No: _____

In The Supreme Court of the United States

E. DRAKE,

Petitioner

v.

MURPHY, AUSTIN, ADAMS, SCHOENFELD; NIELLO PERFORMANCE MOTORS, INCORPORATED; RICHARD SEEBORG; GARLAND E. BURRELL, JR.; EDWARD J. GARCIA; LAWRENCE K. KARLTON; JOHN A. MENDEZ; KIMBERLY J. MUELLER; TROY L. NUNLEY; WILLIAM B. SHUBB; LAWRENCE J. O'NEILL; EDMUND F. BRENNAN; ALLISON CLAIRE; CRAIG M. KELLISON; MICHAEL J. SENG; JENNIFER L. THURSTON,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX IN SUPPORT OF PETITIONERS WRIT OF CERTIORARI

Eric Drake
Pro-Se
10455 North Central Expressway
Suite 109
Dallas, Texas 75231
214-477-9288

March 17, 2019

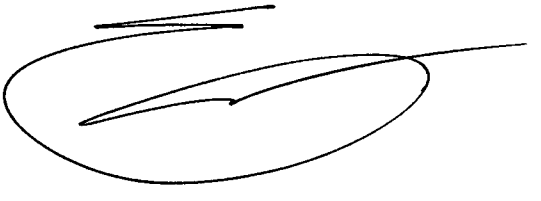
DECLARATION OF ERIC DRAKE

BEFORE ME, the undersigned authority, came and appeared ERIC DRAKE, Petitioner, Affiant who being duly sworn, stated as follows:

"My name is ERIC DRAKE. I am over eighteen years of age and I am fully competent to make this declaration. I am the Petitioner in this matter. I was also the Plaintiff/Petitioner in the preceding pursuant to Appendix Exhibits A through K. Some of the exhibits are excerpts of the original petitions. Exhibits E, F, H, and I are comprised of excerpts because the full briefs, are voluminous and or was difficult to reproduce, and Niello's credit card application Exhibit I is an excerpt, because the entire application for credit would be much longer and impossible to reproduce in its entirety without applying online for credit with Niello. Exhibit H is as close as the affiant could reproduce the actual advertising of the subject car (C32 Mercedes Benz) as it was seen originally online on Niello's website. Exhibit J is a copy of the notice of voluntary dismissal with prejudice filed in the first lawsuit against Niello in the Southern District of Texas, (prior to obtaining evidence that Niello committed fraud during the settlement agreements). Exhibit "K" is the order denying Petitioner's motion to rehearing.

I have personal knowledge of the facts stated herein and such matters are true and correct."

Specifically, I swear and/or affirm that the attached are true and correct copies (except as noted above) of the following under the penalty of perjury:



Eric Drake

APPENDIX "A"

Opinion of Fifth Circuit Court of Appeals
(Cause No. 18-20064)
Rendered on October 18, 2018

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20064
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
October 18, 2018
Lyle W. Cayce
Clerk

E. DRAKE,

Plaintiff - Appellant

v.

MURPHY, AUSTIN, ADAMS, SCHOENFELD; NIELLO PERFORMANCE MOTORS, INCORPORATED; RICHARD SEEBORG; GARLAND E. BURRELL, JR.; EDWARD J. GARCIA; LAWRENCE K. KARLTON; JOHN A. MENDEZ; KIMBERLY J. MUELLER; TROY L. NUNLEY; WILLIAM B. SHUBB; LAWRENCE J. O'NEILL; EDMUND F. BRENNAN; ALLISON CLAIRE; CRAIG M. KELLISON; MICHAEL J. SENG; JENNIFER L. THURSTON,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-1826

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-20064

Plaintiff-Appellant Eric Drake, proceeding pro se, sued Defendant-Appellees (1) Murphy, Austin, Adams, Schoenfeld ("Murphy Austin"), a California law firm, and (2) Niello Performance Motors, Inc. ("Niello"), a California automobile dealership, asserting numerous claims, including fraud and violations of the federal odometer laws. This is the fourth suit Drake has filed against Niello relating to the 2014 sale of a 2003 Mercedes Benz Model C-32.[1] Murphy Austin represented Defendant-Appellee Niello in the previous lawsuits.

In 2013, Drake saw Niello's Cars.com advertisement for a 2003 Mercedes Benz Model C-32. He contacted Niello about purchasing the car, but they were not able to reach an agreement about the terms and conditions of the sale. When negotiations faltered, Drake sued Niello in the Southern District of Texas, McAllen Division. The parties settled, and Drake voluntarily dismissed that case.

Drake traveled to Sacramento, California to sign the settlement agreement. One of the terms of that agreement was that Niello would sell the car to Drake. Under the agreement's terms, Niello delivered the car to Shipping Experts, a California shipping company and a nonparty to this suit, to ship the car from California to Drake in Texas.

Drake then filed three more lawsuits based on the sale and transportation of the car: one in the Northern District of Texas; another in the Northern District of California; and the third, the instant case, in the Southern District of Texas, Houston Division. Drake's primary claim is that the mileage on the car's odometer differed from the mileage set out in the settlement

[1] This court has recently acknowledged that "Drake has been declared a vexatious litigant in Texas state courts . . . ." *Drake v. Costume Armour, Inc.*, No. 17-20671, 2018 WL 4261989, at *1 (5th Cir. Sept. 6, 2018).

agreement. Niello had not appeared, answered, or filed any responsive pleadings in the earlier suits filed in Texas.

In the instant case, Murphy Austin and Niello specially appeared and moved to dismiss for lack of personal jurisdiction, improper venue, and failure to state a claim. The district court held a hearing at which it considered the settlement agreement and declarations from Niello's general counsel and a Murphy Austin representative that set out the jurisdictional facts for each entity. The district court granted the motions to dismiss at the hearing. The district court then entered an order confirming that it had granted Murphy Austin's and Niello's motions to dismiss for lack of personal jurisdiction, "as explained on the record."

Drake moved for reconsideration, and the district court denied the motion. On appeal, Drake did not provide a transcript of the hearing at which the district court dismissed the case for lack of jurisdiction.

We review a district court's dismissal of a complaint for lack of personal jurisdiction de novo.[2] We apply a three-step analysis for our specific personal jurisdiction inquiry:

> (1) whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.[3]

We have now reviewed in detail the entire record on appeal, including the parties' briefs and the record excerpts. We note that Murphy Austin is a

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[2] *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 431 (5th Cir. 2014).

[3] *Id.* at 433 (quoting *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006)).

law firm organized under the laws of California, has no offices in Texas, does not advertise in Texas, and has no attorney licensed to practice law in Texas. Similarly, Niello is a California company, has no offices, dealerships, bank accounts, or a registered agent in Texas, and does not regularly conduct business in Texas or directly target its advertisements to Texas residents. Drake signed the settlement agreement in California and agreed to purchase the car there. Niello's only relevant contact with Texas was its Cars.com advertisement, which was not specifically directed at Texas.

