

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

JEROMY HEDGES and KAYLA	)	
HEDGES, Husband and Wife,	)	
Individually, and as the Parents and	)	
Next Friends of E.H., a minor,	)	Case No. CIV-14-1145-R
	)	
Plaintiffs,	)	
v.	)	
	)	
TRAILER EXPRESS, INC. d/b/a	)	
TRAILER EXPRESS	)	
MANUFACTURING, INC.,	)	
	)	
Defendant.	)	

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**DEFENDANT’S REPLY TO PLAINTIFFS’ OBJECTION TO  
DEFENDANT’S MOTION TO DISMISS  
FOR LACK OF PERSONAL JURISDICTION**

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**d/b/a TRAILER EXPRESS MANUFACTURING, INC.**

COMES NOW the Defendant, Trailer Express, Inc. d/b/a Trailer Express Manufacturing, Inc. (“Trailer Express”), by and through the undersigned, and pursuant to LCvR 7.1(i), respectfully submits this Reply to Plaintiffs’ Objection [Doc. 14] to Trailer Express’ Motion to Dismiss for Lack of Personal Jurisdiction [Doc. 11].

### **INTRODUCTION**

Plaintiffs claim Trailer Express has waived its right to object to this Court’s exercising personal jurisdiction over it, even though Trailer Express has asserted its jurisdictional objection in its state-court Answer, (Aff. Def. ¶ 2 [Doc. 1-2]), continued to maintain that objection in the Joint Status Report and Discovery Plan submitted to this Court, ([Doc. 8] at 4), and orally announced to this Court at this matter’s status and scheduling conference that it would be filing a Motion consistent with that objection. Plaintiffs’ argument rests upon a complete misconstruction of Fed. R. Civ. P. 12 and offers no response to the actual merits presented in Trailer Express’ Motion. Accordingly, Plaintiffs have shown no basis for this Court to exercise jurisdiction over Trailer Express, and they have likewise failed to justify their request for jurisdictional discovery. Trailer Express’ Motion should therefore be granted and this action should be dismissed.

#### **I. TRAILER EXPRESS HAS PRESERVED ITS JURISDICTIONAL OBJECTION.**

The basis of Plaintiffs’ argument revolves around the following sentence in Rule 12(b): “A motion asserting any of these defenses [including lack of personal jurisdiction] must be made before pleading if a responsive pleading is allowed.” (Pls.’ Obj. [Doc. 14] at 2.) However, by looking only at that language, Plaintiffs completely misconstrue Rule

12(b). Contrary to Plaintiffs' assertion, defenses such as lack of personal jurisdiction must be asserted in a responsive pleading (e.g. an Answer) **or** they may be asserted in a motion:

Every defense to a claim for relief in any pleading **must be asserted in the responsive pleading** if one is required. But a party **may** assert the following defenses by motion:

...

(2) lack of personal jurisdiction;

...

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

Fed. R. Civ. P. 12(b) (emphasis supplied);<sup>1</sup> *F.D.I.C. v. Oaklawn Apartments*, 959 F.2d 170, 175 (10th Cir. 1992) (“Objections to personal jurisdiction ... must be asserted in the answer **or** in a pre-answer motion.” (emphasis supplied)). Likewise, Plaintiffs misstate Rule 12(h)(1)(B), which specifically addresses when some defenses, including lack of personal jurisdiction, may be waived. Under Plaintiffs' interpretation, Rule 12(h)(1)(B) waives defenses if either of the following two conditions apply: (1) the defense was not made in a motion, or (2) the defense was not in a responsive pleading. (Pls.' Obj. [Doc. 14] at 3.) That is simply not what the Rule says. As the U.S. District Court for the Northern District of Oklahoma has explained:

Rule 12(h)(1) states that a personal jurisdiction defense must be asserted in a pre-answer motion, if one is made, or pled in the answer, if no pre-answer motion is filed. **Rule 12(h)(1) does not ... require the filing of a pre-answer motion to preserve any of the defenses listed in the rule.** Rather

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<sup>1</sup> Plaintiffs also misstate Rule 12(b)'s counterpart in the Oklahoma Pleading Code, which states a defense of lack of personal jurisdiction “shall be asserted **in** the responsive pleading,” Okla. Stat. tit. 12 § 2012(B) (emphasis supplied), not “before” as Plaintiffs state, (Pls.' Obj. [Doc. 14] at 3 n.1).

the defenses listed in Rule 12(h)(1), such as lack of personal jurisdiction, must be asserted either in a pre-answer motion or in the answer.

