plaintiff incorrectly argues that the amount of time between the filing of the California action and the present action (thirty minutes according to a statement in Plaintiff's Opposition, which is unsupported by any evidence) prevents application of the first-to-file rule. Not so. Abundant authority cited in the Motion that Plaintiff fails to address makes clear that the amount of time between the competing actions has no bearing on application of the first-to-file rule. First means first, whether by an hour, a day, a month or a year.

Plaintiff further argues that certain exceptions to the first-to-file rule apply here, but it is the first-filed court -- *i.e.*, the California court -- that must decide whether an exception applies. Nevertheless, even considering the merits of Plaintiff's argument, Plaintiff fails to show that an exception applies. No settlement negotiations were deterred by the filing of the California action so the anticipatory filing exception does not apply. Nor has Defendant engaged in forum shopping by choosing its home district in Northern California. Nor has the present action progressed further than the California action to provide a compelling exception to the first-to-file rule.

As noted, the California court, as the first-filed action, must determine whether an exception to the first-to-file rule applies. Accordingly, in light of Defendant's statement that the California action was filed *before* this action, Plaintiff concedes that the California action is the first-filed action. Given Plaintiff's concession, it is now up to the California court to determine

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whether an exception applies. Plaintiff respectfully submits that this Court should hold its decision on this Motion in abeyance pending a determination by the California court whether an exception applies. That issue is presently pending before the California court with a hearing set for November 16, 2018.

If this Court decides not to hold its decision in abeyance pending the determination of the California court, the Motion should be granted because no exception to the first-to-file rule applies as explained in detail below.

This case should also be dismissed because Plaintiff has failed to carry its burden of providing non-conclusory allegations of personal jurisdiction in this action. The law of this Circuit, including the cases on which Plaintiff relies, holds that a Defendant must specifically target Washington residents with knowledge that the plaintiff is in Washington. Plaintiff's bare allegations cannot provide a proper basis for personal jurisdiction given the unrebutted facts in Defendant's affidavit that it did not know Plaintiff existed and sold merely to a national audience. Because personal jurisdiction is lacking, the Complaint should be dismissed for this reason, too. Plaintiff's cursory request for jurisdictional discovery is likewise unsupported, without merit and should be denied.

Accordingly, this Court should hold its decision on this Motion in abeyance pending the California court's determination whether any exception to the first-to-file rule applies. Alternatively, this case should be dismissed based on (1) the first-to-file rule; or (2) lack of personal jurisdiction. In the alternative, the Court should exercise its discretion and transfer the action to the Northern District of California.

II. ARGUMENT

A. The California Action Is The First-Filed Action

Plaintiff does not dispute that Defendant filed the California action before Plaintiff filed the present duplicative action. Instead, Plaintiff argues that the February Action is the true first-

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filed action and this action is merely a continuation of the February Action, thereby making this action the first-filed action. *See* Opp. at 3:10-18. Plaintiff's argument is without merit.

The first-to-file analysis is based on the first court that has jurisdiction. *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982) (stating that "when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit . . ."). Plaintiff filed the February Action falsely claiming to be the owner of the Cave Man Kitchens Registration on which its lawsuit was based. Plaintiff alleged subject matter jurisdiction pursuant to 28 U.S.C. section 1338(a). Judge Thomas S. Zilly dismissed the February Action for lack of subject matter jurisdiction. *See* RJN, Ex. M at 4:9-10 ("Plaintiff's Lanham Act claims are DISMISSED without prejudice for lack of subject matter jurisdiction. The Court DECLINES to exercise supplemental jurisdiction as to plaintiff's state law claims."). Thus, when Defendant filed the California action, the California court became the first court with subject matter jurisdiction over the dispute.

Plaintiff argues that this action is the first-filed action because it is related to the February Action. (Opp. at 5:13 ["this dispute was first brought in this Court in the clearly related (indeed virtually identical) February Action . . . ."].) Plaintiff cites no authority supporting the proposition that the first-to-file rule applies to where the "dispute" (as opposed to the action) was first brought. Nor does Plaintiff cite any authority supporting the suggestion that some sort of tacking rule applies such that Plaintiff gets to claim the filing date of the February Action as the filing date of this action because they are "related." Plaintiff cites no authority supporting his argument because there is none.