We agree with the district court that neither Murphy Austin nor Niello has sufficient minimum contacts with Texas to give rise to specific personal jurisdiction there. "We have consistently held that 'merely contracting with a resident of [a] forum state' does not create minimum contacts sufficient to establish personal jurisdiction over a nonresident defendant."[4] This is particularly true when, as here, "an out-of-state defendant has no physical presence in the forum, conducts no business there, and the contract at issue 'was not signed in the state and did not call for performance in the state.'"[5] Neither are Defendants' contacts with Texas sufficiently "substantial, continuous and systematic" to render them "essentially at home" in Texas.[6]

We conclude that the district court's analysis and conclusions are correct in all respects and are free of reversible error. We therefore affirm that court's dismissal of this action.

AFFIRMED.

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[4] *Blakes v. DynCorp Int'l, L.L.C.*, 732 F. App'x 346, 347 (5th Cir. 2018) (quoting *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986)).

[5] *Id.* (quoting *Monkton*, 768 F.3d at 433).

[6] *Sangha v. Navig8 ShipManagement Private Ltd.*, 882 F.3d 96, 101–02 (5th Cir. 2018) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

APPENDIX "B"

Opinion of the District Court
The Southern District of Texas
(Cause No. 4:17-cv-01826)
Rendered on November 13, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

E DRAKE, Plaintiff, VS. MURPHY, AUSTIN, ADAMS, SCHOENFELD, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:17-CV-1826

ORDER

Defendants Murphy, Austin, Adams, Schoenfeld ("Murphy Austin") and Niello Performance Motors, Inc. ("Niello") moved to dismiss Plaintiff Drake's suit against them. Defendant Niello filed a Motion to Dismiss (Doc. No. 5) and an Amended Motion to Dismiss (Doc. No. 12). Defendant Murphy Austin filed a Motion to Dismiss (Doc. No. 7) and an Amended Motion to Dismiss (Doc. No. 13). Plaintiff responded to the various motions to dismiss. (Doc. No. 23.)

During a November 1, 2017 hearing, the Court **GRANTED** both Defendant Murphy Austin's Amended Motion to Dismiss and Defendant Niello's Amended Motion to Dismiss for lack of personal jurisdiction, as explained on the record.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 13th day of November, 2017.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

1 / 1

APPENDIX "C"

District Court's Denial of
Petitioner's Motion to Reconsider
February 2, 2018

Drake v Murphy, Austin, et al
Cause No. 4:17-cv-01826

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

E DRAKE,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:17-CV-1826
	§	
MURPHY, AUSTIN, ADAMS, SCHOENFELD, *et al*,	§	
	§	
	§	
Defendants.	§	

ORDER

Plaintiff has moved for reconsideration (Doc. No. 29) and Defendants Murphy, Austin, Adams, Schoenfeld LLP and Niello Performance Motors, Inc. have moved for sanctions (Doc. No. 31). Plaintiff has filed a Notice of Appeal. (Doc. No. 35.) Plaintiff's Motion for Reconsideration and Defendants' Motion for Sanctions are **DISMISSED WITHOUT PREJUDICE**. The parties may refile after the appeal is resolved.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 2nd of February, 2018.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Petitioner's Notice of Appeal
Filed on February 21, 2018

Drake v Murphy, Austin, et al
Cause No. 18-20064

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

E.V. DRAKE	§	**Case Number: 4:17-cv-01826**
Plaintiff	§	
v.	§	
	§	
MURPHY, AUSTIN, ET AL	§	
Defendants		

PLAINTIFFS' NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that Eric Drake, (Plaintiff-Appellant) in the above named cause of action, hereby appeal to the United States Court of Appeals for the Fifth Circuit.

1. Appellant is filing his notice of appeal in the above cause to the Fifth Circuit Court of Appeals. Appellant is filing his notice of appeal in this Court, pursuant to FRAP, of his desire to appeal the Southern District of Texas order signed by Honorable Keith Ellison, from the final judgment and order that dismissed Defendants Murphy, Austin, Adams, Schoenfeld ("Murphy Austin") and Niello Performance Motors, Inc. (Order: Dkt. 28 and Final Judgment), for alleged lack of personal jurisdiction. Plaintiff disagrees and has shown in his responsive pleadings that the Court does have jurisdiction.

2. Appellant is also appealing the district court's denial of the Appellant's motion for reconsideration, and motion for new trial that the district court is apparently allowing to be overruled by operation of law. *See* (Dkt. 29).

3. In addition, Appellant is additionally appealing the following, which he will set out in his appellate brief:

a). The district court failing to allow the Appellant Drake limited but reasonable discovery before dismissing the Defendants and;

b). The district court failed to allow Appellant and Appellees attorneys to present their evidence through argument, after the Appellant furnished the Court with exhibits and the Plaintiff was informed that the Court would allow arguments.

4. The filing of a Rule 59, motion for reconsideration, and a motion for new trial tolls the above case regarding appellate jurisdiction. But the Court has been silent. In such a case, Texas laws state:

> "Under Texas law, a motion for new trial is overruled by operation of law if it is not granted prior to 75 days after the date the judgment is signed. Tex. R. Civ. P. 329b(c). The trial court retains a plenary power to modify or vacate the judgment for 30 days after a motion for new trial is overruled by operation of law. Tex. R. Civ. P. 329b(e). If a timely motion for new trial is filed, a notice of appeal must be filed within 90 days after the date the judgment is signed. Tex. R. App. P. 26.1."

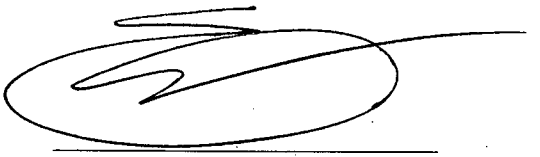
5. The Court dismissed the above defendants on November 13, 2017. As of January 18, 2018, the filing of this notice of appeal in U.S. Mail, the Court has failed to act within 65 days. Rather than wait any longer, the Plaintiff/Appellant is filing his notice of appeal so that the Court's plenary power is not overruled.

6. A court allowing its plenary power to be overruled has occurred once before in a case with the Plaintiff. Yet, the Plaintiff still believes that the Honorable Keith Ellison is one of the best federal judges sitting on the bench in the nation. However, in this case, the Plaintiff is willing to argue his case before the U.S. Supreme Court that the Court does have personal jurisdiction. And that the Court's citing of *International Shoe* is not conclusive or definitive, nor is it enough evidence to sway the Plaintiff in the above cause of action—because of the circumstance already argued by the Plaintiff.

7. This appeal is taken in Cause No. 4:17-cv-01826, styled Eric Drake, *Plaintiff v. Murphy, Austin, et al* Defendants/Appellees.

WHEREFORE, PLAINITFF ERIC DRAKE, hereby submit his notice of appeal regarding the district court order, November 13, 2017, as set forth herein, in the above entitled, numbered, and styled cause of action to the Court.

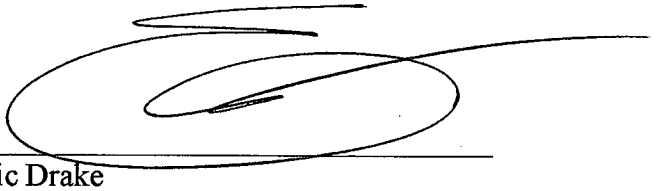
Respectfully submitted;



Eric Drake
Plaintiff
PO Box 8269
Houston, Texas 75533
214-477-9288

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered in accordance with the Federal Rules of Civil Procedure, on this the 2nd day of January 2018 to counsel for Murphy and Austin.