*Tesh v. U.S. Postal Service*, 215 F. Supp. 2d 1220, 1226 (N.D. Okla. 2002) (emphasis supplied).

Accordingly, a motion is not a prerequisite to assert and preserve a jurisdictional defense that is already set forth in a responsive pleading. Trailer Express has complied with Rule 12(b) by asserting its objection to personal jurisdiction in its state-court Answer. (Aff. Def. ¶ 2 [Doc. 1-2].) That said, Plaintiffs also contend that Trailer Express has participated in this litigation, which Plaintiffs contend evidences waiver. (Pls.' Obj. [Doc. 14] at 3-4.) A party's "continued participation in litigation" can result in the forfeit of a previously-asserted objection to personal jurisdiction because such participation is inconsistent with an assertion that personal jurisdiction is lacking. *Hunger U.S. Special Hydraulics Cylinders Corp. v. Hardie-Tynes Mfg. Co.*, 203 F.3d 835, 2000 WL 147392, \*2-3 (10th Cir. 2000) (unpublished table op.) (objection to personal jurisdiction forfeited when, over the course of three years, defendant filed cross-claim and actively sought relief, engaged in settlement negotiations that resolved almost all other claims in case, then sought dismissal for lack of personal jurisdiction). The question, however, turns on whether the defendant's actions amounted to a "legal submission of jurisdiction to the court." *See id.* at \*3 (citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-75 (1982)). The mere filing of entries of appearance, or similar documents that do not evidence defensive moves on the merits, do not waive a properly asserted jurisdictional defense. *See*

*Springer v. Balough*, 96 F. Supp. 2d 1250, 1256 (N.D. Okla. 2000); *see also ORI, Inc. v. Lanewala*, 147 F. Supp. 2d 1069, 1074 (D. Kan. 2001) (if defendant asserted jurisdiction objection it would have been waived when defendant sought “affirmative relief” in counterclaims and motions for summary judgment).

For example, in *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, the federal district court in Kansas found that defendants did not waive any objection to personal jurisdiction, even though the defendants, for approximately two months before raising their objection, participated in limited litigation, including attending of a mediation, exchanging Rule 26(a) initial disclosures, and attending of a pretrial conference. 427 F. Supp. 2d 1011, 1015-16 (D. Kan. 2006). The *Sunlight* court reached its conclusion noting that, unlike cases such as *Hunger*, the defendants did not actively litigate the case and “pass up opportunities to raise the defense.” *Sunlight*, 427 F. Supp. 2d at 1015-16.

In this case, Trailer Express’ objection to personal jurisdiction was plainly set forth as an affirmative defense in its Answer. Under Rule 12(b) and Rule 12(h), Trailer Express has properly asserted and has not waived its objection to personal jurisdiction. Additionally, Trailer Express’ activities in this action do not evidence the seeking of affirmative relief, nor can Trailer Express’ activities amount to a “legal submission of jurisdiction.” Indeed, while Trailer Express participated in the submission of the Joint Status Report and Discovery Plan and attended this matter’s status and scheduling conference, Trailer Express also continued to assert its objection in the Joint Status Report and Discovery Plan, ([Doc. 8] at 4), and even announced as such to the Court during the status and scheduling conference. Moreover, Plaintiffs’ contention that Trailer

Express waived its objection when it submitted its Notice of Constitutional Question [Doc. 10] is wholly unfounded. Trailer Express' Notice was filed by command of Fed. R. Civ. P. 5.1, which **requires** that such a notice be "promptly" filed if any pleading or defense raises a constitutional issue. The Notice does not seek any affirmative relief, but is merely a Rule-required notice to the Oklahoma Attorney General that, prior to the Rule 5.1's implementation, would instead have been sent from the Court directly instead of Trailer Express.<sup>2</sup> See Fed. R. Civ. P. 5.1 advisory committee's note (2006).

Similar to the defendants in *Sunlight*, Trailer Express has not "actively participated in litigation to such an extent that they have waived their right to challenge personal jurisdiction." 427 F. Supp. 2d at 1015-16. Because Trailer Express has not waived its jurisdictional objection, and because Plaintiffs have provided no argument to the actual merits of Trailer Express' Motion to Dismiss, this Court should sustain Trailer Express' Motion.

