

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

JEREMY SCHOEMAKER,	)	
	)	Case No. 8:09cv441
Plaintiff,	)	
	)	
vs.	)	
	)	PLAINTIFF'S BRIEF IN
DAVID SULLIVAN, individually and	)	OPPOSITION TO DEFENDANT'S
d/b/a BIG BLUE DOTS,	)	MOTION TO DISMISS
	)	
Defendant.	)	

### I. INTRODUCTION

The Defendant promotes a wide-reaching internet scam that has duped thousands of consumers into signing up for “kits” supposedly showing them how to make money at home using the internet. The kits are advertised as “free,” except for a nominal shipping and handling fee. However, people who sign up for the Defendant’s scam have their credit cards charged with substantial recurring monthly fees. The consumers also receive nothing of value in return for their substantial payments.

To promote his scam, the Defendant created a fake “news” web site, purporting to be the web site for the “San Diego Herald News.” The Defendant’s web site contained a story purporting to describe how a person named “Mary Steadman” is earning substantial revenue at home by using the Defendant’s kits, which show how to make money posting links on the internet. However, there is no such entity as the San Diego Herald News; the web site is a “fake news site.” There is also no such person as Mary Steadman; she, too, is fake. In fact, the “money-making kits” promoted by the Defendant are completely worthless. The Defendant’s web site is a classic example of the type of false and

misleading advertisements which are banned by the FTC guidelines due to their deceptive and misleading nature.

To further promote his scam, the Defendant used a copyrighted photograph of the Plaintiff, Jeremy Schoemaker---a photograph that shows Mr. Schoemaker holding a real check he received from Google based on legitimate internet marketing efforts. The Defendant used the image of the Plaintiff---a well-known, successful, honest internet marketing expert---in an effort to add an aura of legitimacy to the online money-making kits he was promoting. As intended by the Defendant, consumers have associated the Defendant's fake news site, and the scam offered on the Defendant's web site, with the Plaintiff, causing significant harm to the Plaintiff's reputation and causing persons to question whether the Plaintiff is a willing participant in the widespread scam being promoted by the Defendant.

Although the Defendant seeks to portray himself as an "innocent" bystander who mistakenly used an unknown photograph of an unknown person to promote his scam, nothing could be farther from the truth. The evidence, viewed in the light most favorable to the Plaintiff, shows that the Defendant is familiar with the Plaintiff, visited Plaintiff's web site containing the copyrighted photograph on multiple occasions, knew that the Plaintiff is located in Nebraska, and knew that his use of the Plaintiff's photograph would cause substantial harm to the Plaintiff. Pursuant to the "effects test" set forth in Calder v. Jones, 465 U.S. 783 (1984), the Defendant is subject to personal jurisdiction in this district because he purposely directed his harm at the Plaintiff with knowledge that the brunt of the harm would be felt by the Plaintiff here in Nebraska. The Defendant's Motion to Dismiss should be denied.