Eric Drake

APPENDIX "E"

Excerpts from Petitioner's Fifth Circuit Brief
Drake v Murphy, Austin, et al
Pages 3-5 and 7-14

Cause No. 18-20064

precedent whose premises have long been discarded, and by refusing to consider any distinction between controversies that "relate to" a defendant's contacts with the forum and causes of action that "arise out of" such contacts, the district court erred and abused its discretion and did not consider the amount of contacts that will satisfy the constitutional minimum.

The undisputed contacts in Appellant's case and considering the settlement agreement while he was in Texas over the telephone between Drake and Niello's legal counsel were sufficiently important, and sufficiently related to the underlying cause of action, to make it fair and reasonable for the district court to assert personal jurisdiction over the Appellees.

In addition, there were other emails contacts by other Niello representatives. Todd English was the sales manager of the Porsche dealership. He contacted Appellant by more than 12 emails, but the record shows only two: (**ROA.1108, 1109**). Candy Beck the Internet Sales person who sold the subject vehicle to the Appellant, made over 21 emails to Drake, but the Court's record only shows 9: (**ROA.347, 348, 349, 350, 409, 410, 411, 413, 414, 880, 860, 883, 884**). Ms. Beck sent the buyers order to the Appellant by email: (**ROA.858, 860, 862**). Upper management of Niello sent emails to Drake. Richard Niello (**ROA.1110**) and Roger Niello (**ROA.1111**).

II. Issue Two

The District Court Erred and Abused It's Discretion By Not Allowing The Appellant To Conduct Limited Discovery.

An appellate court reviews a district court's order denying a plaintiff's request for jurisdictional discovery for abuse of discretion. *Davila v. United States*, 713 F.3d 248, 263-64 (5th Cir. 2013). In the Appellant's pleadings, he repeatedly requested the district court to allow him to conduct limited discovery. Drake requested discovery in his original opposition to Appellees dismissal and his amended opposition to Appellees dismissal (**ROA. 790 1st Para, 791, 794 1st Para, 797 2nd Para, 799 3rd Para, 804 2nd Para, 812 3rd Para, 816 3rd Para, 817, 846 2nd Para, 847 1st Para**). However, the district court neither approved the Appellant's requests, nor did the district court even rule on Drake's request to conduct limited discovery.

In the case of *Wyatt v. Kaplan*, the Fifth Circuit commented that it would not hesitate to reverse a dismissal for lack of personal jurisdiction, on the ground that the plaintiff was improperly denied discovery. *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir.1982). *Singletary v. B.R.X., Inc.*, No. 87-3077,5th Cir., 828 F.2d 1135; 1987 U.S. App. LEXIS 13477.

Prior to any jurisdictional discovery,[8] an Appellant need only make out a *prima facie* case that personal jurisdiction exists. *Crane v. New York Zoological Soc'y*, 894 F.2d 454, 458 (D.C. Cir. 1990).

In a federal question case, as in the case at bar, where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules "if the federal statute does not specifically provide for national service of process." *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990) (citing Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104-05, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987)). An Appellant facing a Fed.R.Civ.P. 12(b)(2) motion to dismiss made before any discovery need only allege facts constituting a *prima facie* showing of personal jurisdiction. *Ball v. Metallurgie Hoboken- Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990). Moreover, courts typically construe the pleadings and affidavits in Appellant's favor in the early stages of litigation. *CutCo*, 806 F.2d at 365.

The district court was not restricted to the Appellant's pleadings and had the authority to determine the jurisdictional issue by receiving declara-

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[8]Certainly, "[a] Appellant faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery[.]" *Second Amendment Found.*, 274 F.3d 521, 525. Only after jurisdictional discovery, if the defendant persists in challenging personal jurisdiction, would the Appellant have to establish personal jurisdiction by a preponderance of the evidence. See *Shapiro Lifschitz & Schram v. Hazard*, 24 F.Supp. 2d 66, 70 (D.D.C.)

tions, interrogatories, depositions, oral testimony, or any combination of the recognized methods of **discovery**. ***Id***. *D.J. Investments, Inc. v.Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545-46 (5th Cir. 1985). But the district court erred in not addressing the repeated requests of Drake for limited discovery.

Appellant filed an affidavit (**ROA.851, 852, 853, 854, 855**), which set out the details of what occurred in the dispute between Drake, Niello, and their legal counsel. But the Courts record from the district court does not contain the entire affidavit. The Court's record *is missing the first 3 critical pages of Drake's affidavit*. Because of Drake's race, and corrupt judges in this Court, it wouldn't do any good to file a motion for extension of time.

Discovery under the Federal Rules of Civil Procedure is "broad in scope and freely permitted," *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402 (4th Cir. 2003), and district courts "have broad discretion in [their] resolution of discovery problems that arise in cases pending before [them]." *Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F.3d 56, 64 (4th Cir. 1993) (quoting *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 679, 209 U.S. App. D.C. 416 (D.C. Cir. 1981)). Accordingly, "[w]hen plaintiff can show that discovery is necessary in order

to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery." *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 259 (M.D.N.C. 1988); see also *McLaughlin v. McPhail*, 707 F.2d 800, 806-07 (4th Cir. 1983) (holding that limited discovery "may be warranted to explore jurisdictional facts").

The Ninth Circuit has stated that jurisdictional discovery "should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498, UFCW v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986).

It is well established that a federal district court has the power to require a defendant to respond to discovery requests relevant to his or her motion to dismiss for lack of personal jurisdiction. *E.g., Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 283 (3d Cir. 1994) (where facts relevant to jurisdiction were ambiguous, district court erred in denying discovery); *Edmond v. United States Postal Service General Counsel*, 292 U.S. App. D.C. 240, 949 F.2d 415, 425 (D.C. Cir. 1991) (district court erred in limiting jurisdictional discovery where plaintiffs made specific allegations of con spiracy to support personal jurisdiction); *Theunissen v. Matthews*, 935 F.2d

1454, 1465 (6th Cir. 1991) (court may permit discovery in aid of deciding Rule 12(b)(2) motion, and scope of such discovery is committed to district court's sound discretion); *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (discovery should ordinarily be granted where pertinent jurisdictional facts are disputed, but district court has discretion to control scope of discovery); *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982); *Fraley v. Chesapeake & Ohio Ry. Co.*, 397 F.2d 1, 3-4 (3d Cir. 1968) (district court erred by refusing to require defendant to answer interrogatories to explain ambiguous assertions in its affidavits about scope of business activities within jurisdiction); *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255-56 (1st Cir. 1966) (where plaintiff was "total stranger" to defendant, district court erred in dismissing for lack of personal jurisdiction without giving plaintiff opportunity for discovery).

