No. 19-1124

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UMG RECORDINGS, INC., *et al.*,
Plaintiff–Appellants

v.

TOFIG KURBANOV, *et al.*,
Defendant–Appellees

On Appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division
Case No. 1:18-cv-00957
The Honorable Claude M. Hilton, District Court Judge

ANSWERING BRIEF OF DEFENDANT-APPELLEE TOFIG KURBANOV

Evan Fray-Witzer
Ciampa Fray-Witzer, LLP
20 Park Plaza, Suite 505
Boston, MA 02116
617-426-0000
Evan@CFWLegal.com

Valentin Gurvits
Boston Law Group, PC
825 Beacon Street, Ste 20
Newton, MA 02459
617-928-1800
vgurvits@bostonlawgroup.com

Matthew Shayefar
Law Office of Matthew
Shayefar, PC
925 N La Brea Ave
W. Hollywood, CA 90038
323-948-8101
matt@shayefar.com

Attorneys for Defendant-Appellee Tofig Kurbanov

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1, Defendant-Appellee Tofig Kurbanov states that he is an individual. Kurbanov also states that he is unaware of any publicly held corporation that has a direct financial interest in the outcome of the litigation by reason of franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Articles

Congressional Materials

INTRODUCTION

Plaintiff-Appellants are a collection of twelve record companies, not one of which is located within the Commonwealth of Virginia. Instead, the foreign-corporation Plaintiffs cynically forum-shopped their way into the Eastern District of Virginia's "rocket docket," initiating an action against an alien individual, Defendant Tofig Kurbanov ("Kurbanov"), who resides in, and is a citizen of, the same small city in Southern Russia where he was born.

Kurbanov, who has never been to the United States (much less Virginia), and who does not even possess a visa that would *allow* him to travel to the United States, was named as a defendant in this action solely because he owns and operates two websites that are equally available to users world-wide and which are managed entirely and exclusively from Russia.

The websites at issue, FLVTO.biz and 2CONV.com (the "Websites"), which are free to use, allow visitors to save the audio tracks from online videos to their computers without having to also save the video content. The Websites are content neutral and there are substantial non-infringing reasons why users would and do utilize the Websites.[1] For example, professors or students might download the

[1] *See*, *e.g.*, *Techdirt*, "Music Industry Is Painting A Target On YouTube Ripping Sites, Despite Their Many Non-Infringing Uses" (Sep 15, 2017) https://tdrt.io/gpJ ("[T]here are a ton of legitimate uses outside of the music business to use these sites. I use them all the time. I primarily use them for videos that are essentially speech-based content so I can listen to them on the go. History lectures, public

audio portions of video lectures for later reference and playback; bands may capture the audio tracks from their live performances; parents may want the audio portion of a school concert that they recorded; along with any other number of non-infringing uses.

Each of the Websites receives more than 90% of its traffic from outside the United States and each is available in 23 different languages. Neither of the Websites – which are freely available anywhere in the world – is targeted in any way at either Virginia or the United States, nor are they in any way targeted at *users* in Virginia or the United States any more than they are targeted at users in Italy, Brazil, Turkey, or Mexico (each of which has more users of the websites than the United States).

The websites, which are free for users, are supported entirely by advertising revenue. Kurbanov does not sell the advertisements himself, nor does he interact with advertisers, but instead Kurbanov has agreements with advertising brokers. Kurbanov makes banner space on the Websites available for the advertising brokers but plays no role in selecting the actual advertisements that appear on the Websites. Instead, the brokers use the space as they see fit to place their clients' advertisements.

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debates, reviews: they're all on YouTube, they're all perfectly listenable in audio format, and none of the makers of that content are shouting about YouTube MP3 rips.").

Against this backdrop, the District Court held, in a well-reasoned, 14-page opinion, that the minimum contacts needed for the Court to assert personal jurisdiction over Kurbanov were lacking both in Virginia and the United States as a whole. Indeed, the Court found the contacts so lacking that it did not continue to the second prong of the jurisdictional test, namely whether an exercise of personal jurisdiction over Kurbanov would be constitutionally reasonable. Had the Court considered this factor, it would have similarly determined that personal jurisdiction could not be asserted over Kurbanov consistent with the Due Process Clause of the United States Constitution.

Cognizant perhaps of the complete absence of a Constitutional basis for the assertion of personal jurisdiction over Kurbanov, Plaintiffs and their *amici* seek to make up for this omission with a combination of xenophobia-tinged allegations[2]

[2] Plaintiffs' Brief, p.5 ("Appellee is a Russian national who owns and operates two of the most notorious music piracy websites in the world...."); Association of American Publishers' Brief, p.6 ("Foreign actors are reaching into the United States to acquire copyrighted materials...."); MPAA's Brief, p.5 (warning of "foreign pirates ... depriving aggrieved American copyright owners" of a forum in which to enforce their rights). The RIAA is no stranger to such xenophobia-baiting. *See* Statement of RIAA President Jason Berman Before Joint House and Senate Committees, One Hundredth Congress, First Session, on Digital Audio Taping, pp.30-31 (April 2, 1987) https://babel.hathitrust.org/cgi/pt?id=pst.000013352295 [hereinafter, "Committee Report"] ("With DAT, the Japanese electronics industry will continue to increase its profits at the expense of American creators and producers of music.... The Japanese DAT manufacturers must be told, in no uncertain terms, that their parasitic practices cannot continue.... Prompt approval of such legislation will send the Japanese electronics manufacturers a much-needed message — that their

and "the sky is falling" arguments, insisting that the Court can and should ignore Constitutional limitations because the *potential*[3] scope of the alleged infringing activity by the Websites' users is, according to Plaintiffs, very large.

Preliminarily, it should be recalled that, despite their protestations to the contrary,[4] Plaintiffs and their *amici* have consistently opposed virtually every technological advance from the 1970s forward including the advent of cassette tapes, compact discs, digital audio tapes, and MP3s.[5]

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continued disregard for American intellectual property will no longer be tolerated.").

[3] Plaintiffs assume, without a shred of record evidence, that every visitor to one of the Websites: (a) ended up converting a video file to an audio file, (b) converted a music file, (c) converted a copyrighted music file, and (d) copied one of *Plaintiffs*' copyrighted works. There is no record evidence of any of this and no amount of repetition by Plaintiffs alters that fact.

[4] *Amicus* International Anticounterfitting Coalition, whose members include Plaintiffs Sony Music Entertainment and Universal Music Group, claim in their brief that "*Amici* and their members embrace the use of new technologies...." p. 2. But, as demonstrated in footnote 5, *infra*, nothing could be further from the truth. *See*, *also*, *PCWorld Magazine*, "The Most Anti-Tech Organizations in America" (December 2, 2007) https://www.pcworld.com/article/140081/antitech_organizations.html (discussing the RIAA and MPAA's long history of opposing technological innovation).

[5] *See*, *e.g.*, *The Washington Post*, "The Record Industry Goes To War On Home Taping" (June 15, 1980) https://www.washingtonpost.com/archive/lifestyle/1980/06/15/the-reocrd-industry-goes-to-war-on-home-taping/80be4100-3fa2-4f73-8999-1efb6dd282d9/?utm_term=.6b170a6cf31c (Elektra's then-president tells the recording industry that the use of cassette tapes for home-taping of music is "the most dangerous threat thus far to our well-being"); Committee Report, p. 8 ("[Digital Audio Tape], which is the tape version of the compact disc ('CD'), poses the most significant technological threat that the American music industry has ever faced."); Long, Kenneth, "The RIAA's Case Against Ripping CDs: When Enough

In each instance, Plaintiffs and their *amici's* cries that the sky was falling were either misplaced or entirely made-up.[6]

Is Enough," 11 Hous. Bus. & Tax J. 173 (2011) ("Starting with the case *Atlantic Recording Corp. v. Howell*, the RIAA began asserting that 'it is illegal for someone who has legally purchased a CD to transfer that music into his computer.' The RIAA also brought this theory up during the *Capitol Records, Inc. v. Thomas* case, in which Sony BMG's chief of litigation claimed that 'when an individual makes a copy of the song for himself, I suppose we can say he stole a song. Copying a song you bought is a nice way of saying 'steals just one copy....'"). *Amicus* MPAA and its member organizations famously opposed VCRs (*Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)); recordable DVDs (*Techdirt*, "MPAA: Ripping DVDs Shouldn't Be Allowed Because It Takes Away Our Ability To Charge You Multiple Times For The Same Content" (Feb. 15, 2012) https://tdrt.io/bOx); and DVRs (*arsTechnica*, "MPAA wants to stop DVRs from recording some movies" (June 8, 2008) https://arstechnica.com/uncategorized/2008/06/mpaa-wants-to-stop-dvrs-from-recording-some-movies/).