## II. FACTUAL BACKGROUND

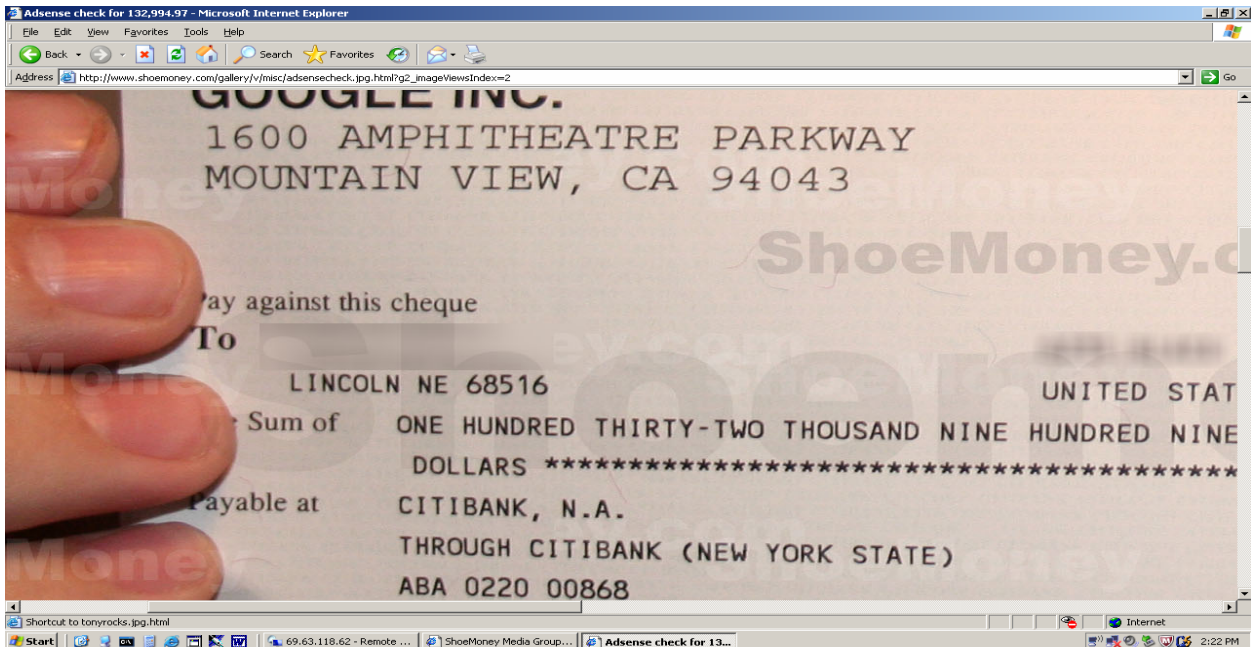
The Plaintiff is an internet entrepreneur who has built an outstanding reputation in the online marketing industry. (Schoemaker Decl., ¶¶ 3-12, 34; Ruckman Decl., ¶ 4). Plaintiff operates several web sites, including [www.shoemoney.com](http://www.shoemoney.com) and [www.shoemoneymedia.com](http://www.shoemoneymedia.com), in connection with his various online endeavors, and those web sites generate approximately 35,000 unique visitors each day. (*Id.*, ¶¶ 5-6). After earning \$132,994.97 in one month in August, 2005, using a particular internet advertising method, the Plaintiff received a check from Google in that amount and he subsequently prepared a photograph of himself holding the \$132,994.97 check in front of his face. (*Id.*, ¶ 17). The photograph is copyrighted. (*Id.*). The photograph is prominently displayed at [www.shoemoney.com](http://www.shoemoney.com) and people (especially those in the online marketing industry) associate the photograph with Plaintiff and his businesses. (*Id.*). Plaintiff is well known by nearly all persons involved in the online marketing industry. (*Id.*, ¶¶ 4, 13, 17; Ralph Ruckman Decl., ¶¶ 3-4).

The Defendant, a self-admitted “online marketer” (*see* Sullivan Decl., ¶ 6), now claims he has never heard of the Plaintiff. (*Id.*, ¶ 8). However, when he was first contacted by Convert2Media CEO Ralph Ruckman about the infringing use of Plaintiff’s copyrighted photograph, the Defendant admitted that he knew exactly who Plaintiff was. (Ruckman Decl., ¶ 7). Similarly, when he was first contacted by Plaintiff’ counsel, the Defendant admitted his familiarity with the Plaintiff and admitted that he had visited the Plaintiff’s web site, which displays the copyrighted photograph, on multiple occasions. (Cooper Decl., ¶¶ 8-9 & Ex. E thereto). The Plaintiff’s web site contains the following

prominent notice on the front page, and on every page, stating that the Plaintiff is located in Lincoln, Nebraska:



(Schoemaker Decl., ¶¶ 5, 14-15 & Ex. B thereto). As if that was not enough, the \$132,994.97 check depicted in the photograph used by the Defendant is addressed to the Defendant at his Lincoln, Nebraska address:



(Id., ¶¶ 15, 17). The web site [www.shoemoney.com](http://www.shoemoney.com) also contains numerous and frequent blog posts referencing Plaintiff's residence and activities in Nebraska. (Id., ¶ 14 & Ex. B thereto). Moreover, Plaintiff's web site also contains a notice advising viewers that all images on the web site are subject to copyright protection. (Id., ¶ 16). As further

evidence of Defendant's familiarity with Plaintiff, Defendant contacted Plaintiff by e-mail after receiving correspondence from Plaintiff's attorney, and the Defendant referred to Plaintiff on multiple occasions by the nickname "Shoe," the name that many of Plaintiff's friends and other industry observers sometimes use when referring to Plaintiff (and certainly not a name that someone would use if they had never heard of Jeremy Schoemaker and were contacting him in response to formal charges of copyright infringement). (Id., ¶¶ 4, 25-26 & Ex. D & E thereto). The Plaintiff and Defendant have attended industry events together, and recently attended an event where the Plaintiff was a featured speaker. (Ruckman Decl., ¶ 5). Defendant's self-serving assertion that he did not know who the Plaintiff was is contradicted by Defendant's own statements and is simply not credible.

The Defendant operates a web site that purports to be the web site for the "San Diego Herald News." (Complaint, Ex. A; see also Schoemaker Decl., ¶ 31)). The web site contains a "news story" about a woman named "Mary Steadman" who recently lost her job, but who is now making \$9,875/month by merely posting links on the internet. (Id.). Surrounding the "news story" are various advertisements for programs called the "Online Cash Success Kit," the "Google Home Income" kit, and the "Google Click Money" kit, which are advertised as a combination of programs that enable even the most inexperienced internet users to make substantial income from home by posting links on the internet. (Id.).

Unbeknownst to consumers, the "San Diego Herald News" is not a real news organization; the Defendant's web site is a "fake news site" created by the Defendant to disguise his advertisements as real news stories discussing legitimate internet money-

making opportunities. (Schoemaker Decl., ¶ 31 & Ex. G thereto). The person depicted in Defendant's fake news story, "Mary Steadman", also is not real. (Id.; see also Cooper Decl., ¶ 11, & Paragraph 7 of Ex. F thereto). Contrary to the "news story," Google has never sent a check to a woman named Mary Steadman. (Cooper Decl., ¶ 11, & Paragraph 7 of Ex. F thereto). Even the comments to the story, which are designed to appear as if they were made by consumers who successfully used the money-making kits promoted by the Defendant, are not real. (Schoemaker Decl., ¶¶ 31-32 & Ex. G thereto). When consumers sign up for the money-making kits, they give their credit card information so they can be charged the nominal \$1.97 charge for shipping and handling. (Complaint, Ex. A). However, a consumer who signs up for each of the three kits is quickly charged five monthly recurring charges of \$81.32, \$59.95, \$6.95 (ironically for "Fraud Protection"), \$9.95, and \$1.00, plus a one-time "bandwidth" charge of \$2.95; the consumer receives nothing of value in return. (Id.; see also Schoemaker Decl., Ex. B). In other words, a consumer who thinks she is purchasing valuable information for the total amount of \$1.97 is actually charged as much as \$164.09 in the first month and an additional \$159.17 each month thereafter, with nothing to show for it.

The Defendant's fraudulent scheme is widespread. (See Schoemaker Decl., Ex. B; Cooper Decl., Exs. F, G & H thereto). He is not the only person who promotes the scam or otherwise participates in this method of consumer deception, as is evidenced by other ongoing litigation, initiated by parties such as the FTC and Google, against other persons who have promoted the same scam. (Cooper Decl., ¶¶ 10-12 & Exs. F, G & H thereto). In those lawsuits, both the FTC and Google allege that thousands of people have been harmed by the promotion of the scam. (Id.).

The Defendant created the advertisements surrounding the fake news story using the “AdBrite” advertising network, an affiliate network that pays the Defendant a fee for each consumer who the Defendant tricks into signing up for the scam. (Sullivan Decl., ¶¶ 9-10; Schoemaker Decl., ¶¶ 28-29). Each time an ad is created—including the ads that depicted the Plaintiff’s copyrighted photograph—the AdBrite network prompted the Defendant to affirmatively select the geographic area to target with the particular ad. (Schoemaker Decl., ¶¶ 28-29 & Ex. F thereto). When the Defendant set up the infringing ads using the Plaintiff’s copyrighted photograph, the Defendant made the conscious decision to target Nebraska residents with the ads. (Id.).