In *Toys "R" Us, Inc. v. Step Two, S.A.*, the Third Circuit reversed the district courts denial of plaintiff's request for jurisdictional discovery, vacated dismissal of plaintiff's complaint, and remanded case for limited jurisdictional discovery and for reconsideration of jurisdiction with benefit of product of that discovery. *Toys "R" Us, Inc. v. Step Two, S.A.*, 3rd Cir., 318 F.3d 446; 2003 U.S. App. LEXIS 1355.

III. Issue Three

The District Court Erred and Abused It's Discretion By Not Considering The Appellant's Choice of Venue Under the Forum Selection Clause. District Court Failed To Consider The History Regarding the Appellant's Claim Against Niello.

It is well settled that the individual's "permanent" residence—i.e., his domicile—that is the benchmark for determining proper venue. See *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 12 S. Ct. 935, 36 L. Ed. 768 (1892); *MacNeil v. Whittemore*, 254 F.2d 820 (2d Cir. 1958); *King v. Wall & Beaver St. Corp.*, 79 U.S. App. D.C. 234, 145 F.2d 377 (1944); R.S. *Mikesell Associates v. Grand River Dam Authority*, 442 F. Supp. 229 (E.D.Okl. 1977); Lee v. Hunt, 410 F. Supp. 329 (D.C.La. 1976); *Smith v. Murchison*, 310 F. Supp. 1079 (S.D.N.Y. 1970); *Finger v. Masterson*, 152 F. Supp. 224 (D.C.S.C. 1957). Residence often turns upon the subjective factor of intent, for a person's domicile is that place where he has his true, fixed, and permanent home, and to which he has the intention of returning in the future although he may presently be absent therefrom. see *Mas v. Perry*, 489 F.2d 1396, 1399-1400 (5th Cir. 1974), cert. denied, 419 U.S. 842, 95 S. Ct. 74, 42 L. Ed. 2d 70 (1974); *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954); *Welsh v. American Surety Co. of New York*, 186 F.2d 16, 17-18 (5th Cir. 1951); Lee v. Hunt, 410 F. Supp. at 332.

Supreme Court supports a plaintiffs' choice of forum and that it should rarely be disturbed.[9]

Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947).

In Gulf Oil Corp. v. Gilbert, 1947, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055, the Supreme Court elucidated upon the factors justifying a Section 1404(a) change of venue, but it was careful to point out that the plaintiff's choice of forum shall rarely be disturbed, 330 U.S. at 508. A plaintiff's choice of forum "is entitled to significant consideration and will not be disturbed unless other factors weigh strongly in favor of transfer." *Royal & Sunalliance v. British Airways*, 167 F.Supp.2d 573, 576 (2001).

Further, the Supreme Court cautioned that dismissal of a plaintiffs' claim should not be the remedy when the defendant is objecting to venue, but that the plaintiffs' choice should be given weigh. Case law substantiates that it *would not* be unreasonable or unjust result if the above cause of action were litigated in this district. *D.H. Blair & Co.*, 462 F.3d at 103. The plaintiff's choice of forum is to be respected. *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 65 (2d Cir. 1981).

[9]"The plaintiff's choice of forum should rarely be disturbed." *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992).

Therefore, important jurisdictional factor can be a "forum selection clause. "A valid forum selection clause . . . may act as a waiver to objections to personal jurisdiction." *Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 282 n.11 (4th Cir. 2009). Forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

In speaking about the Appellant choice of Texas and the Appellees objection to having this legal dispute being resolved in Texas, Drake directs the Court to a letter that Dennis Murphy wrote a federal court in Amarillo, Texas (**ROA.1113, 1114**). Murphy, the attorney for Niello wrote:

> "It is also noted that each of his (Appellant's) selected courts are far more difficult for Niello representatives to appear in than the Dallas Courts."

This letter to the Amarillo courts concedes to having the legal dispute decided in a Texas federal court. This of course, is the opposite of what Appellees pled in the district court. Moreover, there are hundreds of defense attorneys in Houston, why select a Dallas attorney? Further, the case was settled, but it was Niello's attorney that decided to violate that agreement to try and dispose of the Appellant case without paying any compensation.

APPENDIX "F"

Excerpts from Petitioner's District Court
Response to Respondents Motion to Dismiss
Drake v Murphy, Austin, et al
Pages 3-5 and 7-14

Cause No. 4:17-cv-01826

that particular fraud at that time. Further, Plaintiff did not requests that the Settlement Agreement be rescinded and other causes of actions.

VENUE IS PROPER IN THE SOUTHERN DISTRICT OF TEXAS

27. The Southern District of Texas is where the Plaintiff filed his original petition, thus refilling in the Southern District is proper because this district still has control and jurisdiction to rule, oversee, and manage the case against Defendant Niello.

DEFENDANTS ALLEGATIONS OF FAILING TO STATE A CLAIM

28. Before dismissing a claim based on failing to state a claim upon which relief can be granted, courts in general, even the U.S. Supreme Court have ruled that a dismissal on the bases of failure to state a claim without allowing the litigant to amend their pleadings should be reversed and remanded. Defendant pled:

> "When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff a chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice, unless it is clear that to do so would be futile. See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir.2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."). However, a plaintiff should be denied leave to amend a complaint if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face." 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1487 (2d ed. 1990); see also Ayers v. Johnson, 247 Fed.Appx.

534, 535 (5th Cir.2007) (" '[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.' " (quoting Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. of Am. Co., 195 F.3d 765, 771 (5th Cir.1999)."

29. Defendants are apparently coming to the conclusion that amendment would be futile based on their improper assessment of the entire case as set forth herein and in the Plaintiffs previous opposition.

DEFENDANTS ALLEGATIONS OF IMPROPER VENUE

30. Defendants has raised allegations that venue is not proper in the Southern District of Texas but have not provided any case law supporting their theory.

Case law states:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Case law dictates that federal courts have exercised jurisdiction over property and cases where the defendants have pled venue was improper:

Keller v. Millice, H-92-3140, U.S. Dist. Court, Southern District of Texas, Houston, Texas, 838 F. Supp. 1163; 1993 U.S. Dist. LEXIS 19515.

31. In resolving a Rule 12(b)(3) motion, "the court is permitted to look at evidence beyond simply those facts alleged in the complaint and its proper attachments." *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (internal quotation marks omitted). Under the general venue statute, venue is proper in:

2). *a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.* There are substantial contacts between the Defendants and the Plaintiff as shown by **Exhibit D** annexed herein. The fraud of telling the Plaintiff that there was only 1 (one) mile on the C32 from the time it was traded to the time it was traded was told to the Plaintiff by telephone when the Plaintiff was in Texas by Todd English. Dennis Murphy also supported this untruth, up and until lately and now calls it a mistake. The property, the C32 is located in Texas. And as the Plaintiffs previous pleadings have stated the property tax was paid in Texas, all taxes on the C32 was paid in Texas, and the C32 was delivered to directly from California.

(3) *if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.* Defendants are subject to the Courts personal jurisdiction by its contacts to the forum state where the Plaintiff resides as seen in **Exhibit 4**. In addition, the above case is a cause of action based upon both diversity and Plaintiffs original petition also asks a federal question.