**II. PLAINTIFFS' REQUEST FOR JURISDICTIONAL DISCOVERY SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE FAILED TO SHOW ANY CONTROVERSY OVER FACTS BEARING ON PERSONAL JURISDICTION.**

In an effort to establish personal jurisdiction after the fact, Plaintiffs alternatively request this Court allow it to conduct jurisdictional discovery. (Pls.' Obj. [Doc. 14] at 4.) However, Plaintiffs have not shown, in their Petition or in their present Objection, how

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<sup>2</sup> Plaintiffs' reliance on *First Texas Savings Assoc. v. Bernsen*, 921 P.2d 1293 (Okla. Civ. App. 1996) is distinguishable. In that case, the defendants' objection was waived by operation of Oklahoma statute, Okla. Stat. tit. 12 § 2012(A)(1)(b), which states certain defenses – including lack of personal jurisdiction – are waived if a defendant opts to enter an appearance and file a reservation of time with which to answer. *Bernsen*, 921 P.2d at 1296.

any facts bearing on jurisdiction are controverted to allow jurisdictional discovery. Plaintiffs therefore have not met their burden of showing why Trailer Express should now be haled into this forum to submit to discovery addressing why it should not be in this forum in the first place.

When a defendant moves to dismiss for lack of jurisdiction, trial courts are vested with “broad discretion” when deciding whether a party is entitled to limited discovery of the facts supporting such a motion. *Budde v. Ling-Temco-Vought, Inc.*, 511 F.2d 1033, 1035 (10th Cir. 1975). A trial court abuses its discretion only if the denial of jurisdictional discovery results in prejudice to a litigant, with prejudice present only when “pertinent facts bearing on the question of jurisdiction are controverted ... or where a more satisfactory showing of the facts is necessary.” *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1189 (10th Cir. 2010) (quoting *Sizova v. Nat’l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002)). A court does not abuse its discretion if it finds jurisdictional discovery would be unlikely to resolve the jurisdictional dispute raised. *Bell Helicopter Textron, Inc. v. Heliquest Int’l, Ltd.*, 385 F.3d 1291, 1299 (10th Cir. 2004). Importantly, the party seeking jurisdictional discovery bears the burden of proving entitlement to such discovery. *Breakthrough Mgmt.*, 629 F.3d at 1189 n.11.

Judge Eagan of the Northern District of Oklahoma addressed this problem in *Speedsportz, LLC v. Bauer*, No. 11-CV-0280-CVE-PJC, 2011 WL 4526767 (N.D. Okla. Sept. 28, 2011) (unpublished). In that case, an Oklahoma company sued a California driver in Oklahoma federal court for damage the driver allegedly caused to the

company's collectible automobile while test driving it in Arizona. *Id.* at \*1. The driver moved to dismiss for lack of personal jurisdiction, relying on a supporting affidavit describing his lack of Oklahoma contacts, and the plaintiff asserted there were bases for both general and specific jurisdiction over the driver. *Id.* at \*1-3. As a last resort, the plaintiff argued it was at least entitled to conduct jurisdictional discovery and look into the driver's national connections to establish jurisdiction in Oklahoma. *Id.* at \*4. The court denied the request, noting that "plaintiff [had] not identified a single fact" in dispute, citing to other district courts in the Tenth Circuit that had likewise denied discovery where the plaintiff had not first shown any actual controversy of jurisdictional facts. *Id.* (citing *Fisher v. Sw. Bell Tel. Co.*, No. 07-CV-433-CVE-SAJ, 2008 WL 2165957, \*5 n.3 (N.D. Okla. May 20, 2008) (unpublished); *Custom Cupboards, Inc. v. Cemp Srl*, No. 10-1060-JWL, 2010 WL 1854054, \*5 (D. Kan. May 7, 2010) (unpublished); *First Magnus Fin. Corp. v. Star Equity Funding*, No. 06-2426-JWL, 2007 WL 635312, \*10 (D. Kan. Feb. 27, 2007) (unpublished)).

In *McNeill v. Geostar*, the Utah federal district court likewise denied a request for jurisdictional discovery, wherein the plaintiff wanted to establish personal jurisdiction through a company's "alter-ego" connection with the forum. No. 2:06-CV-911TS, 2007 WL 1577671, \*3 (D. Utah May 29, 2007) (unpublished). Finding the plaintiff's efforts to make such a connection would not be fruitful, the court explained:

The Court agrees with Gastar that Plaintiff has not identified any controverted jurisdictional facts which would warrant jurisdictional discovery, and he may not rest on speculative or conclusory claims. Plaintiff's broad assertions under an alter ego theory are vague and conclusory-largely stated "upon information and belief"-and do not

demonstrate factual disputes. Nor does Plaintiff identify what discovery he seeks or why it would be fruitful to the precise issues before the Court. Therefore, the Court declines to allow discovery on the limited issue of personal jurisdiction over Gastar in this matter.

