

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

02-5165 through 02-5175
BRIDGEPORT MUSIC, INC., et
al.,

Plaintiffs-Appellants,

v.

STILL N THE WATER
PUBLISHING, et al.,
Defendants-Appellees.

02-5227 through 02-5234
BRIDGEPORT MUSIC, INC., et
al.,

Plaintiffs-Appellants,

v.

DM RECORDS, INC., et al.,
Defendants-Appellees.

Nos. 02-5165
through 02-5175;
02-5227 through
02-5234

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 01-00707/749/750/860/869/881/905/964;
01-01093/94/128; 01-00730/827/832/842/856/946;

2 *Bridgeport Music, et al.* Nos. 02-5165 - 02-5175;
v. Still N the Water 02-5227 - 02-5234
Publishing, et al.

01-01028/53—Thomas A. Higgins, Todd J. Campbell,
District Judges.

Argued and Submitted: October 29, 2002

Decided and Filed: May 5, 2003

Before: KEITH and DAUGHTREY, Circuit Judges;
KATZ, District Judge.

COUNSEL

ARGUED: Richard S. Busch, KING & BALLOW, Nashville, Tennessee, for Appellants. Henry J. Fasthoff IV, STUMPF, CRADDOCK, MASSEY & PULMAN, Houston, Texas, for Appellees. **ON BRIEF:** Richard S. Busch, D’Lesli M. Davis, Virginia F. Flack, KING & BALLOW, Nashville, Tennessee, for Appellants. Henry J. Fasthoff IV, STUMPF, CRADDOCK, MASSEY & PULMAN, Houston, Texas, Mary Ellen Morris, MILLER & MARTIN, Nashville, Tennessee, Elena J. Xoinis, DODSON, PARKER, DINKINS & BEHM, Nashville, Tennessee, Karl M. Braun, HALL, BOOTH, SMITH & SLOVER, Nashville, Tennessee, for Appellees.

OPINION

PER CURIAM Plaintiffs-Appellants Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc. (collectively “Bridgeport”) appeal the

* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

the district court did not make findings as to the remaining two elements of the *Mohasco* test. On appeal, the parties chiefly dispute the district court's purposeful availment findings, but also present arguments as to the remaining *Mohasco* factors. However, because the district court did not address these factors, and because the appellate record does not lend itself to a ruling on these factors as to each of the 18 individual actions before the Court, we address only the district court's purposeful availment determination.

The district court did not conduct an evidentiary hearing, and we therefore review the pleadings and other documentary evidence in a light most favorable to Bridgeport without considering Appellees' controverting assertions. See *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000). "Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff . . . alleges collectively fail to state a prima facie case for jurisdiction." *Kerry Steel, Inc. v. Paragon Indus.*, 106 F.3d 147, 149 (6th Cir. 1997) (quoting *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991)). As plaintiff, Bridgeport bears the burden of establishing jurisdiction, see *Tobin*, 993 F.2d at 543, but need only make a prima facie showing. See *Calphalon*, 228 F.3d at 721.

C. Purposeful Availment

Under the first prong of the *Mohasco* test, Appellants must establish that Appellees purposefully availed themselves of the privilege of acting in Tennessee or causing a consequence in Tennessee. "[P]urposeful availment is something akin to a deliberate undertaking to do or cause an act or thing to be done in [the forum state] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [the forum state], something more than a passive availment of [the forum state's] opportunities." *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891 (6th Cir. 2002) (internal citation and quotation omitted). "The 'purposeful

availment' requirement is satisfied when the defendant's contacts with the forum state 'proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State,' and when the defendant's conduct and connection with the forum are such that he 'should reasonably anticipate being haled into court there.'" *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (quoting *Burger King*, 471 U.S. at 474-75). The "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Burger King*, 471 U.S. at 475 (internal citation omitted); see also *Lak, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir. 1989). The emphasis in the purposeful availment inquiry is whether the defendant has engaged in "some overt actions connecting the defendant with the forum state." *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998). If a plaintiff can demonstrate purposeful availment, the absence of physical contacts with the forum state will not defeat personal jurisdiction over a non-resident defendant. See *Burger King*, 471 U.S. at 476; *CompuServe*, 89 F.3d at 1265.

1. Stream of commerce "plus" theory

As a preliminary matter, we note that in the instant action, the district court, as well as the parties on appeal, presume that this Circuit has adopted Justice O'Connor's approach to purposeful availment as articulated in *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102 (1987) (O'Connor, J.) (plurality op.). In *Asahi*, which reflects the Supreme Court's most recent discussion of purposeful availment, the Court debated whether a foreign manufacturer that places a product in the stream of commerce purposefully avails itself of the privilege of conducting business in a state where the product ultimately is found. In her plurality opinion, which embraces what has come to be known as the "stream of commerce 'plus'" theory, Justice O'Connor opined