> **"If no judicial district meets one of these two qualifications, the action may be brought in a district in which any defendant is subject to personal jurisdiction at the time the action is commenced. *Id.* § 1391(a)(3)."**

32. The Plaintiff has provided the Court with sufficient evidence that venue is improper in the Southern District of Texas. Defendant has made many allegations without providing to the Court adequate evidence to support its allegations. The burden is on the Defendant to prove its allegations that venue is not proper.[2] Furthermore, Plaintiff denies that he resided in Dallas County at the time he acquired the C32. Plaintiff had the subject vehicle delivered to a dealership that he had a long established relationship with--no other dealership in Texas wanted to get involved with a used vehicle being delivered to their property.

33. Under the statutes of the United States, the jurisdiction of the federal courts, sitting in Texas, is not to be controlled by the statutes of that state that give to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of a defendant. Jurisdiction is acquired as against the person by service of process; but as against property within the jurisdiction of the court, personal service is not required.

Mexican C. R. Co. v. Pinkney, No. 1199., SUPREME COURT OF THE U. S., 149 U.S. 194; 13 S. Ct. 859; 37 L. Ed. 699; 1893 U.S. LEXIS 2283, Submitted April 17, 1893.

---

[2]Munoz v. Toyota Motor Corp., No. C-11-170, 2011 U.S. Dist. LEXIS 105412, 2011 WL 4000902, at *2 (S.D. Tex. July 20, 2011) (holding that the defendant "bears the burden of showing improper venue in connection with a motion to dismiss"), and GBS Dev., Inc. v. West, No. 5:09-CV-39 (DF), 2009 U.S. Dist. LEXIS 51373, 2009 WL 1703217, at *1 (E.D. Tex. June 18, 2009) (finding that the moving party bears the burden of proof on a 12(b)(3) motion to dismiss for improper venue).

DEFENDANTS CLAIMS OF RES JUDICATA

34. Under Texas law, the affirmative defense of *res judicata* or "claim preclusion" requires proof of the following elements:

a). a prior final judgment on the merits by a court of competent jurisdiction. **The first case filed by the Plaintiff in the Southern District of Texas was not tried or heard by the court on its merits. The second case filed by the Plaintiff in the Northern District of Texas was not tried or heard by the court on its merits. Factually, the first lawsuit had no final judgment signed by that court and filed into the courts record.**

b). the parties to the second lawsuit are identical to the parties in the first suit, or in privity with them. As set forth the parties are different in the above cause of action. **The Niello company is broken up into different owners—and even though the Plaintiff may have used similar causes of actions, the fraud committed by Niello prior to the sale of the C32 was different than the fraud committed by Niello after the sale of the C32.**

c). a second action based on the same claims as were raised or could have been raised in the first action. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652, 39 Tex. Sup. Ct. J. 351 (Tex. 1996). **As pled herein, Plaintiff have filed to rescind the contract, which was not raised in the first lawsuit and could not had been raised because the Plaintiff had no evidence that Niello had committed fraud in the Settlement Agreement until after he received the title and tax paper work which took months for the Plaintiff to receive.**

DEFENDANT NIELLO DID NOT COMPLAIN ABOUT THE PLAINTIFF REPRESENTING HIS COMPANY IN THE FIRST LAWSUIT.

35. The vehicle was registered in Wayne Vonn Publishing Company when purchased by the Plaintiff. Defendants were dealing with the Plaintiffs company and should have objected to the fact that the Plaintiff was representing himself, but Niello through their attorney, Dennis Murphy did not object in the first lawsuit against Niello filed in the Southern District of Texas. However, in October of 2015, Niello through Mr. Murphy objected to the Plaintiff representing himself in second lawsuit filed in Amarillo.

36. If the Defendants are asserting that the Southern District is not a proper jurisdiction then the Settlement Agreement was void in those respects.

> "A judgment is void only when it is apparent that the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act."). *Burciaga v. Deutsche Bank Nat'l Trust Co.*, No. 16-40826, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, 871 F.3d 380; 2017 U.S. App. LEXIS 18083."

- Defendant Niello did not object or protest to an alleged improper venue in the first Texas lawsuit filed by the Plaintiff in the Southern District of Texas.
- Defendant Niello did not request that the proceedings in the first Texas lawsuit filed in the Southern District be transferred to California.
- Defendants are subject to personal jurisdiction: thus, that standing alone should be sufficient to warrant denial of Niello and Murphy, Austin's law firm Motion to Dismiss on the grounds of improper venue. *Id.*
- Defendants do not argue to transfer the above case for: (1) "the convenience of the parties and the witnesses" and (2) "the interests of justice."

37. If the Defendants argument is correct, the first lawsuit filed by the Plaintiff was likewise filed in the wrong jurisdiction, and improper venue. If this is true, then the dismissal falls under an exception:

> Fed. R. Civ. P. 41(b) states that order of dismissal operates as adjudication on merits unless dismissal is for lack of jurisdiction, improper venue, or failure to join party, and forum non conveniens dismissal, which involves court's declining to exercise its jurisdiction, does fall under one of these exceptions.
>
> Although it did not specifically say so, order granting defendant's motion, seeking to be dismissed as party from Fair Labor Standards Act (FLSA), 29 USCS §§ 201 et seq., suit, constituted dismissal with prejudice under Fed. R. Civ. P. 41(b) because order *was not based on* lack of jurisdiction, improper venue, or failure to join party.
>
> While dismissal for failure to prosecute or to comply with rules or any order of court operates as adjudication upon merits even though substantive issues of case are never reached, this rule does not apply in case of dismissal for lack of jurisdiction or for improper venue. *Saylor v. Lindsley* (2d Cir. N.Y. Mar. 18, 1968).

And more importantly if the Defendants are correct, it does not preclude the filing of another action based on the same claims.

> Dismissal of complaint for alleged violation of Racketeer Influenced and Corrupt Organizations Act by sister federal district court on ground of improper venue does not preclude refiling of action on same claim in appropriate forum. Meineke Discount Muffler Shops, Inc. v. Noto (E.D.N.Y. Aug. 16, 1982), 548 F Supp 352.

38. The doctrine of collateral estoppel is equally inapplicable to the above case. Under Texas law, collateral estoppel applies when an issue decided in the first action is (1) actually litigated, which the first lawsuit filed by the Plaintiff against Niello wasn't litigated; (2) essential to the prior judgment, which again it was not because although the Plaintiff is pleading some of the exact same causes of actions, the subject matter or the actual fraud is different; and (3) identical to an issue in a pending action. Fraud committed after the Settlement Agreement was dissimilar. See *Johnson & Higgins, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 521, 41 Tex. Sup. Ct. J. 268 (Tex.1998). Here Niello's amenability (or lack thereof) to suit in Texas is the subject matter, which wasn't a legal concern in the prior Texas suit in the Southern District of Texas. That same jurisdictional question was not at issue in the McAllen suit, therefore, again, Niello's dismissal from the Texas Lawsuit has no estoppel effect on the instant suit in the Plaintiffs opinion.