When the Plaintiff advised the AdBrite network that the Defendant’s ads contained Plaintiff’s copyrighted material, AdBrite immediately terminated Defendant from the AdBrite network. (Cooper Decl., ¶ 3 & Ex. A thereto; Ruckman Decl., ¶¶ 7-8). Thus, when the Defendant states in his Declaration that he had “zero activity” on the AdBrite network after November 11, 2009, that is because he had been terminated from the AdBrite network on or before November 9, 2009 for using unauthorized images. (Ruckman Decl. ¶¶ 7-8). Before his AdBrite account was terminated, the Defendant told the AdBrite affiliate that the Defendant knew who Plaintiff was and that the Defendant did not take the copyright infringement allegations seriously. (Id.).

### **III. MOTION TO DISMISS STANDARD**

“While it is true that the plaintiff bears the ultimate burden of proof on this issue, jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing.” Dakota Industries, Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8<sup>th</sup> Cir. 1991) (citing Cutco Ind. V. Naughton, 806 F.2d 361, 365 (2d

Cir. 1986)). “To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction.” Id. (citing Watlow Elec. Mfg. v. Patch Rubber Co., 838 F.2d 999, 1000 (8<sup>th</sup> Cir. 1988); Falkirk Min. Co. v Japan Steel Works, Ltd., 906 F.2d 369, 373 (8<sup>th</sup> Cir. 1990)). “For purposes of a prima facie showing, the court must view the evidence in the light most favorable to the plaintiff and resolve all factual conflicts in the plaintiff’ favor.” Digi-Tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd., 89 F.3d 519, 522 (1996); Denenberg v. Ruder, 2006 WL 379614 at \*1 (D.Neb. Feb. 15, 2006) (Smith Camp, J.) In analyzing a motion to dismiss, the court must also draw all reasonable inferences in favor of the plaintiff. Id.; see also Dakota, 946 F.2d at 1387 (citations omitted).

Nebraska’s long-arm statute extends jurisdiction over non-resident defendants to the full extent allowed by the Due Process clause of the United States Constitution. Neb. Rev. Stat. § 25-536; Wagner v. Unicord Corp., 247 Neb. 217, 526 N.W.2d 74, 77 (1995). A non-resident defendant may be subject to personal jurisdiction if he has minimum contacts with the forum state such that he should reasonably anticipate being haled into court there. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

The Eighth Circuit applies a five-factor test in analyzing whether a defendant’s contacts with the forum state are sufficient to form the basis for personal jurisdiction: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum; (3) the relation of the cause of action to these contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.” Digi-tel, 89 F.3d at 522-23 (citing Wessels, Arnold & Henderson v. National Medical



Waste, Inc., 65 F.3d 1427, 1432 (8<sup>th</sup> Cir. 1995)). “The third of the five factors --- the relationship between the cause of action and the defendant’s contacts with the forum --- gives rise to the distinction between specific and general jurisdiction.” Denenberg v. Berman, U.S. Dist. Ct., 4:02cv7, Filing No. 32 (Dec. 20, 2002).

The personal jurisdiction analysis is altered when the defendant is accused of committing an intentional tort:

When an intentional act is aimed at the forum with knowledge that the brunt of the injury will be suffered in the forum, then the intentional tortfeasor must “reasonably anticipate being haled into court” in the forum.