[6] *See*, *e.g.*, *The Copia Institute*, "The Sky is Rising 2019: A detailed look at the state of the entertainment industry," pp.2-3 (April 2019) https://skyisrising.com/TheSkyIsRising2019.pdf ("In January of 2012, we released the very first Sky is Rising report, highlighting how – despite numerous doom and gloom stories about the impact of the internet on the creative communities – nearly all of the actual data showed tremendous, and often unprecedented, growth in both earnings and creative output.... The data in this report show that, once again, the sky is rising. …Contrary to clockwork complaints of content creation being killed off – all evidence points to an internet that has enabled stunning growth and opportunity for content. .... [T]here is no evidence whatsoever to support the idea that either content creators or the general public have been harmed by the internet revolution."); *Newsweek*, "Inside the Piracy Study the European Union Hid: Illegal Downloads Don't Harm Overall Sales" (Sept. 22, 2017) https://www.newsweek.com/secret-piracy-study-european-union-669436 ("Your illegal downloads of video games, top music acts and even e-books don't harm sales, according to a landmark report on piracy that the European Commission ordered but then buried when the findings didn't tell officials what they wanted to hear. The 300-page study offered the counterintuitive conclusion that illegal

Ultimately, however, Plaintiffs' and their *amici*'s hysteria is simply irrelevant to the jurisdictional question presented here. And, as this Court will see, the District Court properly concluded that there was a wholesale lack of any relevant, continuing, or substantial connections tying Kurbanov to Virginia or to the United States as a whole. Had the District Court needed to proceed further, it would have also concluded that, as a matter of law, it would be constitutionally unreasonable to subject Kurbanov to jurisdiction in either Virginia or the United States. Accordingly, this Court should affirm the District Court's dismissal of the Complaint.

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downloads actually help the gaming industry and have no negative impact on music sales by big stars or on e-book profits."); *BBC News*, "Music sales are not affected by web piracy, study finds" (March 20, 2013) https://www.bbc.com/news/technology-21856720 ("A report published by the European Commission Joint Research Centre claims that music web piracy does not harm legitimate sales.... They also found that freely streamed music provided a small boost to sales figures."); *TechDirt*, "GAO Concludes Piracy Stats Are Usually Junk, File Sharing Can Help Sales Studies" (April 13, 2010) https://tdrt.io/a7q ("The GAO's study unsurprisingly found that U.S. government and industry claims that piracy damages the economy to the tune of billions of dollars 'cannot be substantiated due to the absence of underlying studies.' The full GAO report ... not only argues that claims of economic impact have not been based on substantive science – but that file sharing can actually have a positive impact on sales....").

JURISDICTIONAL STATEMENT

Pursuant to the Local Rules of the Fourth Circuit, Appellees adopt Appellants' Jurisdictional Statement. L.R. 28(b).

STATEMENT OF ISSUES ON APPEAL

1. Whether the District Court properly held that it lacked personal jurisdiction over Kurbanov, a Russian citizen and resident who has never visited the United States and lacks minimum contacts with the United States, for claims arising out of the operation (in Russia) of two websites that are freely available to users throughout the world and which are not targeted at the United States.

2. Whether the District Court's dismissal should be upheld in any event because it would be constitutionally unreasonable to exercise personal jurisdiction over Kurbanov, consistent with the five-part test outlined by this Court in *Consulting Eng'rs Corp. v. Geometric Ltd*., 561 F.3d 273 (4th Cir. 2009).

3. Whether the District Court properly denied jurisdictional discovery where Plaintiffs waived such a request by: (a) only requesting discovery in a footnote which provided no evidence or argument as to why such discovery was necessary or would have been useful; and (b) Plaintiffs conceded in the same footnote that such discovery was not actually necessary.

STATEMENT OF THE CASE

I. Relevant Facts

A. Kurbanov and the Websites

Kurbanov was born in Rostov-on-Don in Russia. J.A.67, ¶2. He currently lives in Rostov-on-Don in Russia. *Id.*; J.A.382. Kurbanov has *never* been to the United States of America (including the Commonwealth of Virginia). J.A.68, ¶3.

Kurbanov operates the websites flvto.biz and 2conv.com (the "Websites"). *Id.*, ¶4; J.A.382. The Websites allow visitors to save the audio tracks from online videos to their computers without necessarily saving the video content as well. J.A.68, ¶5. The Websites are content-neutral and there are substantial non-infringing reasons why users would and do utilize the Websites. *Id.*, ¶6. *See*, *also*, fn.1, *supra*. For example, professors or students might choose to download the audio portions of lectures for later reference and playback, bands may want to capture the audio tracks from their live performances that they have captured on video, and parents may want the audio portion of a school concert that they recorded. J.A.68, ¶6.

Although Plaintiffs' Complaint focused solely on the Websites' ability to record audio tracks from the YouTube website, as the Websites themselves make clear, they can be used with a variety of websites other than YouTube, located anywhere in the world, that stream video content. *Id.*, ¶7; J.A.383.

All of the work that Kurbanov has done on the Websites has been performed in Russia. J.A.68, ¶8; J.A.385. Obviously, Kurbanov has never done any work for the Websites from within the United States (including Virginia). J.A.68, ¶¶9-10; J.A.385.

Kurbanov has never done business in Virginia or the United States nor has he ever solicited business in Virginia or the United States. J.A.69, ¶11; J.A.385. Kurbanov has never had employees in Virginia or the United States. J.A.69, ¶12. Kurbanov has never held a bank account in Virginia or the United States. *Id.*, ¶13; J.A.385. Kurbanov has never owned or leased real estate in Virginia or the United States. J.A.69, ¶14. Kurbanov has never had a telephone number in Virginia or the United States. *Id.*, ¶15. Kurbanov has never paid taxes in Virginia or the United States. *Id.*, ¶16; J.A.385.

Kurbanov has not engaged in any persistent course of conduct (or any conduct at all) in Virginia or the United States. J.A.69, ¶17; J.A.389. He has never derived revenue from services rendered in Virginia or the United States. J.A.69, ¶18; J.A.384. Kurbanov has never had an agent for the service of process Virginia or the United States. J.A.69, ¶19; J.A.385.

The Websites are not specifically targeted at Internet users in Virginia or the United States. J.A.69, ¶20; J.A.384. The Websites are not targeted to any particular country, but rather they are targeted at the entire world of eligible

Internet users. J.A.69, ¶20. Indeed, the Websites are available in 23 different language, including Italian, Portuguese, Polish, Turkish, Japanese, Korean, Russian and Arabic. *Id.*, ¶21; J.A.383.

The Websites are free to use. Accordingly, no users make any payments (from the United States, from Virginia, or from anywhere else) for using the Websites or the services available on the Websites. J.A.69, ¶22; J.A.384. Instead, virtually all revenue derived from the Websites comes from advertisements. J.A.70, ¶23; J.A.384.

Kurbanov does not sell the advertisements himself directly or interact with advertisers, but instead Kurbanov has agreements with advertising brokers. J.A.70, ¶¶24-25; J.A.384. Other than making space on the Websites available for the advertising brokers, Kurbanov plays no role in selecting the actual advertisements that appear on the Websites – rather the broker uses the space as it sees fit to place its clients' advertisements. In other words, an advertiser buys (from the broker) the right to display whatever advertisements it chooses in the space provided on the Websites, as long as the advertisements comply with the law and the broker's own rules. J.A.70, ¶26; J.A.384.

Because Kurbanov plays no role in the selection of the ads, he does not target the residents of any given location through the use of advertisements: he does not direct the advertisements themselves and certainly does not himself take

any steps to target the residents of either Virginia or the United States.[7] J.A.70, ¶27; J.A.393.

Similarly, Kurbanov plays no role whatsoever in so-called "interest-based targeting" of advertisements (advertising that changes based on a user's internet history).[8] J.A.71, ¶30. To the extent that such interest-based targeting takes place, it is done solely by the advertising brokers or advertisers themselves, not Kurbanov. *Id.* Additionally, the advertisements at issue are not advertising the Websites, but rather are advertisements promoting the products or services of the advertisers themselves. *Id.*, ¶31. In other words, Kurbanov is not advertising the Websites into Virginia or the United States by virtue of the advertisements referenced in Plaintiffs' Complaint. *Id.*, ¶32. In fact, the Websites are not advertised at all – whether within the United States or elsewhere. *Id.*, ¶33; J.A.393.

The Websites have visitors from over 200 distinct countries around the world. J.A.71, ¶34; J.A.383. For the 2conv.com website, only 5.87% of the users

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[7] It is possible for the advertisers themselves, working with the advertising broker, to aim advertisements to viewers in specific locations. This process is known as "geolocation" or "geo-targeting." To the extent that there is any geolocation or geo-targeting of advertisements appearing on the Websites, however, it is done by the advertisers and the advertising broker without any input from Kurbanov. J.A.70-71, ¶¶28-29.

[8] It is unclear how such targeting is, in any event, relevant to questions of jurisdiction. Nevertheless, to the extent that such targeting has relevance, it is not done by Kurbanov. J.A.71, ¶30.

of the website are from the United States and the website gets more users from Italy (8.89%), Brazil (9.78%), and Mexico (8.83%). J.A.71-72, ¶36. This means that *over 94% of the users of the 2conv.com website come from outside the United States*. With respect to the flvto.biz website, only 9.92% of the users of the website are from the United States and the website gets more visitors from Turkey (11.21%) and Brazil (10.19%). J.A.72, ¶39. This means that *over 90% of the users of the flvto.biz website come from outside the United States*.