Plaintiff's argument also ignores that when Defendant filed the California action, there was no lawsuit pending in this District because Judge Thomas S. Zilly had already dismissed the February Action and closed the case. *See* RJN, Ex. M at 4:13 ("The Clerk is DIRECTED to CLOSE this case . . ."). When an action is dismissed "the action terminates and has 'no effect on the priority of filing of' other related actions." *Alul v. Am. Honda Motor Co., Inc.*, No. 16-CV-04384-JST, 2016 WL 7116934, at *5 (N.D. Cal. Dec. 7, 2016) (quoting *Com Sys., Inc. v. Nahmad*,

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924 F.2d 1062, 1991 WL 7602 at *4 (9th Cir. 1991). Therefore, Plaintiff's dismissed February Action cannot be used as the basis for claiming priority over Defendant's California action. *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1293-94 (N.D. Cal. 2013) (rejecting argument that previously dismissed action constituted the first-filed action); *ASUSTeK v. AFTG–TG LLC*, No. 5:CV 11–0192–EJD, 2011 WL 6845791 (N.D. Cal. Dec. 29, 2011) (same); *Quickturn Design Sys., Inc. v. Meta Sys.*, No. C-96-0881 MHP, 1996 WL 671230, at *6 (N.D. Cal. Oct. 31, 1996) (same).

Plaintiff's argument that the first-to-file rule does not apply because the California action and the present action were filed "virtually simultaneously" (Opp. at 3:9) is both unsupported by any case law and meritless. Plaintiff concedes it filed its action after Defendant filed the California action; it is of no consequence that Plaintiff filed the present lawsuit soon thereafter. "[T]he rule favoring the right of the first litigant to choose the forum, absent countervailing interests of justice or convenience, is supported by [reasons] just as valid when applied to the situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits." *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993) (first-filed rule "just as valid when applied to the situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits"); *Fisher v. Duff*, No. C15-5944 BHS, 2016 WL 3280429, at *2 (W.D. Wash. June 15, 2016) ("Although the time period between the two filings is short, the policy rationales behind the first-to-file rule—economy, consistency, and comity—are '"just as valid when applied to the situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits."') (quoting *Genentech*, 998 F.2d. at 938); *Diablo Techs., Inc. v. Netlist, Inc.*, No.: 13–CV–3901, 2013 WL 5609321, at *3, *5 (N.D. Cal. Oct. 13, 2013) (applying first-to-file rule to deny dismissal or transfer of first-filed N.D. Cal. case when it was filed less than two hours before the later-filed suit). Plaintiff does not address any of the similar authority that was cited in the Motion and thereby concedes it.

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B. The Northern District Of California Should Decide If There Is An Exception To The First-To-File Rule

Plaintiff urges this Court to disregard the first-to-file rule by arguing that purported exceptions apply here because the California action is anticipatory and a result of forum shopping. Opp. at 5-6. Because Plaintiff effectively concedes that the California action is the first-filed action, the California court should determine whether an exception to the first-to-file rule applies. District courts in the Ninth Circuit have held that the court in the first-filed action should determine whether any of the doctrine's exceptions apply. *See CRU Acquisition Grp., LLC v. Mykey Tech. Inc.*, No. 3:11-CV-05743-RBL, 2012 WL 441293, at *1 (W.D. Wash. Feb. 10, 2012) ("[T]he court with jurisdiction over the first-filed action should normally weigh the balance of convenience and any other factors that might warrant an exception to the first-to-file rule."); *ASUSTeK Comput. Inc. v. Round Rock Research, LLC*, No. C 11-6636 CW, 2012 WL 2055026, at *2 (N.D. Cal. June 5, 2012) ("The court with the first-filed action should normally determine whether an exception to the first-to-file rule applies."); *Intuitive Surgical, Inc. v. Calif. Inst. of Tech.*, 2007 WL 1150787, at *2–3 (N.D. Cal. 2007) ("the court in the first-filed action should decide whether there is an exception to the first-to-file rule"). Whether an exception applies is already pending before the California court and Defendant has notified the California court that it would request that this Court hold its decision on this Motion in abeyance pending the California court's determination whether an exception to the first-to-file rule applies. Suppl. RJN, Ex. P at 2, 8, 11. Accordingly, Defendant respectfully submits that this Court should hold its decision in abeyance pending the California court's ruling, which is set for hearing on November 16, 2018.