39. When the Plaintiff and Defendant Niello agreed to settle the prior lawsuit that the Plaintiff filed in the Southern District of Texas, the Plaintiff signed the dismissal but Defendant Niello's counsel did not sign any dismissals or agreement to dismiss the case, which was filed into the courts record. On page 13 of the Defendant Niello dismissal, Niello admits that the Plaintiff was representing his company. Defendant Niello's legal counsel stated:

> "The Settlement Agreement was executed by Plaintiff in his individual capacity as well as on behalf of the LLC. (Levy-Storms Decl.¶ 3, Exh. A.)"

DEFENDANT DENNIS MURPHY ATTEMPTS TO AVAIL HIMSELF OF LITIGATION BY A CALIFORNIA STATE STATUTE

40. In Dennis Murphy's amended motion to dismiss, he struggles to divest himself of the Courts jurisdiction in several unsuccessful ways. Murphy claims that a California state statute: California Code, §1714.11 is applicable in a federal lawsuit in the state of Texas is preposterous. It is possible to use Texas state laws in arguing a federal suit but not a state statute in the state of California in a federal lawsuit in Texas. The statue states:

> (a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.

Murphy apparently is attempting to use sub. section (b) of this statute which states:

(b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof. The defense shall be raised by the attorney charged with civil conspiracy upon that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to timely raise the defense shall constitute a waiver thereof.

However, sub. section (c) clearly define that Murphy's attempt cannot be successful:

(c) **This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where** (1) the attorney has an independent legal duty to the plaintiff, or (2) **the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain**.

41. Dennis Murphy should be disbarred for his actions of agreeing with the Plaintiff to settle his clients (Defendant Niello) case but his verbal agreement was no more than a sham to give him more time to file his dispositive motion; his judgment on the pleadings. What makes Murphy's conduct so repulsive is that he carried these acts out against the Plaintiff when the he had advised Murphy that he would be in the hospital in surgery. Murphy sought to take advantage of the Plaintiff, knowing that if he just had surgery, then he would not be able to answer Murphy's judgment on the pleadings.

42. Plaintiff made contact with the California Bar Association, but the bar wanted proof of the verbal settlement agreement, and the Plaintiff refused to provide said proof, but would rather wait for Mr. Murphy to be untruthful in his deposition, which is a

felony crime, thus this action would suspend his license to practice law. Plaintiff has undeniable proof of the conversations, which would support the verbal settlement agreement between the Plaintiff and Murphy. Plaintiff expects Dennis Murphy to testify (if the Court orders depositions prior to ruling) that he don't recall. Plaintiff believes that the Court would realize that Murphy would remember such an agreement. And the evidence would be used to purge Murphy's testimony.

43. An evasive answer is treated as a failure to answer and a reason to sanction Mr. Murphy, his law firm, as well as Defendant Niello. Texas Rules of Court, 215.1 (c).

44. It would be fair play and substantial justice for this Court to exercise jurisdiction over Defendants Niello and Murphy, Austin, et al law firm because of all the reasons asserted herein and in the Plaintiffs opposition that he has filed previously to the Defendants motion to dismiss. The Court should exercise jurisdiction over the above cause in the interest of justice, because Dennis Murphy's unethical conduct in regards to the verbal agreement to settle the Niello case, when he believed the Plaintiff was in the hospital, in surgery to file a dispositive motion is reprehensible. No federal court in California will hold this law firm or Mr. Murphy accountable for his actions—thus, the Plaintiff is respectfully requesting that the Court act in the interest of justice to keep this case before this Honorable Court. The ordering of the depositions prior to the Courts ruling on jurisdiction might be enough to settle the case. Mr. Dennis Murphy have not denied that the Plaintiff and himself had an agreement to settle the Niello case in 30-pages of pleadings, however, as pled herein, evidence that he will not be able to argue with or deny will be filed into the Courts record after his oral deposition.

APPENDIX "G"

Fifth Circuit Court of Appeals Denial of
Petitioners Motion to Stay and Continue
Rendered on August 14, 2018

Cause No. 18-20064

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 14, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-20064 E. Drake v. Murphy Austin Adams Schoenfeld, et al
USDC No. 4:17-CV-1826

The court has denied appellant's motion to stay this case.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

Mr. E. Drake
Mrs. Laura Richards Sherry

APPENDIX "H"

Subject Vehicle as Advertised on Respondents Niello own Website (niellopporsche.com) And used as an Exhibit in the District Court