When comparing the number of users from the various states in the United States, only 1.75% of 2conv.com and 1.70% of flvto.biz users from the United States come from Virginia, making it the 11th and 13th state in terms of users, respectively. Both of the Websites get far more users from California than they do from any other state, with 11.26% of 2conv.com and 10.65% of flvto.biz users from the United States coming from California. J.A.72, ¶¶37, 40.

Users of the Websites do not need to create an account, register, or sign in to use the services of the Websites. J.A.72, ¶41; J.A.384.

As of the date of the filing of the Complaint in this matter, the Websites were not (and currently they are not) hosted in Virginia or the United States. J.A.73, ¶42. Instead, the servers hosting the Websites are based in Germany and are hosted through the hosting provider Hetzner Online GmbH, which is organized in Germany. *Id.*, ¶42; J.A.384-85.

It would be extremely burdensome and costly for Kurbanov to travel to Virginia (or anywhere else in the United States) for trial and other proceedings in this case. J.A.73, ¶45. Having never travelled to the United States, Kurbanov has never applied for or obtained a United States visa. *Id.*, ¶46. According to the United States Embassies and Consulates in Russia, however:

> Visa operations across Russia were reduced following drastic cuts to our personnel by the Russian Federation in 2017 and the closure of U.S. Consulate St. Petersburg by the Russian Federation in March, 2018. Fewer people inevitably mean fewer staff to provide visa services.

https://ru.usembassy.gov/visas/, last accessed April 10, 2019. The Embassies and Consulates warned that, although "Applicants may schedule interviews in Moscow, Yekaterinburg, or Vladivostok ... wait times are long." *Id.* According to Google Maps, it is a 12-hour drive from Rostov-on-Don to Moscow, a 28-hour drive to Yekaterinburg, and nearly a 12-hour flight to Vladivostok.

B. Plaintiffs

None of the Plaintiffs have their principal place of business in Virginia. J.A.13-14; J.A.382. Three of the Plaintiffs (UMG Recordings, Inc., Capitol Records, LLC and Warner Bros. Records Inc.) have their principal places of business in the Los Angeles, California area – representing 43% of the works in suit. J.A.96-97, ¶¶5, 8, 11. One Plaintiff (Sony Music Entertainment US Latin LLC) has its principal place of business in Florida, and eight have their principal places of business in New York (Atlantic Recording Corporation, Elektra

Entertainment Group Inc., Fueled by Ramen LLC, Nonesuch Records Inc., Sony Music Entertainment, Arista Records LLC, LaFace Records LLC and Zomba Recording LLC). J.A.13-14. Three of the New York based Plaintiffs also have offices in the Los Angeles, California area (Atlantic Recording Corporation, Elektra Entertainment Group Inc., and Sony Music Entertainment), representing another 44% of the works in suit. J.A.97-99, ¶¶13, 14, 16, 17, 23, 24.

All of the Plaintiffs are at home in the federal district courts of California: UMG Recordings, Inc. has been the plaintiff in 980 cases in the federal courts of California; Capitol Records, LLC – 605 cases; Warner Bros. Records Inc. – 330 cases; Atlantic Recording Corporation – 348 cases; Elektra Entertainment Group, Inc. – 398 cases; Fueled by Ramen, LLC and Nonesuch Records, Inc. – 2 cases each; Sony Music Entertainment – 156 cases; Sony Music Entertainment US Latin LLC – 3 cases; Arista Records LLC – 687 cases; LaFace Records LLC – 29 cases; and Zomba Recording LLC – 79 cases. J.A.96-100, ¶¶2, 6, 9, 12, 15, 18, 20, 22, 25, 27, 29, 31.

II. Procedural History

On August 3, 2018, Plaintiffs filed suit in the United States District Court for the Eastern District of Virginia, alleging violations of the Copyright Act. J.A.4, 8, 25-32. Kurbanov appeared through counsel and filed a timely motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2). J.A.5, 35-36, 38-59. In the

alternative, Kurbanov asked the district court to transfer the case to the Central District of California. J.A.39, 59-64.

On January 22, 2019, the District Court (Hilton, J.) granted Kurbanov's motion to dismiss for lack of personal jurisdiction. J.A.6, 382-96. On January 31, 2019, Appellants filed a timely notice of appeal. J.A.6, 397.

SUMMARY OF ARGUMENT

The District Court properly concluded that personal jurisdiction could not be exercised over Kurbanov either in Virginia or anywhere in the United States, in accordance with due process. Specifically, Plaintiffs have not, and cannot, show that Kurbanov has sufficient minimum contacts with Virginia or the United States, and an exercise of personal jurisdiction over him would not be reasonable in accordance with the Due Process Clause of the United States Constitution. The District Court correctly found in favor of Kurbanov that there were not sufficient contacts with Virginia or the United States and this Court should affirm the District Court's dismissal of Plaintiffs' complaint.

Plaintiffs' reliance on the raw number of users from Virginia and the United States that use Kurbanov's websites is misplaced in the personal jurisdiction analysis. The unilateral actions of users of the Websites are irrelevant to the specific jurisdiction analysis that must be undertaken by the court.

Plaintiffs' attempts to tie personal jurisdiction to the geolocation of ads on the Websites is misplaced, where any such geolocation is accomplished solely by third-party advertising brokers. Such targeted advertising has no relevance to the underlying claims against Kurbanov and, accordingly, cannot form the basis for a finding of personal jurisdiction over him.

The remaining factors relied upon by Plaintiffs are all unavailing: (a) Kurbanov's designation of an agent to receive claims of copyright infringement cannot constitute a basis for asserting personal jurisdiction because contacts with the government are explicitly excluded from the analysis, the designation of the agent has nothing to do with the underlying claims, and asserting jurisdiction on that basis would run contrary to the express aims of the Copyright Act; (b) Kurbanov's use of a domain name registrar, registry, or hosting provider in the United States are *de minimis* and irrelevant to the underlying claims; and (c) Plaintiffs' citations to the Terms of Use on Kurbanov's are irrelevant to the purposeful availment inquiry.

The District Court properly found that there were not sufficient contacts between Kurbanov and either Virginia or the United States to assert personal jurisdiction over him. Accordingly, the District Court did not reach the issue of whether the exercise of personal jurisdiction would be constitutionally reasonable. Had the District Court reached this issue, it would find that exercise of personal jurisdiction over Kurbanov would be unreasonable because, *inter alia*, the burden on Kurbanov (who has no way of coming to the United States currently) would be great and the application of United States copyright laws against Kurbanov would be extra-territorial and in violation of heightened concerns of national sovereignty.

Finally, jurisdictional discovery was not warranted because Plaintiffs never presented any arguments to the District Court as to how such discovery would change the jurisdictional analysis and, instead, specifically stated that no such discovery was needed.

ARGUMENT

I. Standard of Review

"Under Rule 12(b)(2), a defendant must affirmatively raise a personal jurisdiction challenge, but the plaintiff bears the burden of demonstrating personal jurisdiction at every stage following such a challenge." *Grayson v. Anderson*, 816 F.3d 262, 267 (4th Cir. 2016). If the court provides the parties with "a fair opportunity to present both the relevant jurisdictional evidence and their legal arguments," then it is the plaintiff's burden to prove the existence of facts to support personal jurisdiction "by a preponderance of the evidence...." *Id.*, at 268. This Court has made clear that an evidentiary hearing with witnesses is not required for the "preponderance of the evidence" standard to apply – instead, it is sufficient for the Court to consider evidence such as affidavits and exhibits. *Id.*, at 269 ("[W]e see no reason to impose on a district court the hard and fast rule that it must automatically assemble attorneys and witnesses when doing so would ultimately serve no meaningful purpose. Creating such needless inefficiency would undermine a principal purpose of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action and proceeding.'" (quoting Fed.R.Civ.P. 1)).

This Court reviews the District Court's finding that it lacked personal jurisdiction *de novo*. *Tire Eng'g & Distribution, LLC v. Shandong Linglong*

Rubber Co., Ltd., 682 F.3d 292, 300 (4th Cir. 2012); *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 (4th Cir. 2009). Because this Court's review is *de novo*, the Court does "not defer to the district court and may affirm the dismissal of [the] complaint on any ground." *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 476 (4th Cir. 2014). *See*, *also*, *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004) ("[W]e 'may affirm the dismissal by the district court on the basis of any ground supported by the record even if it is not the basis relied upon by the district court.'").