C. Plaintiff's Purported Exceptions To The First-To-File Rule Do Not Apply

If this Court is inclined to entertain Plaintiff's arguments, the Court should find that Plaintiff has not met its burden of providing evidence proving that this case meets an exception to the first to file rule. *See Interwoven, Inc. v. Vertical Computer Sys., Inc.*, No. C 10-4645 RS, 2011 WL 227671, at *3 (N.D. Cal. Jan. 24, 2011) (rejecting anticipatory filing argument because party

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alleging anticipation had "no persuasive evidence"); *Tricom Research, Inc. v. Tactical Support Equip., Inc.*, No. 08-cv2130-RGK (PLAx), 2008 WL 11338513, at *3 (C.D. Cal. June 27, 2008) ("Plaintiff's evidence fails to satisfy the high burden necessary to warrant application of the exception.").

Plaintiff fails to provide any authority supporting its assertion that an anticipatory suit exception to the first-to-file rule should apply in this case. A suit is anticipatory if "such situations would thwart settlement negotiations, encouraging intellectual property holders to file suit rather than communicate with the alleged infringer." *Tria Beauty, Inc. v. Oregon Aesthetic Techs., Inc.*, No. 10-CV-05053 WHA, 2011 WL 13253662, at *4 (N.D. Cal. Mar. 10, 2011). Here, Plaintiff asserts that Defendant rushed its filing but fails to provide any facts that Defendant's filing thwarted any settlement negotiations.

Further, it is not "anticipatory" for Defendant to prepare its Complaint in the California action to seek redress for damages from Plaintiff's frivolous lawsuit based on false allegations of trademark ownership, which Defendant only uncovered through an intensive investigation, as well as declaratory relief that Defendant is not infringing Plaintiff's purported trademarks. *See* RJN, Ex. N at ¶ 83 ("As a direct and proximate result of the filing and maintenance of Defendant's Lawsuit against Caveman Foods as set forth above, Caveman Foods has been damaged in an amount to be proven at trial, but at least in the amount of $250,000, including but not limited to attorneys' fees and litigation costs and expenses incurred by Caveman Foods in defense of the meritless lawsuit . . . ."). While it was a certainty that the February Action would be dismissed for lack of subject matter jurisdiction after Defendant uncovered that Plaintiff did not own the Cave Man Kitchens Registration as it alleged, Defendant could not file its lawsuit for malicious prosecution and other claims for relief until the February Action was dismissed. Waiting until a claim ripens before filing a lawsuit is not "anticipatory."

Neither does Plaintiff provide any authority that the California action was filed based on impermissible forum shopping. Plaintiff ignores that: (1) Defendant is a California corporation; (2) Defendant's principal place of business is located in California; (3) Defendant suffered harm in

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California based on the February Action; (4) Defendant's trademarks that Plaintiff sought to enjoin are managed from Defendant's headquarters in California; and (5) the vast majority of the witnesses (6 versus 1) are located in California. A party's decision to file suit in its home state "does not amount to impermissible forum shopping." *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1082 (C.D. Cal. 1999); *Palantir Techs., Inc. v. Palantir.net, Inc.*, No. C 07-03863 CRB, 2007 U.S. Dist. LEXIS 76830, at *5 (N.D. Cal. Oct. 2, 2007) ("there can be no allegation of forum shopping because [first-filer] is located in the Northern District of California"). Accordingly, Plaintiff fails to show that Defendant engaged in impermissible forum shopping.

Plaintiff's argument that the present action has progressed further because of the history of the February Action is without merit. Opp. at 7:6-8:4. The February Action proceeded only to the point where Judge Zilly determined the Court did not have subject matter jurisdiction because Plaintiff *admittedly* did not own the Cave Man Kitchens Registration when the lawsuit was brought. No substantive determinations were made of any kind other than applying unambiguous law to Plaintiff's concession that it did not own the Cave Man Kitchens Registration at the time of filing, which required that the action be dismissed.[2] In short, Plaintiff cannot credibly claim that the February Action had proceeded to such a point that it would be a waste of resources to now proceed with the California action when the only thing that was decided in the February Action was that the Court did not have subject matter jurisdiction to even hear the parties' dispute.

Plaintiff's argument that Defendant's desire to proceed in California would result in "a complete waste of time, effort, and resources to not only the parties but this Court" (Opp. at 7:22-24) is hypocritical considering Plaintiff wasted the resources of the parties and the Court by filing the February Action based on false claims to owning the Cave Man Kitchens Registration on

[2] Cave Man Kitchens conflates this Court with this District by arguing that this Court is already familiar with the parties, the claims, and the procedural history of this case. Opp. at 7:6-7. Judge Thomas S. Zilly presided over the February Action; this Court was not involved. Further, the only motion Judge Thomas S. Zilly decided in the February Action was the motion to dismiss.