Denenberg v. Ruder, 2006 WL 379614 at \*4 (D.Neb. Feb. 15, 2006) (quoting Calder v. Jones, 465 U.S. 789-90 (1984)). “Where specific personal jurisdiction over a non-resident is asserted, due process is satisfied if the defendant has purposely directed its activities at forum residents, and the litigation results from injuries arising out of, or relating to, those activities.” Burlington Indus., Inc. v. Maples Indus., Inc., 97 F.3d 1100, 1103 (citing Wessels, Arnold & Henderson v. National Medical Waste, Inc., 65 F.3d 1427, 1432 n.4 (8<sup>th</sup> Cir. 1995)); see also Denenberg v. Berman, 4:02cv7, Filing No. 32, p. 4. “An individual injured in [Nebraska]<sup>1</sup> need not go to [California]<sup>2</sup> to seek redress from persons who, though remaining in [California],<sup>3</sup> knowingly cause the injury in [Nebraska]<sup>4</sup>.” Calder, 465 U.S. at 789-90 (citing World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 397 (1980)).

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<sup>1</sup> California in original.

<sup>2</sup> Florida in original.

<sup>3</sup> Florida in original.

<sup>4</sup> California in original.

#### IV. ARGUMENT

Pursuant to the “effects test” set forth in Calder v. Jones, 465 U.S. 789 (1984), the Court may exercise personal jurisdiction over the Defendant because he purposely directed his harm at the Plaintiff with knowledge that the Plaintiff would be harmed in Nebraska.

The facts of this case are substantially similar to the facts in Denenberg v. Ruder, 2006 WL 379614 (D.Neb. Feb. 15, 2006) (Smith Camp. J.). In Ruder, the plaintiff was an Omaha plastic surgeon who alleged that a California resident intentionally appropriated copyrighted photographs from the plaintiff’s web site and used them on the defendant’s own web site “for the purpose of misleading and deceiving potential patients and enhancing his own practice.” Id. at \*3. The California defendant had no physical contacts with Nebraska. In denying the defendant’s Motion to Dismiss for lack of personal jurisdiction, this Court noted that “[s]uch intentional conduct can give rise to specific personal jurisdiction over a defendant in the forum where a plaintiff’s website was established, particularly if the website bore indicia that it was created in the forum, by a resident of the forum, for the promotion of business in the forum.” Id. (citing Burlington Indus., Inc. v. Maples Indus., Inc., 97 F.3d 1100, 1103 (8<sup>th</sup> Cir. 1996) (holding that due process is satisfied for purposes of specific personal jurisdiction if a defendant intentionally directed his activities at residents of the forum, and the litigation is based on injuries arising out of, or relating to, those activities)).

In Ruder, this Court embraced the Supreme Court’s “effects test” as set forth in Calder:

When an intentional act is aimed at the forum with knowledge that the brunt of the injury will be suffered in the forum, then the intentional tortfeasor must “reasonably anticipate being haled into court” in the forum.

Ruder, 2006 WL 379614 at \*4 (Smith Camp, J.) (quoting Calder v. Jones, 465 U.S. 789-90 (1984)). Applying the “effects test,” the Ruder court found that the California defendant was subject to personal jurisdiction in Nebraska because he visited the plaintiff’s Nebraska-based website, used copyrighted photographs found on that web site for his own commercial gain, and the plaintiff’s web site stated the plaintiff was located in Nebraska. Viewing the facts in the light most favorable to the Nebraska plaintiff, the California defendant had directed harm at the plaintiff with knowledge that the harm would be felt in Nebraska. The exercise of personal jurisdiction was proper.

In a substantially similar case brought by the same plaintiff involving nearly identical facts, Judge Bataillon denied a motion to dismiss for lack of personal jurisdiction and held that the defendant, who had visited the Nebraska plaintiff’s web site and later used copyrighted photographs from plaintiff’s web site, was subject to personal jurisdiction in Nebraska. Denenberg v. Djordjevic, 2007 WL 4525011 (D.Neb. Dec. 18, 2007). The court held that the Nebraska plaintiff “need not go to California to seek redress from a person, though remaining in California, knowingly causes him injury in Nebraska,” and that the California defendant “should have anticipated being haled into court in Nebraska” when he used the Nebraska plaintiff’s photographs without authorization. Id. at \*5. The court reached this result despite the California defendant’s affidavit testimony that he had never conducted business in Nebraska, never solicited business from Nebraska, and never had “any contacts whatsoever with Nebraska or its residents.” Id. at \*2. See also Denenberg v. Berman, U.S.Dist.Ct., D.Neb., 4:02cv7, Filing No. 32 (Kopf, J.) (same).