A party seeking jurisdictional discovery must offer more than simple "speculation or conclusory assertions about contacts with a forum state." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402-03 (4th Cir. 2003). Judicial discovery is not warranted where the plaintiff has failed to make a "concrete proffer" demonstrating either that the defendant's jurisdictional affidavits were tainted by "fraud or intentional misconduct" or, at a minimum, the plaintiff must demonstrate that the "additional information" sought "would ... alter [the] analysis of personal jurisdiction." *Id.*

This Court reviews a denial of jurisdictional discovery under an abuse of discretion standard. *Id.* *See*, *also*, *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 330 (4th Cir. 2013) ("Although the plaintiffs also claim that the district court abused its discretion in denying them jurisdictional discovery, they only mention

the issue in a footnote and do not present argument on the point, thus forfeiting the issue.... The district court properly recognized the weaknesses of the plaintiffs' arguments for personal jurisdiction and determined that the cost of jurisdictional discovery would not be justified. This is an appropriate exercise of discretion.").

II. The District Court Properly Dismissed Plaintiffs' Complaint for a Lack of Personal Jurisdiction Over Tofig Kurbanov, a Russian Resident and Citizen.

Although a determination of personal jurisdiction under a state's long-arm statute is sometimes a two-step process – consideration of whether the state statute authorizes an exercise of jurisdiction, followed by a constitutional due process analysis – where, as here, the relevant long-arm statute extends to the limits of the United States Constitution's Due Process Clause, the two inquiries merge into one. *See*, *e.g.*, *Consulting Eng'rs*, 561 F.3d at 277 ("Because Virginia's long-arm statute is intended to extend personal jurisdiction to the extent permissible under the due process clause, the statutory inquiry merges with the constitutional inquiry."); *KMLLC Media, LLC v. Telemetry, Inc.*, 2015 U.S. Dist. LEXIS 145764, at *7-8 (E.D. Va. Oct. 27, 2015) ("Because Virginia's long arm statute is intended to extend personal jurisdiction to the outer limits of due process, the constitutional and statutory inquiries merge." (citations omitted)).

And, under Fed. R. Civ. P. 4(k)(2), the Court conducts the same constitutional analysis, only applied to the entire country as opposed to a single

state. *See*, *e.g.*, *Base Metal Trading v. Ojsc Novokuznetsky Aluminum Factory*, 283 F.3d 208, 215 (4th Cir. 2002) ("Rule 4(k)(2) allows a federal court to assert jurisdiction in cases 'arising under federal law' when the defendant is not subject to personal jurisdiction in any state court, but has contacts with the United States as a whole.").

"To satisfy the constitutional due process requirement, a defendant must have sufficient 'minimum contacts' with the forum state such that 'the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Consulting Eng'rs Corp.*, 561 F.3d at 277 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). "The minimum contacts test requires the plaintiff to show that the defendant 'purposefully directed his activities at the residents of the forum' and that the plaintiff's cause of action 'arise[s] out of' those activities." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). "This test is designed to ensure that the defendant is not 'haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.' ... It protects a defendant from having to defend himself in a forum where he should not have anticipated being sued." *Id.* (citations omitted).

The Supreme Court recently reaffirmed that the due process inquiry must focus "'on the relationship among the defendant, the forum, and the litigation.'"

Walden v. Fiore, 571 U.S. 277, 283 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). As the *Walden* court explained:

> For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case.
>
> First, the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State.... We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State....
>
> Second, our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.

Id. at 284-85.

In conducting its analysis, the Court is not concerned with the defendant's non-suit contacts with the forum. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) ("In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.... When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." (citations and internal quotation marks omitted)); *PTA-FLA, Inc. v. ZTE Corp.*, 715 Fed. Appx. 237, 242 (4th Cir. 2017) (similar).

This Court has "synthesized the due process requirements for asserting specific personal jurisdiction into a three part test in which the Court considers: (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.'" *Consulting Eng'rs Corp.*, 561 F.3d at 277 (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

A. Purposeful Availment

This Court has articulated a series of nonexclusive factors to be considered in determining whether a defendant has engaged in purposeful availment, including: "whether the defendant maintains offices or agents in the forum state ... whether the defendant owns property in the forum state ... whether the defendant reached into the forum state to solicit or initiate business ... whether the defendant deliberately engaged in significant or long-term business activities in the forum state ... whether the parties contractually agreed that the law of the forum state would govern disputes ... whether the defendant made in-person contact with the resident of the forum in the forum state regarding the business relationship ... the nature, quality and extent of the parties' communications about the business being transacted ... and whether the performance of contractual duties was to occur

within the forum." *Consulting Eng'rs Corp.*, 561 F.3d at 278 (multiple citations omitted).

Unsurprisingly, Plaintiffs' brief entirely ignores these factors. Kurbanov has no offices or agents in Virginia or the United States; has never solicited or initiated business in Virginia or the United States; has no significant or long-term business activities in Virginia or the United States; there is no contract between Kurbanov and Plaintiffs selecting Virginia or United States law (indeed, there is no contract at all between the parties); Kurbanov has made no in-person contact with residents of Virginia or the United States regarding a business relationship; the parties have never communicated with one another; and there were no contractual duties to be performed within Virginia or the United States. Quite to the contrary, any actions taken by Kurbanov were taken wholly and entirely within Russia, where Kurbanov resides.

Instead, Plaintiffs focus exclusively on the supposed mechanics of the Websites in an attempt to prove purposeful availment in Virginia or the United States as a whole. Specifically, Plaintiffs point to seven topics that they claim speak to purposeful availment: (1) the number of visitors to the Websites from Virginia and the United States; (2) the nature of the visitors' "interaction" with the Websites; (3) the nature of the "relationship" between the users and the Websites; (4) the fact that the Websites don't block visitors from Virginia or the United

States; (5) the appointment of a DMCA agent to receive complaints of alleged copyright infringement; (6) other "contacts" with companies in the United States; and (7) the Websites' terms of use. The District Court properly rejected these arguments below and this Court should do the same here.

1. Plaintiffs' Misplaced Focus on the Raw Number of Visitors to the Websites

Preliminarily, whereas Kurbanov provided the District Court (and this Court) with the actual statistics tracking the number of visitors to the Websites (J.A. 77-94), Plaintiffs proffered only unverified and inaccurate statistics from a website called SimilarWeb.com. By its own admission, SimilarWeb only provides an "estimate" of the number of visitors to a website.[9] This is, of course, understandable because SimilarWeb does not actually have access to the logs or servers of the websites for which it is attempting to estimate traffic (as opposed to the metrics provided by Kurbanov, which are derived from the Websites' actual usage logs).

Even if this were not the case, however, Plaintiffs' obsession with the raw number of visitors to the Websites is misplaced. Numerous other federal courts

[9] *See* https://www.similarweb.com/corp/developer/estimated_visits_api (last accessed April 11, 2019) ("The Total Traffic API allows you to input a domain and receive the Estimated Number of Visits for the domain on a daily, weekly, or monthly basis for desktop and mobile users.").

have, in similar situations, rejected the argument that a foreign defendant may be subject to personal jurisdiction in the United States based simply on the amount of traffic generated by the website originating from the United States. *See*, *e.g.*, *Liberty Media Holdings, LLC v. Letyagin, et al.*, 2011 WL 13217328 at *4 (S.D. Fla. Dec. 14, 2011) ("Plaintiff contends that Defendant has 'considerable' web traffic originating from the United States and has presented an exhibit showing that fifteen percent of the visitors to the website are from the United States. Precedent, however, establishes that maintaining a website accessible to users in a jurisdiction does not subject a defendant to be sued there: those users must be directly targeted, such that the defendant can foresee having to defend a lawsuit...."); *Fraserside IP L.L.C. v. Hammy Media, LTD*, 2012 U.S. Dist. LEXIS 5359 (N.D. Iowa Jan. 17, 2012) (rejecting personal jurisdiction despite allegations that "xHamster's website www.xHamster.com is visited daily by over 1,500,000 internet users worldwide with roughly 20 percent of the site's visitors being from the United States"); *Fraserside IP, L.L.C. v. Youngtek Solutions, Ltd.*, 2013 U.S. Dist. LEXIS 3779 (N.D. Iowa Jan. 10, 2013) (allegations that "17 to 20 percent of visitors to Youngtek's websites are U.S. citizens"); *Fraserside IP L.L.C. v. Netvertising Ltd.*, 2012 U.S. Dist. LEXIS 180949 (N.D. Iowa Dec. 21, 2012) (allegations that "16.7% percent of HardSexTube's website's daily visitors are from the United States"); *Fraserside IP L.L.C. v. Letyagin*, 885 F.Supp.2d 906 (N.D. Iowa 2012)

(allegations that "eighteen percent of SunPorno's website's 2,500,000 daily visitors are from the United States); *Fraserside IP L.L.C. v. Youngtek Solutions Ltd.*, 2012 U.S. Dist. LEXIS 98041 (N.D. Iowa July 16, 2012) (allegations that "the EmpFlix.com website is allegedly visited daily by over 1,500,000 internet users worldwide with approximately 16.9 percent of the site's visitors coming from the United States. The TNAFlix.com website is allegedly visited daily by over 3,000,000 internet users worldwide with approximately 21.5 percent of the site's visitors coming from the United States.").

In focusing solely on the raw number of viewers that the Websites draw from Virginia or the United States – Plaintiffs improperly attempt to elevate the importance of ***non-claim related contacts*** with Virginia and the United States.