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which Plaintiff's claims were based.[3] Plaintiff then continued to waste everyone's resources after Defendant uncovered Plaintiff's false allegations of trademark ownership and moved to dismiss based on unequivocal case law that required the dismissal of the February Action based on lack of subject matter jurisdiction. Rather than dismissing its Complaint without prejudice, Plaintiff opposed the motion based on meritless arguments unsupported by any on-point case law, required Defendant to file a reply in support of its motion to dismiss, and required the Court to issue a written opinion dismissing the lawsuit. Plaintiff's only apparent concern – until now – has been to needlessly drive up Defendant's litigation expenses as part of its shakedown seeking to extract a monetary payment from Defendant under the threat of an injunction to strip Defendant from its most significant asset – the CAVEMAN brand.

In sum, whether an exception to the first-to-file rule applies should be made by the California court. To the extent this Court decides the issue, Plaintiff provides this Court with no authority or reason to find an exception to the first-to-file rule in this case.

D. Alternatively, Plaintiff's Complaint Should Be Dismissed For Lack Of Personal Jurisdiction

Plaintiff argues solely that Washington has specific jurisdiction over Defendant, but fails to meet its burden of showing that Defendant purposefully directed its activities at residents of Washington. Additionally, forcing Defendant to litigate in Washington does not comport with fair play and substantial justice.

1. Defendant Has Not Purposefully Directed Its Activity To Washington

Plaintiff cannot meet the purposeful direction prong because Defendant did not know that Cave Man Kitchens is a Washington resident and Defendant did not individually target

[3] Moreover, "'a suit dismissed without prejudice . . . leaves the situation the same as if the suit had never been brought in the first place.'" *Alul v. Am. Honda Motor Co., Inc.*, No. 16-CV-04384-JST, 2016 WL 7116934, at *5 (N.D. Cal. Dec. 7, 2016) (quoting *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959)). A dismissed action thus "carries down with it" all previous proceedings, pleadings, orders, and issues. *National R.R. Passenger Corp. v. International Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990) (internal quotation omitted).

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Washington. Plaintiff acknowledges that the "expressly aimed" element of the purposeful direction test is met "when the defendant is alleged to have engaged in wrongful conduct ***targeted at a plaintiff whom the defendant knows to be a resident of the forum state.***" Opp. at 12 (citing *Getty Images (US), Inc. v. Virtual Clinics*, No. C13-0626 JLR, 2013 WL 4827815, at *5 (W.D. Wash. Sept. 9, 2013)) (emphasis added).[4] Defendant had no prior knowledge (before the dispute in the TTAB arose) that Cave Man Kitchens was in Washington and did not direct its activity to Washington to compete with Cave Man Kitchens for customers. Mot. at 11 (citing Opperman Decl., ¶ 14). Plaintiff's conclusory assertion that "Paragraph 17 of the Complaint alleges that Caveman Foods adopted its 'Caveman' mark with knowledge of Plaintiff" (Opp. at 11) is ridiculous on its face[5] and "need not be taken as true when viewed in light of defendant['s] uncontroverted evidence." *Danonio v. Southwest Educational Development Lab.*, C10-1193 RSL, 2011 WL 211857, at *3 (W.D. Wash. May 26, 2011) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)). Further, Defendant's awareness that its products were sold in Washington as part of its nationally directed sales "goes to the foreseeability of harm in the forum, not whether the conduct was 'expressly aimed' at the forum." *Job's Daughters Int'l*

[4] Plaintiff curiously relies on *Getty Images* and *Mountain West*. *See* Opp. at 10, 12. Both cases support Defendant's argument that specific jurisdiction requires a party to show targeted conduct directed to the forum state. The court in *Getty Images* found personal jurisdiction because "the websites were targeted at Washington residents, had a 'specific focus' on Washington, and the economic value of the websites turns, in significant measure, on their appeal to Washington residents." *Getty Images*, 2013 WL 4827815, at *5. The court in *Mountain West* similarly found personal jurisdiction because "[t]he alleged actions were not merely contacts with Washington that could have foreseeable effects in Washington" but defendant "knew Plaintiff to be located in and operating out of the State of Washington." *Microsoft Corp. v. Mountain W. Computers, Inc.*, No. C14-1772 RSM, 2015 WL 4479490, at *7 (W.D. Wash. July 22, 2015). Neither *Getty Images* nor *Mountain West* found personal jurisdiction where, as here, the defendant did not target the forum state and did not know the plaintiff was a resident of the forum state.