Similarly, in Thomas Jackson Publishing, Inc. v. Buckner, 625 F.Supp. 1044 (D.Neb. 1985), this Court described the standard for personal jurisdiction in copyright infringement cases as follows:

Although no physical ties to Nebraska can be attributed to defendants, the “minimum contacts” test has been satisfied in this instance. Assuming the alleged acts of copyright infringement to be true, the Court finds that defendants’ conduct and connection with the state of Nebraska were such that they should reasonably have anticipated being sued in this forum. Defendants’ activities were “purposely directed” at plaintiff, a resident of this forum, and the likelihood of such acts causing injury to plaintiff in this state was both foreseeable and highly probable. Thus, defendants cannot argue that they had no “fair warning” that their activities would render them liable to suit here.

Thomas Jackson Publishing, 625 F.Supp. at 1046 (citing Burger King Corp., 105 S.Ct. at 2182-83).

Like in Ruder, Djordjevic, Berman, and Thomas Jackson Publishing, the evidence in this case, viewed in the light most favorable to the Nebraska plaintiff, establishes a prima facie case that the defendant knew who Plaintiff was and knew that his use of Plaintiff’s image would cause harm to Plaintiff in Nebraska.

The evidence shows that the Defendant knew the Plaintiff was located in Nebraska. Plaintiff created the web site [www.shoemoney.com](http://www.shoemoney.com) in Nebraska. (Schoemaker Declaration, ¶¶ 14-15 & Ex. B thereto; Cooper Decl., ¶ 7 & Ex. E thereto). The web site is registered to Mr. Schoemaker at a Nebraska address. (Id., ¶ 5 & Ex. A thereto). The web site contains notices on every page that the Plaintiff is located in Nebraska. For example, the top of the front page (and every other page) of the web site states: “Based in Lincoln, Nebraska.” (Id., ¶ 14 & Ex. B thereto). Plaintiff also frequently posts various blog entries on the web site that refer to his Nebraska residence. (Id.).

Before Plaintiff filed this lawsuit, Defendant David Sullivan admitted that he had on multiple occasions visited the Plaintiff's web site, which contains prominent notices that the Plaintiff is "based in Lincoln, Nebraska" and "Centered in Lincoln, Nebraska." (Cooper Decl., ¶ 8 & Ex. E thereto). Specifically, when asked how often he had visited [www.shoemoney.com](http://www.shoemoney.com), the Defendant estimated that he had visited the Plaintiff's web site "less than 5 times." (Id.). The check in the copyrighted photograph also lists Lincoln, Nebraska as the recipient's address, providing the Defendant with further notice of the Defendant's residence. (Schoemaker Decl., ¶ 15). The Plaintiff's web site contains numerous blog entries about the Plaintiff's residence and activities in Lincoln, Nebraska. (Id., ¶ 14 & Ex. B thereto). Moreover, the Plaintiff's web site [www.shoemoney.com](http://www.shoemoney.com) was created by the Plaintiff in Lincoln, Nebraska, and the vast majority of the content on that web site was posted by the Plaintiff from his Lincoln, Nebraska location. (Id., ¶ 5). In addition, before the Plaintiff contacted the Defendant about the copyright infringement, the Defendant admitted to a third party (Ralph Ruckman) that he knew who Plaintiff was. (Ruckman Decl., ¶ 7). The Plaintiff and Defendant have even attended industry events together, some of which featured Plaintiff as a speaker. (Id., ¶ 5). The Defendant's self-serving statement that he did not know the Plaintiff is simply false.

The Defendant's argument that he did not know any harm would be caused by his use of the Plaintiff's image is also not credible. Although the Defendant contends that he did not know the photograph was subject to copyright protection, this argument is contradicted by the evidence that the Plaintiff's web site contains a prominent notice next

to the photograph advising viewers that the image is copyrighted.<sup>5</sup> (Schoemaker Decl., ¶ 16).