Because Plaintiffs are intentionally attempting to blur this concept, it is important to step back and appreciate what Plaintiffs' "estimated" numbers claim to say. First, the simple fact that an individual might visit one of the Websites is not an indication that that visitor actually utilized the Websites' functionality. As with any website, some visitors will come to the website because they are curious as to what the website does, but then leave the website without ever having made use of the site's ability to save an audio track.

Next, of those visitors that *do* seek to save an audio track from a URL link containing a video, any number are accessing videos that have nothing to do with

music at all. Indeed, according to video sharing website Youtube.com, music related videos account for only 2.5% of all of YouTube's traffic. *See Digital Music News*, "YouTube Says Just 2.5% Of Its Traffic Is Music-Related" (April 29, 2016) https://www.digitalmusicnews.com/2016/04/29/youtube-says-just-2-5-of-its-traffic-is-music-related. This, of course, does not even mean that 2.5% of YouTube's traffic involves *Plaintiffs'* music, but rather music as a whole constitutes 2.5% of YouTube's traffic. This includes that music is copyrighted; music that is subject to a Creative Commons license; and music freely offered to the public without restriction. And, of course, given YouTube's international reach, much of that music is itself likely from outside the United States and thus not owned by Plaintiffs.[10]

Ultimately, then, Plaintiffs' repeated and breathless citations to (what they claim to be) the raw number of visitors to the Websites from Virginia and the United States means very little inasmuch as the numbers do not necessarily speak to ***claim-related contacts*** with the forum at all.

The Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), is particularly instructive. In *Bristol-Myers*, "more than 600 plaintiffs, most of whom are not California residents, filed

[10] YouTube has local versions in more than 88 countries. is available in 76 different languages, and fewer than 17% of its visitors come from the United States. J.A.254-55, ¶¶13, 16, 19.

[a] civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix." *Id.*, at 1777.

Although the Supreme Court found that Bristol-Myers "engages in business activities in California and sells Plavix there," it nonetheless held that the California courts could not exercise personal jurisdiction over the claims brought by non-California residents. The Court reached this conclusion despite the fact that "five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located" in California and the company "employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento." *Id.*, at 1778. Indeed, the Supreme Court noted that "BMS does sell Plavix in California. Between 2006 and 2012, it ***sold almost 187 million Plavix*** pills in the State and took in more than $900 million from those sales." *Id.*, at 1778 (emphasis added).

Nevertheless, the Supreme Court rejected the argument that these contacts should be considered for specific jurisdiction purposes because the contacts did not relate directly to the claims brought by the non-resident plaintiffs:

> For a court to exercise specific jurisdiction over a claim there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.... When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the

> State.... What is needed is a connection between the forum and the specific claims at issue.

Id., at 1776.

The same holds true here. While Plaintiffs point simply to the raw number of visitors to Kurbanov's Websites, they do not allege (nor can the allege) how many of those visitors (if any) they claim used the Websites to download Plaintiffs' copyrighted works.

Even assuming, however, that Plaintiffs had provided evidence to demonstrate that *some* of the Websites' visitors from Virginia or the United States were misusing the Websites' functionality in a manner that infringed upon Plaintiffs' copyrighted works,[11] this would not advance Plaintiffs' "purposeful availment" argument. As the District Court below properly stated, "Purposeful availment cannot be satisfied by the unilateral activity of those who claim some relationship with a nonresident defendant." J.A.389 (citing *Kulko v. Superior Court of California In and For City and County of San Francisco*, 436 U.S. 84, 93-94 (1978)). With this in mind, the District Court properly concluded that the raw number of visitors to the Websites from Virginia and the United States did not prove purposeful availment because:

[11] The Websites' Terms of Service specifically prohibit, in multiple provisions, the use of the Websites to infringe on the intellectual property rights of third-parties. *See* J.A.159-64

> The contact that users have with the Websites is unilateral in nature and as such cannot be the basis for jurisdiction without more.... Users may access the Websites from anywhere on the globe and they select their location when they use the Websites.

J.A.393.

The District Court's holding was consistent with other decisions from courts within the Fourth Circuit. For example, in *Intercarrier Communications, LLC v. WhatsApp, Inc.*, 2013 U.S. Dist. LEXIS 131318 (E.D. Va. 2013), that court addressed the issue of personal jurisdiction arising out of the use of the immensely popular messaging app, WhatsApp, which the court noted ranked "in the top five of the world's best-selling apps with an estimated 200-300 million users." *Id.*, at *12-13. While acknowledging that "some users of WhatsApp's product do so in Virginia, and undoubtedly ordered the product in Virginia," the court found this to be irrelevant to its purposeful availment analysis:

> Under ICC's theory, however, every district in the United States has jurisdiction over WhatsApp, because it has consciously chosen to conduct business in every single forum in which a user sends a message with the WhatsApp Messenger. The WhatsApp Messenger ranks in the top five of the world's best-selling apps with an estimated 200-300 million users. This Court does not agree with ICC's argument that a company "consciously" or "deliberately" targets a forum if a user unilaterally downloads or uses its software within that forum, nor does ICC cite any authority supporting its broad interpretation of specific jurisdiction.

Id.

As is the case here, the *WhatsApp* case involved parties that were all strangers to Virginia, a fact that the court found relevant to its analysis:

> This patent dispute is between Texas and California companies.... Although some Virginia residents presumably use the popular WhatsApp Messenger, no evidence exists to show that Virginia residents use this software proportionately more than residents of any other state. Accordingly, "[t]his Court cannot stand as a willing repository for cases which have no real nexus to [the Eastern District of Virginia]."

Id., at *17 (quoting *Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F.Supp.2d 689, 699 (E.D. Va. 2000)).

The opinion in *Zaletel v. Prisma Labs, Inc.*, 226 F.Supp.3d 599 (E.D. Va. 2016), is also instructive. There, the plaintiff brought a trademark infringement claim against the defendant that had created a wildly popular app that allows users to apply artistic filters to photographs. Within the first six months of the app's release, it had "been downloaded approximately 70 million times." *Id.*, at 604. In summarizing the plaintiff's jurisdictional arguments, the court stated:

> Distilled to its essence, plaintiff's argument for jurisdiction is (i) that defendant distributes its Prisma app to Virginia users via downloads through Apple and Google's online app stores; (ii) that defendant distributes its Prisma app through defendant's website, http://prisma-ai.com, which links individuals directly to the Apple and Google stores; and (iii) that defendant processes images on servers outside of Virginia and sends the processed images (via defendant's Prisma app) to a Virginia user's device.

Id., at 608.

Nevertheless, the Court rejected personal jurisdiction, citing to this Court's holding in *ALS Scan*: "under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each state where the electronic signal is transmitted and received." 293 F.3d at 714-15.

Because Plaintiffs rely on contacts (visits to the Websites) unconnected to their claims of infringement and because even those contacts which *might* be related to Plaintiffs' claims are initiated unilaterally by the visitors to the Websites, the District Court properly held that the raw number of visitors to the Website from Virginia or the United States did not demonstrate purposeful availment on the part of Kurbanov.

2. The "Nature" of the Interactions with the Websites

Plaintiffs next take issue with the District Court's well-considered conclusion that the Websites are "semi-interactive" under this Court's holding in *ALS Scan*, which adopted a modified version of the sliding scale of interactivity outlined in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Penn. 1997). The District Court, below, held that:

> the Websites are semi-interactive. They allow users to share information with the host and for files to be downloaded, but there is not a significant or prolonged engagement between the user and the Websites.... Also, there is no evidence that users exchanged multiple files with the Websites.... Plaintiffs attempt to describe the Websites as highly interactive due to the million of users. This is incorrect because the number of users cannot make a website highly interactive, there must instead be numerous transactions between the site and a user

> evidencing an ongoing relationship.... Here, there is no ongoing relationship as the Terms of Use state that the files transmitted between the Websites and users are only stored until the user has downloaded them.... Further, users do not need to create an account, sign in, or register in order to use the Websites. This want of an ongoing, developed relationship between users and the Websites leads to a finding that the Websites are semi-interactive.

J.A.392.

Plaintiffs' argument that the Websites somehow become more "interactive" because visitors view more than one page at the website or even that they may return to the website more than once is farcical. For example, the *Washington Post*'s website is likely "passive" inasmuch as it is a "site[] which merely post[s] information on the internet and [is] accessible by users in foreign jurisdictions." J.A. 391. Nevertheless, a visitor may read any number of different stories on different pages at the *Washington Post*'s website and, indeed, readers likely return to the website multiple times. Such does not transform a "passive" website into an "interactive" one.

More to the point, though, Plaintiffs place too much emphasis solely on the level of interactivity. As the District Court properly explained, the level of interactivity of a website does not eliminate the need for the website to *also* be specifically targeted at the forum for jurisdiction to be proper:

> The Fourth Circuit has made it clear that personal jurisdiction requires purposeful targeting of a forum with manifest intent to engage in business there. *ALS Scan*, 293 F.3d at 714; *Graduate Mgmt. Admission Council v. Raju (GMAC)*, 241 F. Supp. 2d 589, 594 (E.D. Va. 2003).