Drake v Murphy, Austin, et al

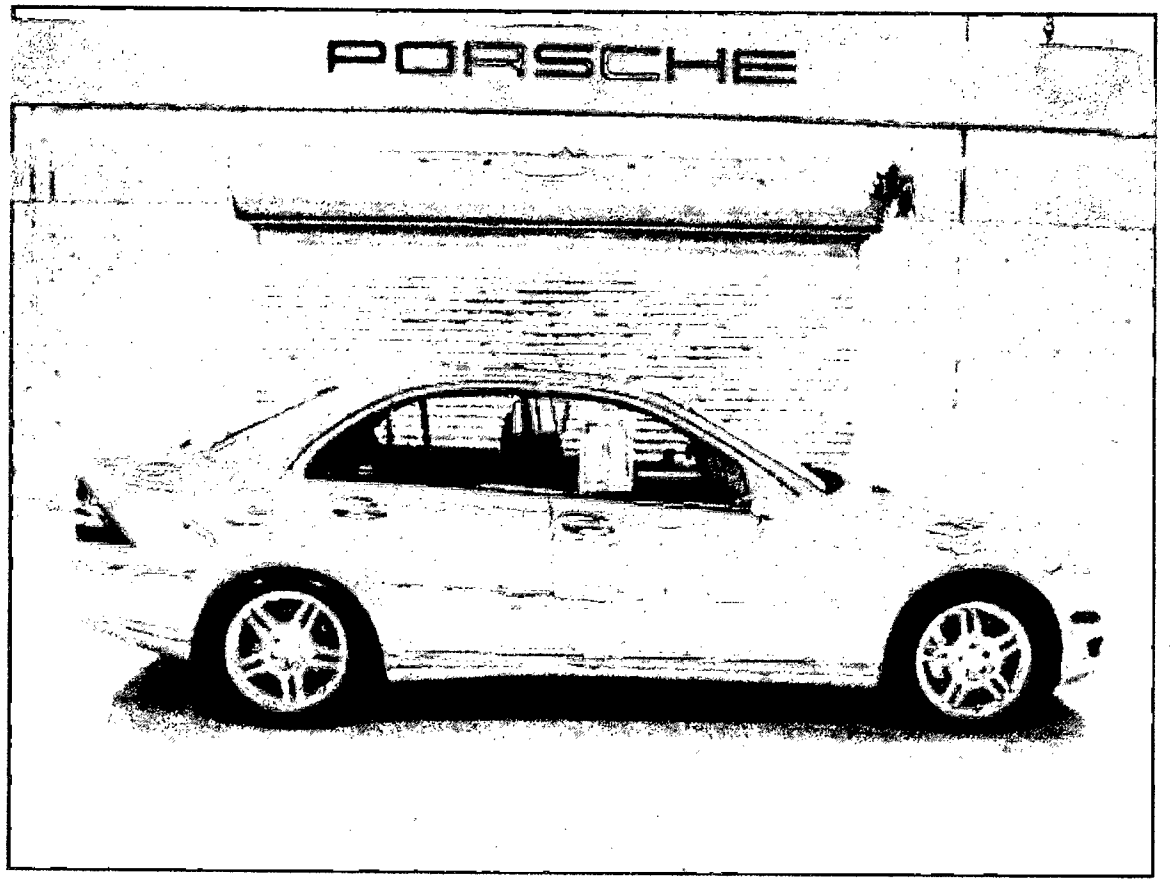
Cause No. 4:17-cv-01826

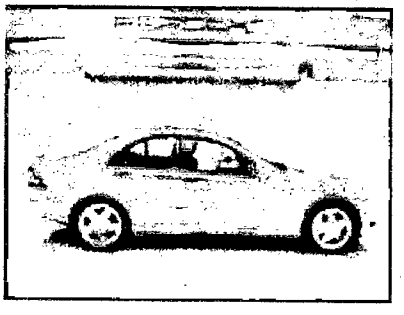
Candy Beck <cbeck@niello.com>

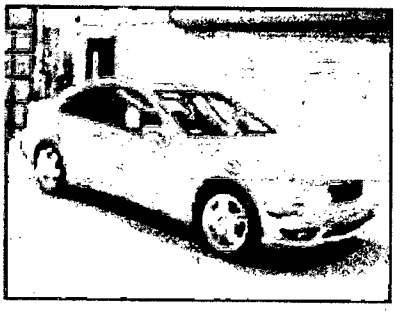
10/6/13

Hi Eric,

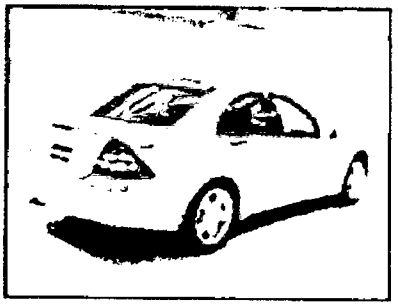
Here is the ad with pictures: 2003 Mercedes-Benz C-Class C32 AMG®

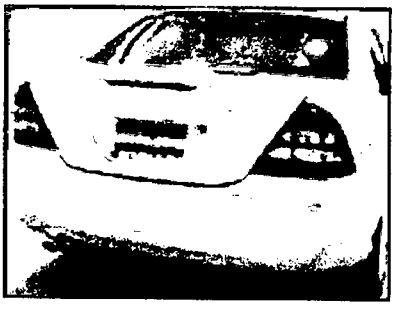






3/a





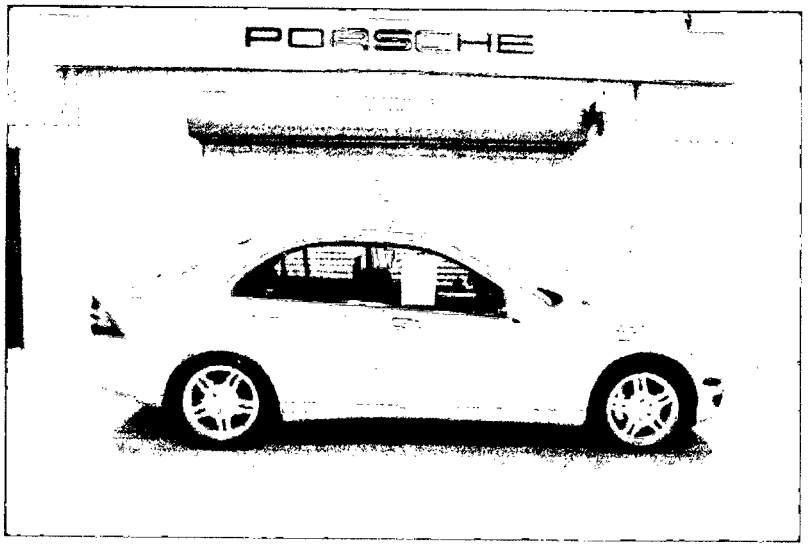
$16,895

VIN: WDBRF65J33F302747

MILEAGE: 35,188 Miles
TRANSMISSION: 5-Speed Automatic with Touch Shift
COLOR: Brilliant Silver Metallic / Charcoal
STATUS: In Stock at Niello Porsche
OPTIONS:

Best regards,

Candy



2003 Mercedes-Benz C-Class C32 AMG Information

Price: $16,895 **Year:** 2003 **Mileage:** 35,188

Color: Brilliant Silver Metallic

2003 Mercedes-Benz C-Class C32 AMG Description from Seller

One Owner, Super low miles and Extremely hard to find. If you're looking at a positively red-hot Mercedes C32 AMG. This one is ready for you to put the pedal to the metal. Be prepared to be transformed when you get behind the wheel and feel the power surge through your fingers right into your very soul. RWD,C4 Package,Auto tilt-away steering wheel,Garage door transmitter: Homelink,Sport steering wheel,Heated front seats,10- Speaker Bose Audio,10-Way AMG Sport Power Seats,17 Inch AMG Dual Spoke Wheels,5-Speed AMG Speedshift Automatic Transmission,AMG Sport Suspension,Bi-Xenon Headlights,Cruise Control,Dual Power Seats,Front Dual Zone A/C w/ Automatic Climate Control,Keyless Entry,Leather multifunction steering wheel,Moonroof / Sunroof,Power door locks,Power Windows,Tilt and telescoping steering wheel

APPENDIX "I"

Excerpts taken from Respondent Niello own Website to Apply for a Niello Credit Card This was used as an Exhibit in the District Court Proceedings. The application for Niello's credit is available to consumers nationwide
Drake v Murphy, Austin, et al

Cause No. 4:17-cv-01826

NIELLO.COM **THINKNIELLO**

NIELLO CONCOURS D'ESPERANO 68

* Indicates a required field

Please Tell Us About Yourself

Please note: Rate, fee and other cost information follows this application. You will be able to review this information before you submit the application.
Click here to view the terms and conditions document.

Step 1: Background Information

Salesperson? Have you set an appointment or spoken with your service department?
- Yes
- No

Type of Application Select One

Purchase Price $ [ ] (no commas or decimals)

Important information about procedures for opening a new account

To help the government fight the funding of terrorism and money laundering activities, U. S. Federal law requires financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means for you: when you open an account, we will ask for your name, address, date of birth and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

Personal Information

Name First Name [ ] M.I. [ ] Last Name [ ]

Social Security Number [ ] - [ ] - [ ] Your information is safe! View our online privacy policy

E-mail Address † [ ]

Birthdate (mm/dd/yyyy) [ ] / [ ] / [ ]

Physical Street Address
Physical Street Address & Unit/Apt # if any [ ]
P.O. Box if any [ ]
City [ ] State Select a state Zip [ ] - [ ]

Housing Status Select Housing

Home Phone Number † [ ] - [ ] - [ ]

Cell Phone Number † [ ] - [ ] - [ ]

Employment Information

Employer Name [ ]

Work Phone Number † [ ] - [ ] - [ ]

† By providing your contact information, you agree that we may contact you regarding your account by email or by phone using automated dialers, artificial or recorded voice messages, or by text message.