*Id.* (footnotes omitted).

In this case, the Plaintiffs' only allegations speaking to Trailer Express' contact with this forum aver that Trailer Express' product, a trailer, was placed into the stream of commerce. (Pet. [Doc. 1-1] ¶ 3.) In their Objection, Plaintiffs present no additional allegations in support of jurisdiction, and they fail to illustrate any controversy they have with the assertions made in the affidavit of Mr. Lewis May, which provides the factual support for Trailer Express' Motion to Dismiss. (*See generally* May Aff. [Doc. 11-1].) Under the rationale provided in *Speedsportz* and *McNeil* both, Plaintiffs cannot rest on these nearly-nonexistent allegations but still seek discovery to try and find jurisdiction after the fact. Indeed, to allow otherwise would be contrary to the basic good-faith pleading burden found in the Federal Rules of Civil Procedure: Plaintiffs, in the first instance, must "have a good-faith basis for asserting personal jurisdiction over [Trailer Express] prior to filing [their] complaint."<sup>3</sup> *Weisler v. Cmty. Health Sys., Inc.*, Civ. No. 12-0079NV/CG, 2012 WL 4498919, \*15 (D.N.M. Sept. 27, 2012) (unpublished) (plaintiff was not entitled to jurisdictional discovery when original assertion of jurisdiction was "unsupported by any colorable facts").

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<sup>3</sup> The fact Plaintiffs claim originated in state court, rather than federal court, does not change this "good faith" requirement when, under Okla. Stat. tit. 12 § 2011, Plaintiffs are still bound to only present their claim against Trailer Express if warranted under law.

Moreover, while Plaintiffs claim they should be entitled to cross-examine Mr. May on the contents of his affidavit, they do not explain what facts they think they will unearth that will change the dispositive assertions made in Mr. May's affidavit. (*See* Pls.' Obj. [Doc. 14] at 4.) This indicates that, even if granted jurisdictional discovery, there is a low probability that allowing such discovery will affect the merits of Trailer Express' Motion to Dismiss. This low probability further warrants this Court's denying Plaintiffs' request for discovery. *See Bell Helicopter*, 385 F.3d at 1299; *Grynberg v. Ivanhoe Energy, Inc.*, 666 F. Supp. 2d 1218, 1228 (D. Colo. 2009) (proposed discovery unlikely to have real impact on jurisdictional issues), *aff'd*, 490 F. App'x 86 (10th Cir. 2012) (unpublished).

Finally, Plaintiffs' assertion that they should be able to discover "the extent of Defendant's activities in Oklahoma[.]" (Pls.' Obj. [Doc. 14] at 4), suggests Plaintiffs seek nothing more than an inappropriate fishing expedition, again warranting denial of the requested discovery. *See Breakthrough Mgmt.*, 629 F.3d at 1190 (conclusory assertion that discovery was necessary seemed like attempt to "use discovery as a fishing expedition rather than to obtain needed documents to defeat" tribe's jurisdictional sovereign immunity claim); *Custom Cupboards*, 2010 WL 1854054 at \*6 ("In the absence of any material and relevant evidence from plaintiff to support its assertion of jurisdiction, the Court is not prepared to authorize what would amount to a fishing expedition – and a costly one, at that – in an effort to allow plaintiff to hale the Italian defendant into court in Kansas."); *see also Sizelove v. Woodward Regional*, No. CIV-11-0230-HE, 2011 WL 5087997, \*3 (W.D. Okla. Oct. 25, 2011) (unpublished) (denying

jurisdictional discovery where “plaintiff has not offered any basis for the court to conclude that such discovery would be other than a fishing expedition”).

Plaintiffs did not provide any factual contentions supporting Trailer Express’ alleged contact with the State of Oklahoma. Trailer Express’ Motion to Dismiss tested that lack of factual support, and Plaintiffs now seek to create a factual link through jurisdictional discovery. However, this find-jurisdiction-after-the-fact method is inappropriate and only serves to encourage “fishing expedition” discovery (and a fruitless one, at that). This Court should therefore deny Plaintiffs’ request for jurisdictional discovery and grant Plaintiffs’ Motion to Dismiss.

WHEREFORE, Defendant Trailer Express, Inc. d/b/a Trailer Express Manufacturing, Inc., respectfully requests this Court grant it the relief sought in its Motion to Dismiss for Lack of Personal Jurisdiction [Doc. 11].