> An evaluation of the contacts in this case points to the absence of personal jurisdiction due to a lack of purposeful targeting of either Virginia or the United States.

J.A.391.

Numerous other Courts have similarly held that "interactivity" is not a substitute for purposeful targeting of a forum. *See*, *e.g.*, *Pathfinder Software, LLC v. Core Cashless, LLC*, 127 F.Supp.3d 531, 542-43 (M.D.N.C. 2015) ("Applying the Fourth Circuit's framework, the Court concludes that Core Cashless' semi-interactive website does not subject it to personal jurisdiction in North Carolina. Nothing about the website suggests that Core Cashless has specifically directed electronic activity toward North Carolina with any manifested intent of engaging in business or other interactions in the state."). *See*, *also*, *Fraserside IP L.L.C. v. Hammy Media, LTD*, 2012 U.S. Dist. LEXIS 5359, *24-25 (N.D. Iowa Jan. 17, 2012) ("Although xHamster's website is both commercial and interactive, as an Iowa district court noted in a case presenting similar facts, such a website 'is arguably no more directed at Iowa than at Uzbekistan.'"); *be2 LLC v. Ivanov*, 642 F.3d 555, 558 (7th Cir. 2011) ("If the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution."); *Toys "R" Us, Inc. V. Step Two, S.A.*, 318 F.3d 446, 452-54 (3d Cir. 2003) ("[T]he mere operation of a commercially interactive web site should

not subject the operator to jurisdiction.... Rather, there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the [jurisdiction].")

3. The Nature of the "Relationship" Between Visitors and the Websites

Plaintiffs next argue that, despite the fact that the Websites are free and open for visitors to use without charge, "the websites and their U.S. and Virginia users have a quintessential Internet-based *commercial* relationship." Appellants' Brief, p.32. Plaintiffs reason that, because Kurbanov's Websites sell advertising space to third-party brokers, this somehow makes the relationship between the Websites and its users commercial in nature.[12] The District Court considered and properly rejected this argument:

> Next, the relationship between the Websites and the users is not based on a commercial contract. While users of the Websites must agree to the Terms of Use, the Websites are free to use. Defendant does earn money from the sale of advertising space on the Websites, but all of this money comes from third party advertisers who Defendant does not deal with directly. The revenue from the advertisements cannot be the basis for finding a commercial relationship with the users because they are separate interactions and the due process analysis must only look at the acts from which the cause of action arises, here, the alleged aid in music piracy.

J.A.393.

[12] The Court might reasonably wonder how this would be relevant to Plaintiffs' specific jurisdiction arguments, even if true. The simple answer is: it wouldn't be.

Plaintiffs nevertheless argue that this revenue model is "hardly uncommon," pointing to "Google, Facebook, ESPN, CNN" as examples. Quite true. However, this proves Defendants' point, not Plaintiffs'. Despite their size, interactivity, and advertising revenues that surely dwarf Defendants' revenues by orders of magnitude, none of the websites cited by Plaintiffs are subject to universal jurisdiction everywhere that the sites may be accessed, which would certainly be the result if Plaintiffs' position were adopted, effectively destroying any limits whatsoever on a court's ability to exercise jurisdiction over a foreign website.

Plaintiffs then pivot, arguing that the nature of the relationship between the Websites and its users is somehow altered (in a jurisdictionally-relevant way) by virtue of the fact that the advertising brokers with whom Defendants have a relationship have the ability to offer their clients advertisements specific to an end-users location. This process is known as "geo-targeting" or "geo-location." It is important to note, of course, that neither Kurbanov nor the Websites perform any geo-targeting or geo-location. To the extent that any geo-locating or geo-targeting of third-party advertisements happens at all, it happens at the direction of the advertising brokers. The brokers – and not Kurbanov – have full control over what ads are shown and whether they are geo-targeted.

The District Court considered all of this and found the allegations of geo-targeted ads to be jurisdictionally irrelevant:

> Plaintiffs make the contention that Defendant's tracking of where the users are located and use of geo-targeted advertisements demonstrates that he was targeting Virginians and Americans. This is an attenuated argument as tracking the location of a user does not show targeting of the user or their location; instead it is merely a recording of where the user's unilateral act took place. *See, e.g., Intercarrier Communications LLC V. WhatsApp Inc.,* 3:12-cv-776, 2013 U.S. Dist. LEXIS 131318, 2013 WL 5230631, at *4 (Sept. 13, 2013 E.D. Va.) (finding no personal jurisdiction based on unilateral acts of users even where the defendant could users' track locations). Even if the Websites' servers knew exactly where the users were located, any interaction would still be in the unilateral control of the users as they initiate the contacts. *See Zaletel v. Prisma Labs, Inc.*, 226 F. Supp. 3d 599, 610 (E.D. Va. 2016) (finding user-initiated contact to be fortuitous and not arising out of defendant created contacts with the forum). It is clear that Defendant did not take any actions which purposefully targeted Virginia or the United States.

J.A.393-94.[13]

Under a remarkably similar set of facts, both the D.C. District Court and the D.C. Circuit Court recently reached the same conclusion as the District Court did

[13] Plaintiffs claim that the Ninth Circuit's decision in *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011) requires a different result. It does not. Contrary to the District Court's holding here that "it is clear that Defendant did not take any action which purposefully targeted Virginia or the United States," J.A.394, the *Mavrix* Court specifically found "most salient the fact that Brand used Mavrix's copyrighted photos as part of its exploitation of the California market for its own commercial gain." *Mavrix*, 647 F.3d at 1229. Specifically, the *Mavrix* court found that the defendants – who operated a celebrity gossip website that had a "specific focus on the California-centered celebrity and entertainment industries" – "continuously and deliberately exploited" the California market for its website. *Id.*, at 1230. Additionally, unlike the case here, the defendant in *Mavrix* "does not argue that the exercise of jurisdiction would be unreasonable on the basis of any of the factors listed in Burger King." *Id.*, at 1228.

here, soundly rejecting a theory of personal jurisdiction based on the placement of geo-targeted ads by a third-party ad broker. *See Triple Up Ltd. v. Youku Tudou Inc.*, 235 F.Supp.3d 15 (D.D.C. 2017), *aff'd* 2018 U.S. App. LEXIS 19699 (D.C. Cir. July 17, 2018). As the *Triple Up* district court held:

> As further evidence of Youku's contacts with the United States, Triple Up points to the fact that Youku generates revenue by allowing third-parties to sometimes display English-language ads for American products before some of Youku's videos, and that these ads are allegedly selected based in part on the viewer's geographic location.... It appears that Youku does not prepare these advertisements itself, but rather contracts with region-specific advertising groups, including groups in the United States, who then ensure that visitors to Youku's websites see ads targeted for their part of the world.... These third-party ads, Triple Up says, represent "purposeful transmission[s] of advertisements to D.C. residents," which it says constitute purposeful availment of D.C. laws.
>
> The Court need not decide whether Youku's hosting of English-language ads for American audiences rises to the level of purposeful availment, however, because Triple Up's lawsuit does not 'aris[e] out of or relate[] to' those third-party advertisements, as specific jurisdiction requires.
>
> …there is no evidence that the presence of any ads for American products played any role in making the allegedly infringing videos viewable on Youku's websites from within the United States. As Youku notes, even if Youku's websites featured only Chinese-language ads for Chinese products aimed at Chinese consumers – or if they featured no advertisements at all – Triple Up's "allegations would remain the same." ... The existence of geographically-targeted advertisements is therefore causally independent of the alleged availability of the films at issue. Thus on these facts – where the advertisements bear no causal relationship to the plaintiff's cause of action – the Court concludes that selling internet ad space to regional agencies who then license that space to local businesses does not

> automatically subject the website to the jurisdiction of every forum in which it is accessible.

Id., at 26-28.

In affirming the district court's holding, the D.C. Circuit went further, finding that the geo-targeted ads did not constitute purposeful availment:

> Triple Up argues that Youku purposefully availed itself of the United States forum by passively permitting the videos to be streamed in the United States along with "geographically targeted" advertisements. Youku indisputably derives revenue from advertisements that accompany its videos, but Triple Up has not shown that Youku was in control of the advertisements' placement with particular films or "purposefully directed" them toward United States viewers... Advertisers purchase Youku's online advertising services through third-party agencies. So while Youku "act[s] to maximize usage of [its] websites," ... Triple Up has not alleged facts plausibly showing that Youku played a material role in pairing advertisements with specific videos based on viewership, see *Walden*, 571 U.S. at 286 ("[A] defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction").

2018 U.S. App. LEXIS 19699 at *7-8.

4. Geo-blocking

On the flip-side of their geo-targeting argument, Plaintiffs argue that Kurbanov subjected himself to jurisdiction in Virginia or the United States by not actively *blocking* the Websites so that they could not be accessed by users in those locations. The law requires no such thing. Personal jurisdiction is based on a defendant's voluntary and relevant contacts with a forum and not an assumption that the operator of a website is subject to universal personal jurisdiction

everywhere in the world except those places where he actively prevents his website from being viewed.