Net Annual Income $ [ ] (no commas or decimals)

Income Notice: You may include income that you earn or own, including funds regularly deposited into accounts you own. If you are age 21 or older, you may also include accessible income which is not earned or owned by you but is regularly accessed or used to pay your expenses. You need not list income from alimony, child support, or separate maintenance payments unless you wish it considered as a basis for repaying this obligation.

34a

NIELLO.COM **THINK**NIELLO

NIELLO CONCOURS d'ELEGANCE

Niello Advantage Card Credit Card

Buy now and pay over time

A Niello Advantage Card credit card is an easy and convenient way to pay for goods and services. Plus, as a Niello Advantage Card cardholder you can enjoy other great benefits throughout the year, such as:

- Special promotional offers where available
- Revolving line of credit that you can use for future purchases
- Quick credit decision
- Convenient monthly payments to fit your budget
- Easy-to-use online account management and bill payment options

The following special terms promotions may be available to you on qualifying purchases if your application is approved. Please ask your merchant which promotions they are offering.

Types of special terms promotions that might be available:

- No Interest if Paid in Full within promotional period with regular monthly payments This is a deferred interest promotion. This means that if you do not pay off the purchase balance in full within the special terms promotional period, interest will be charged to your account from the purchase date at the regular APR for Purchases rate of 28.99%. Paying only the minimum monthly payment will not pay off the purchase balance before the end of the special terms promotional period. To avoid interest charges, you must either pay more than the minimum monthly payment or make a lump sum payment(s) before the end of the special terms promotional period.

  Important reminder: For No Interest if Paid in Full promotions, you will have to pay interest that accrues at a 28.99% APR from the date of purchase if you do not pay the purchase balance in full within the special terms promotional period.

- Special Rate with equal or fixed monthly payments
  A special (reduced) rate will apply until your qualifying purchase is paid in full. Equal or fixed monthly payments are required.

The Niello Advantage Card credit card is issued by Wells Fargo Bank, N.A. with approved credit. Apply for the Niello Advantage Card credit card by selecting the button below.

Information for Applicant(s)

If you choose to apply online, you must be 18 years of age or older and provide an e-mail address. If we are able to complete the evaluation of your application within approximately 45 seconds, we will notify you of the credit decision online. If you are approved for credit, you will receive a credit card in the mail.

Please read these documents carefully and retain them for future reference:

Niello Advantage Card credit card agreement and disclosures online

Online Privacy Policy

Apply Now **Check Status**

Equal Housing Lender

APPENDIX "J"

Copy of the Voluntary Dismissal with Prejudice Filed in the first lawsuit in the Southern District of Texas in McAllen Division

Drake/WVPG LLC v The Niello Company, et al

Cause No. M-13-626

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

EVD/WVPG LLC

Plaintiff Case Number M-13-626

VS

THE NIELLO COMPANY AND
NIELLO IMPORTS OF ROCKLIN,
INC.

Defendants

NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE
[FRCP 41(a)(1)(A)]

TO: THE CLERK OF THE ABOVE-ENTITLED COURT

Pursuant to rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, Plaintiff EVD/WVPG LLC ("Plaintiff") hereby makes the following Notice of Voluntary Dismissal with prejudice of Defendants THE NIELLO COMPANY and NIELLO IMPORTS OF ROCKLIN, INC.

Plaintiff voluntarily dismisses all claims with prejudice brought in this action against Defendants THE NIELLO COMPANY and NIELLO IMPORTS OF ROCKLIN, INC. Each side is to bear their own costs. Defendants THE NIELLO COMPANY and NIELLO IMPORTS OF ROCKLIN, INC. have not submitted to the jurisdiction of this court, however, the parties have resolved the matter.

Dated: January 9, 2014

DRAKE,E.
1209 S. 10th Street, Suite A
No. 790
McAllen, Texas 78501
214-477-9288

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

EVD/WVPG LLC **CASE NUMBER: M-13-626**

Plaintiff **"jury"**

VS

THE NIELLO COMPANY AND
NIELLO IMPORTS OF ROCKLIN, INC.

Defendants

ORDER ON PLAINTIFFS MOTION FOR DISMISSAL

THE FOREGOING REQUEST CONSIDERED:

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiffs EVD/WVPG LLC and Eric Drake's claims against the above Defendant's are hereby dismissed with prejudice. Each party shall bear their own cost of court and attorney's fees and any other expenses. That the parties (EVD/WVPG LLC, and Eric Drake and The Niello Company and Niello Imports of Rocklin, Inc.) are obligated to comply with the settlement agreement, which have been agreed to by both parties in the above entitled, numbered, and styled cause of action and shall be enforceable by this Court. The Plaintiffs, EVD/WVPG LLC and Eric Drake's Motion to Dismiss is hereby GRANTED.

Singed this _____day of _____, 2014, McAllen (County of Hidalgo), Texas.

_____
HONORABLE JUDGE

Solo Page

Eric Drake
1209 South 10th Street
Suite A, No. 790
McAllen, Texas 78501

January 14, 2014

Clerk of Court
Attention: Sylvia Martinez
Bentsen Tower
1701 W. Hwy. 83
Suite 1011
McAllen, Texas 78501

RE: *EVD/WVPGLLC v The Niello Company et al*
Cause Number: M-13-626
Motion to dismiss with prejudice

Dear Ms. Martinez:

The above-mentioned cause of action and parties has reached a settlement between the Plaintiff and the defendants. I have attached an original motion of dismissal and have executed the same for the defendants. Please present the attached motion to dismiss with prejudice to the Court, along with the enclosed order of dismissal.

If you should have any questions, please contact me at the above address or for immediate response please call me at: 214-477-9288.

Thank you,

Eric Drake

APPENDIX "K"

Fifth Circuit Court of Appeals Denial of
Petitioners Motion for Rehearing and Rehearing
En Banc
Rendered on December 4, 2018

Cause No. 18-20064

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20064

E. DRAKE,

Plaintiff - Appellant

v.

MURPHY, AUSTIN, ADAMS, SCHOENFELD; NIELLO PERFORMANCE MOTORS, INCORPORATED; RICHARD SEEBORG; GARLAND E. BURRELL, JR.; EDWARD J. GARCIA; LAWRENCE K. KARLTON; JOHN A. MENDEZ; KIMBERLY J. MUELLER; TROY L. NUNLEY; WILLIAM B. SHUBB; LAWRENCE J. O'NEILL; EDMUND F. BRENNAN; ALLISON CLAIRE; CRAIG M. KELLISON; MICHAEL J. SENG; JENNIFER L. THURSTON,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's opposed motion for leave to file petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that appellant's opposed motion to recuse Judge Willett from the panel is DENIED.

On October 29, 2018, the clerk provided the Appellant 14 days to correct deficiencies in the petition for rehearing filed on October 29, 2018. The directed corrections were not made. Accordingly, IT IS ORDERED that the previously filed petition for rehearing is stricken because it does not comply with the applicable FED. R. APP. P. or 5TH CIR. R.