[5] Plaintiff's lack of interest in truthful allegations is well-established by its false allegations of trademark ownership in the February Action, and is furthered here by frivolous assertions that Defendant based in California intentionally traded off of the name of Plaintiff's single restaurant location in Washington when Defendant chose its CAVEMAN trademarks for its packaged snack foods sold through national retailers and online.

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v. Yoast, No. C16-1573RSL, 2018 WL 307133, at *3 (W.D. Wash. Jan. 5, 2018) (quoting *Cummins v. Lollar*, 2013 WL 12124089, at *5-6 (C.D. Cal. Feb. 11, 2013)). In order for Plaintiff's theory to succeed, it must identify evidence showing "individualized targeting" directed to Washington. *See Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086–88 (9th Cir.2000). No such evidence exists.

Further, Plaintiff's claims do not arise out of Defendant's March 6, 2011 letter to Plaintiff (see Opp. at 11) and thus cannot form the basis to obtain specific jurisdiction. *See Blue Nile, Inc. v. Ideal Diamond Sols., Inc.*, No. C10-380 TSZ, 2011 WL 830724, at *2 (W.D. Wash. Mar. 1, 2011) ("The claim must be one that arises out of or relates to the defendant's forum-related activities.") Contrary to Plaintiff's argument that Defendant challenged Plaintiff's use of its trademarks, Defendant in fact sought a coexistence agreement with Plaintiff. *See* Opp. at 11; Dkt. No. 26-4, pp. 9-10 (asking for assistance to "evaluat[e] the prospects of coexistence"); *see also Cray Inc. v. Raytheon Co.*, 179 F. Supp. 3d 977, 985 (W.D. Wash. 2016) (holding that licensing negotiations cannot confer personal jurisdiction).

2. The Exercise of Jurisdiction Does Not Comport With Fair Play And Substantial Justice

Because Plaintiff cannot carry its burden on the purposeful direction prong of the personal jurisdiction test, analysis of the reasonableness factors are unnecessary. Even so, looking at the applicable reasonableness factors from Defendant's moving papers, subjecting Defendant to the personal jurisdiction of this Court would be unreasonable and contradict the traditional notions of fair play and substantial justice. Plaintiff provides no meaningful analysis other than to argue that common law rights should be decided by a Washington court. Opp. at 13. Of course, the reasonableness factors do not focus on state common law trademark rights as courts consistently find personal jurisdiction to be unreasonable for trademark actions involving state common law claims. *See, e.g., Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014) (finding personal jurisdiction unreasonable in matter involving common law trademark infringement). Moreover, the Complaint provides only cursory allegations about

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any state common law claims. The Court should give the same consideration to Plaintiff's argument.

E. Plaintiff's Request For Jurisdictional Discovery Should Be Denied

Plaintiff's allegations that Defendant directed its activities at Washington are conclusory and do not support a finding that further discovery will likely provide sufficient evidence to the contrary. *See Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995) (stating that "[w]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery"). The Ninth Circuit in *Terracom* held that there was no basis for permitting jurisdictional discovery where plaintiff has "failed to demonstrate how further discovery would allow it to contradict the affidavits" of defendant. *Id.* at 562. Plaintiff has not and cannot make any such demonstration. Moreover, jurisdictional discovery here would be inefficient considering the California court is required to decide whether the first-to-file rule applies.

F. If The Court Decides This Case Should Not Be Dismissed, This Case Should Be Transferred Under The Doctrine Of Forum *Non Conveniens*

Because public and private factors favor litigating this matter elsewhere, the Court should exercise its discretion under the doctrine of forum *non conveniens* and transfer the case. Defendant's moving papers show that public and private interests favor resolution in the Northern District of California, including that Caveman Foods is aware of six witnesses in California and Plaintiff is aware of only one witness in Washington.

III. CONCLUSION

For the foregoing reasons, the Court should hold its decision in abeyance pending the determination of the California court whether an exception to the first-to-file rule applies. Alternatively, the Court should grant Defendant's motion to dismiss pursuant to the first-to-file rule or pursuant to Federal Rule of Civil Procedure 12(b)(2). In the alternative, the Court should transfer the case to the Northern District of California on forum *non conveniens* grounds.

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DATED: October 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 19th day of October, 2018.

s/

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