The plaintiff in *Triple Up* made an identical argument, which the district court soundly rejected:

> Triple Up's most novel argument concerns Youku's "geoblocking" capabilities.... It is undisputed that Youku has the technology to block videos on its website from being viewed in certain geographic locations ... there is little question that, in principle, Youku could geoblock *all* its videos from being displayed in the United States, had it the resources and inclination to do so. Thus, Triple Up reasons, because Youku failed to take affirmative steps to prevent the videos from being displayed in the United States, it must have "purposefully transmitted specific broadcasts" to the United States "with full knowledge that they would be viewed" there.
>
> The Court, however, is unpersuaded that the possibility of "geoblocking" warrants a different result here.... To hold otherwise would invite a sea change in the law of internet personal jurisdiction.... To be sure, the proposition that a website's *affirmative geoblocking* efforts should weigh *against* the exercise of personal jurisdiction is unobjectionable. But Triple Up's proposed rule – which equates a *failure to geoblock* with purposeful availment – would effectively mandate geoblocking for any website operator wishing to avoid suit in the United States. To say the least, such a rule would carry significant policy implications reaching beyond the scope of this lawsuit, ... and, indeed, could limit U.S. residents' access to what is appropriately called the *World* Wide Web.
>
> ...Even apart from these difficulties, Triple Up's argument is at odds with existing personal jurisdiction principles. The operative test, after all, is whether the defendant has committed "some *act*" by which it "purposefully avails itself of the privilege of conducting activities within the forum.... The Court is unaware of any authority suggesting that a *failure to act* might constitute purposeful availment.

235 F.Supp.3d at 25.

5. The Appointment of a DMCA Agent

Plaintiffs next argue that the mere fact that the Websites have registered with the United States Copyright Office an agent (located in Rostov-on-Don in Russia) for the receipt of takedown notices under the Digital Millennium Copyright Act (a "DMCA agent"), means that Kurbanov has purposeful availed himself of the United States. The argument is both absurd and counter to the interests of rightsholders.

Preliminarily, the Court should note that each of the Websites' terms of use specifically *disclaim* the idea that they are availing themselves of the United States, stating that:

> Although we are not subject to United States law, we voluntarily comply with the Digital Millennium Copyright Act. Pursuant to Title 17, Section 512(c)(2) of the United States Code. If you believe that any of your copyrighted material is being infringed on the Website, we have designated an agent to receive notifications of claimed copyright infringement.

J.A.164, 172.

Evan if this were not the case, at least one court to directly consider the question held specifically that: "The fact a DMCA agent is registered in the United States should not be considered when evaluating contacts for personal jurisdiction." *Hydentra HLP Int., Ltd. v. Sagan Ltd*., 266 F.Supp.3d 1196, 1203 (D. Ariz. 2017).

And, although the appointment of a DMCA agent does not even hold the same significance as the appointment of a statutory agent for the service of process (who, by necessity, is actually within the forum as opposed to Defendants' DMCA agent here), it has long been recognized in this Circuit (and elsewhere) that the appointment of a statutory agent within the forum is insufficient to confer personal jurisdiction over a defendant. *See*, *e.g.*, *Sebastian v. Davol, Inc.*, 2017 U.S. Dist. LEXIS 122466, at *31 (W.D.N.C. Aug. 3, 2017) ("[T]he designation of a statutory agent for service of process [is] insufficient to confer jurisdiction over an out-of-state corporation." (citing *Public Impact, LLC v. Boston Consulting Grp., Inc.*, 117 F.Supp.3d 732, 739 (M.D.N.C. 2015), *Gestao E Servicos LDA v. Virgin Enters. Ltd.*, 511 F.3d 437, 446 (4th Cir. 2007), and *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971))). Other courts have held similarly. *See King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 576 (9th Cir. 2011) ("[I]t is the corporate activities of the defendant, not just the mere designation of a statutory agent, that is helpful in determining whether the court has personal jurisdiction over the defendant.... The simple act of appointing a statutory agent is not, nor has it ever been, a magical jurisdictional litmus test.").

Additionally, courts have long held that a party's interactions with a United States government agency cannot be part of the jurisdictional analysis. *See*, *e.g.*, *LG Display Co., LTD. v. Obayashi Seikou Co., LTD*, 919 F.Supp.2d 17, 27 (D.D.C.

2013) ("Stated simply, a party's contacts with government agencies do not enter the jurisdictional calculus."); *Freiman v. Lazur*, 925 F.Supp. 14, 24 (D.D.C. 1996) (government contacts doctrine prevented the exercise of personal jurisdiction when the defendant applied to register a copyright with the U.S. Copyright Office in Washington, D.C.); *Lamb v. Turbine Designs, Inc.*, 41 F.Supp.2d 1362, 1365 (N.D. Ga. 1999) ("Rooted in the constitutional right to petition the government and first recognized in the District of Columbia, the 'governmental contacts' principle prevents a court from exercising jurisdiction based solely on a defendant's contact with a federal instrumentality.").

Finally, consideration of the Websites' DMCA agent as part of a jurisdictional analysis would run counter to public policy and defeat the *protections* provided to rights-holders under the DMCA. Congress enacted the DMCA to "foster cooperation among copyright holders and service providers in dealing with infringement on the Internet...." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021-22 (9th Cir. 2013). If a foreign website-operator were to subject itself to jurisdiction within the United States simply by virtue of designating a DMCA agent, the website operator would have strong incentive not to do so, thwarting the purposes of the DMCA.

6. Random Minor Contacts with U.S. Businesses

Plaintiffs next half-heartedly argue that random minor contacts with United States businesses (unrelated to Plaintiffs' actual claims here) are sufficient to establish personal jurisdiction. For example, Plaintiffs suggest that it is jurisdictionally significant that the domain names for the Websites were registered with Arizona-based registrar GoDaddy.com. It is an argument easily (and frequently) rejected. *See*, *e.g.*, *Proprietors of Strata Plan No. 36 v. Coral Gardens Resort Mgmt., Ltd.*, 2009 U.S. Dist. LEXIS 97704, at *15 (E.D. Va. Oct. 16, 2009) ("Finally, as to the registration of the domain name in Virginia, the court noted 'mere registration of the domain name with a company located in Virginia does not support personal jurisdiction in this state.'"); *Graduate Mgmt. Admission Council*, 241 F.Supp.2d at 595 ("First, mere registration of the domain name with a company located in Virginia does not support personal jurisdiction in this state."); *Am. Online, Inc. v. Huang*, 106 F.Supp.2d 848, 858 (E.D. Va. 2000) ("Even assuming that a domain name registration is a 'thing' that may be located in Virginia, it is nonetheless a relatively minor portion of the Internet's architecture, and a minuscule presence in this Commonwealth; in terms of physical or electronic presence, it is merely a reference point in a computer database."); *EZScreenPrint LLC v. SmallDog Prints LLC*, 2018 U.S. Dist. LEXIS 131611, at *8 (D. Ariz. Aug. 6, 2018) ("Moreover, the Court is cognizant of the fact that Defendants' domain

name is registered with GoDaddy, an Arizona corporation. GoDaddy is apparently the largest domain registrar in the world and maintains over 50 million domain names worldwide, as of 2013.... The argument Plaintiff advances could allow millions of companies with domain names registered through GoDaddy to be subject to general personal jurisdiction in the state of Arizona.").

Even more absurd, however, is Plaintiffs' suggestion that jurisdiction is proper in Virginia because Verisign, Inc. *oversees* the entire top-level .com domain and Neustar, Inc. *oversees* the entire top-level .biz domain. Currently, there are **140.7 million registered .com domains and an additional 1.98 million .biz domains**. *See* DomainTools, "Domain Count Statistics for TLDs" (last accessed April 11, 2019) http://research.domaintools.com/statistics/tld-counts. Under Plaintiffs' theory, every registrant of each of those 142+ million domains is subject to personal jurisdiction in Virginia by virtue of their use of a top-level .com or .biz domain.

Slightly (but only slightly) less absurd is Plaintiffs' argument that jurisdiction can be based on the fact that the Websites had previously utilized at least some servers located within the United States. First, it should be noted that, as of the date that the Complaint was filed, the Websites did not utilize *any* servers located in Virginia or the United States. Prior to that, however, the Websites had previously utilized Amazon Web Services ("AWS") for hosting, which does have

servers in Virginia, among other places. J.A.73, ¶¶42-44. The agreement the Websites previously had with Amazon was entered into from Russia. *Id.*, ¶43. In July of 2018, the Websites switched their servers to Hetzner Online GmbH, which is located in Germany. *Id.*, ¶44.

Even if this were not the case, however, this Court has specifically "described as 'de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum." *Carefirst*, 334 F.3d at 402 (citing *Christian Science Bd. Of Directors v. Nolan*, 259 F.3d 209, 217 (4th Cir. 2001)). Other courts have held similarly. *See*, *e.g.*, *Zaletel*, 226 F.Supp.3d at 610 ("[I]t is pellucid that defendant's servers do not target Virginia, because the users who initiate contact with the server unilaterally control the location where the server's response will wind up.... Thus, defendant's (and its server's) contact with Virginia – as opposed to any other State – is entirely fortuitous and did not 'arise out of contacts that the defendant [itself] create[d] with the forum State.'").

The same result should obtain here. Although the Websites may have – for a time – been hosted on third-party servers in Virginia, they were never managed, administered, or maintained in Virginia or the United States. To the contrary, the Websites were, at all times, managed, maintained, and administered exclusively out of Russia. As such, the mere presence of servers within Virginia is not a

sufficient basis for the exercise of personal jurisdiction over Kurbanov in Virginia or the United States.

Finally, Plaintiffs assert that the Websites' Terms of Use are somehow relevant here (even though they are wholly unrelated to Plaintiffs' claims). Specifically, Plaintiffs point to portions of the jurisdictional provisions contained within the Terms of Use (while ignoring those parts of the Terms of Use that more clearly defy their position). First, the Terms specifically call for the application of "the laws of THE RUSSIAN FEDERATION without regard to conflict of law provisions." J.A.166, 174. Next, the provision notes that:

> FOR ANY CLAIM BROUGHT BY YOU AGAINST US, YOU AGREE TO SUBMIT AND CONSENT TO THE PERSONAL AND EXCLUSIVE JURISDICTION IN, AND THE EXCLUSIVE VENUE OF THE COURTS IN THE RUSSIAN FEDERATION.

Id.

This is, of course, directly contrary to Plaintiffs' supposition that the Kurbanov has intentionally subjected himself to the jurisdiction of Virginia and/or the United States. Plaintiffs, however, rely on the next sentence of the agreement that provides that, for claims *brought by* Kurbanov, such claims may be brought either in the Russian Federation or wherever the user may be found. *Id.* Such a provision, of course, is not only common sense but fully consistent with Defendant's position here because it simply preserves the option for the Defendant Websites to bring an action wherever a user may be found, *recognizing that there*

may not be minimum contacts to sue a user of the website in the Russian Federation, just as there are no minimum contacts involving Kurbanov in the United States. Moreover, it is not what Kurbanov has claimed to *reserve* for himself that is actually relevant, but whether Kurbanov has acted in a way that is consistent with an exercise of personal jurisdiction. And, despite this provision in the Terms of Use, Kurbanov has never sued anyone in Virginia, the United States, or anywhere else for that matter. J.A.250, ¶3.

Ultimately, having considered all of Plaintiffs' many arguments, the District Court concluded that "[i]t is clear that Defendant did not take any actions which purposefully targeted Virginia or the United States." J.A.394. The District Court was correct: it *is* clear and, accordingly, this Court should affirm the dismissal of Plaintiffs' complaint.

B. An Exercise of Jurisdiction Would Not Be Reasonable

Having conclusively determined that it could not exercise jurisdiction over Kurbanov because he had not purposefully availed himself of Virginia or the United States, the District Court chose not to undertake the analysis of whether an exercise of jurisdiction would have been constitutionally reasonable. Had the District Court chosen to do so, it would have concluded that an exercise of jurisdiction would not have been reasonable and this Court is free to affirm the District Court's dismissal on that basis. *Drager*, 741 F.3d at 476 (the Court does

"not defer to the district court and may affirm the dismissal of Gross's complaint on any ground"); *Greenhouse*, 392 F.3d at 660 ("[W]e 'may affirm the dismissal by the district court on the basis of any ground supported by the record even if it is not the basis relied upon by the district court.'").

In determining if an exercise of personal jurisdiction is constitutionally reasonable, this Court has dictated the consideration of five factors: "(1) the burden on the defendant of litigating in the forum; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the shared interest of the states in obtaining efficient resolution of disputes; and (5) the interests of the states in furthering substantive social policies." *Consulting Eng'rs Corp.*, 561 F.3d at 279.

1. *Burden on the Defendant* – Kurbanov is a citizen of Russia who has never visited the United States and does not hold a United States visa. As noted, above, the United States Embassies and Consulates has indicated that there are extended wait times to obtain a United States visa as a result of the closing of a number of consulates within Russia. Defending a lawsuit in the United States – where he has no connections whatsoever – would present a great burden to Kurbanov.

2. *The Interest of the Forum State* – If the forum state is considered to be Virginia, then the state has no interest in the present litigation

whatsoever. None of the parties to the litigation are from Virginia and no actions underlying Plaintiffs' claims occurred in Virginia. And, although the United States certainly has an interest in protecting the interests of copyright holders, it is generally recognized that those interests end at the water's edge. *See*, *e.g.*, *Tire Eng'g*, 682 F.3d at 306 ("As a general matter, the Copyright Act is considered to have no extraterritorial reach."); *Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 249 n.5 (4th Cir. 1994) ("[T]he Copyright Act is generally considered to have no extraterritorial application."). *See*, *also*, *Palmer v. Braun*, 376 F.3d 1254, 1258 (11th Cir. 2004) ("Federal copyright law has no extraterritorial effect, and cannot be invoked to secure relief for acts of infringement occurring outside the United States."). Accordingly, this factor does not support an exercise of jurisdiction.

3. *Plaintiffs' Interests in Convenient and Effective Relief* – Plaintiffs would undoubtedly face some burdens in having to litigate their claims against Kurbanov in Russia. Nevertheless, Russian law provides for the protection of copyright interests. *See*, *e.g*, International Comparative Legal Guides – Copyright 2018 | Russia, available at https://iclg.com/practice-areas/copyright-laws-and-regulations/russia#chaptercontent5. And, as this Court has held, the burdens on an alien defendant must be given enhanced consideration even if a denial of personal jurisdiction would present the plaintiffs with their own burdens.

See, *e.g.*, *Ellicott Mach. Corp. v. John Holland Party, Ltd.*, 995 F.2d 474, 480 (4th Cir. 1993).

4. *The Final Factors* – To the extent that the final factors are applicable, they weigh in favor of a denial of personal jurisdiction given the important sovereignty concerns at play. Astonishingly, Plaintiffs assert (presumably straight-faced) that, in the present case:

> the federalism concerns that have led the Supreme Court to limit the jurisdiction of one state to avoid interfering with the prerogatives of another are entirely absent.

Appellant's Brief, p.45.

What, Plaintiffs seem to miss, however, is that the state "federalism concerns" absent here are replaced with ***heightened*** concerns of national sovereignty. *See*, *e.g.*, *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."); *Gray v. Riso Kagaku Corp.*, 1996 U.S. App. LEXIS 8406, at *11 (4th Cir. Apr. 17, 1996) ("When personal jurisdiction over an alien defendant is at issue, a court must also consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a court in the United States."); *Base Metal Trading*, 283 F.3d at 214 ("And '[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in

assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.'"); *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199-200 (9th Cir. 1988) ("The Supreme Court, though, has cautioned against extending state long arm statutes in an international context.... This circuit has also stated that litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist.").

Accordingly, and for the reasons outlined above, this Court should find that an exercise of personal jurisdiction over Kurbanov would not be reasonable.

III. Plaintiffs Waived Jurisdictional Discovery and, in Any Event, it is Not Warranted Here.

This Court reviews a denial of jurisdictional discovery under an abuse of discretion standard. *Carefirst*, 334 F.3d at 402-03. Where, as here, Plaintiffs raised the issue before the District Court only in a footnote, without any explanation as to why such jurisdictional discovery was necessary or warranted, and indeed actually disclaiming the need for such discovery,[14] they can hardly be heard now to complain that the District Court "abused its discretion" in failing to give them that which they said they did not need. *See Unspam Techs.*, 716 F.3d at 330.

[14] *See* J.A.135, fn.11 ("Plaintiffs respectfully submit that the jurisdictional basis for this case is already plain").

CONCLUSION

For the reasons stated hereinabove, this Court should affirm the District Court's dismissal of Plaintiffs' complaint, holding that personal jurisdiction over Kurbanov is not constitutionally permissible in Virginia or the United States.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee Tofig Kurbanov respectfully requests that oral argument be granted in accordance with Fed. R. App. P. 34 because the Court's decisional process would be aided by oral argument.

Respectfully Submitted,

/s/ Evan Fray-Witzer
Evan Fray-Witzer
Ciampa Fray-Witzer, LLP
20 Park Plaza, Suite 505
Boston, MA 02116
617-426-0000
Evan@CFWLegal.com

/s/ Valentin Gurvits
Valentin Gurvits
Boston Law Group, PC
825 Beacon Street, Ste 20
Newton, MA 02459
617-928-1800
vgurvits@bostonlawgroup.com

/s/ Matthew Shayefar
Matthew Shayefar
Law Office of Matthew Shayefar, PC
925 N La Brea Ave
W. Hollywood, CA 90038
323-948-8101
matt@shayefar.com

Dated: April 11, 2019

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Dated: April 11, 2019 /s/ Matthew Shayefar, Esq.

CERTIFICATE OF SERVICE

I certify that on April 11, 2019, I electronically file the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: April 11, 2019 /s/ Matthew Shayefar, Esq.