But there is a more obvious and fundamental reason why the Defendant's argument that he did not know his use of the Plaintiff's image would cause harm must be rejected. The Defendant was running an internet scam and was tricking consumers into signing up for a monthly subscription service to a worthless product. (Complaint, Ex. A; Schoemaker Decl., ¶ 31 & Ex. G thereto; Cooper Decl., ¶¶ 10-12 & Exs. F, G & H thereto). The Defendant's web site was disguised as a legitimate news web site affiliated with the "San Diego Herald News," but no such news organization exists.<sup>6</sup> (Schoemaker Decl., ¶ 31 & Ex. G thereto). The web site contained a story describing the excellent results achieved by a fake person using the featured internet money-making system, but the story was fabricated. (*Id.*). For the Defendant to suggest that he did not know he would cause harm to someone by affiliating or associating that person with his scam is absurd. The Defendant attempted to add legitimacy to his internet advertisements by affiliating his scam offers with the Plaintiff, the most trusted name in the internet money-making industry. It strains credulity to suggest that the Defendant, a self-admitted "online marketer," did not know exactly what he was doing when he chose to use the Plaintiff's image in his advertisements for an online money-making offer.

Like the Plaintiff in this case, Google was also concerned with the use of its name in scams like the one promoted by Defendant David Sullivan. Google is currently pursuing a federal lawsuit to prevent wrongdoers like Sullivan from victimizing more people. (Cooper

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<sup>5</sup> This argument is also without merit because even if the plaintiff owner of the image had not taken the formal step of registering the photograph for copyright protection, the plaintiff would still possess a copyright interest in the photograph. Application for registration of the photograph for copyright protection merely affects the remedies available to the copyright owner.

Decl., ¶¶ 10-11 & Exs. F & G thereto). In the introduction to its Complaint, Google described the scam as follows:

This action seeks to stop a widespread Internet advertising scam that is defrauding the public by misusing the famous Google brand. The scam victimizes unsuspecting consumers by prominently displaying the famous GOOGLE mark, by suggesting sponsorship by the plaintiff, Google, Inc. (“Google”), and by urging consumers to obtain a kit supposedly showing them how to make money working from home with Google. The kit is advertised as free, except for a nominal shipping and handling charge or access fee. However, people who sign up for these offers have their credit cards charged with substantial recurring monthly fees. They also receive little of value, or nothing at all, in return for their payments.

(Cooper Declaration, Exhibit “F”). Likewise, the FTC obtained an TRO in June, 2009 (four months before the Defendant claims to have even begun using Plaintiff’s photograph in his scam) against other persons involved in promoting the same scam promoted by Defendant David Sullivan in this action. See FTC v. Infusion Media, Inc., Case No. 2:09cv1112 (D.Nev. June 23, 2009; Cooper Declaration, ¶ 12 & Ex. H thereto). It was abundantly clear to the Defendant that he was promoting a scam, and that it would cause great harm to anyone who was believed to be associated in any way with the scam.<sup>7</sup>

The Defendant basically asks the Court to draw every inference in his favor, ignore his admissions about his familiarity with Plaintiff and his visits to Plaintiff’s Nebraska-based web site, and conclude that he promoted a scam without knowledge that it would be harmful to the Plaintiff to have his name/image associated with the scam. Defendant also wants to Court to ignore the fact that his AdBrite ads geographically targeted Nebraska residents. However, for purposes of the Defendant’s Motion to Dismiss, the Court is

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<sup>6</sup> Defendant was promoting the scam, through the use of Plaintiff’s copyrighted photograph, one more than one web site. See Schoemaker Declaration, ¶¶ 23-24 & Ex. C thereto.

<sup>7</sup> The Defendant did not even want his *own* name associated in any way with his web site or advertisements. Hence the reason why the Defendant registered his web site using a privacy masking system to prevent the general public from learning his identity. (Schoemaker Decl., ¶ 21).

required to draw every inference in favor of the Plaintiff, not in favor of the Defendant. The evidence presented leaves no doubt that the Plaintiff has met his burden of presenting a prima facie case of personal jurisdiction.

The exercise of personal jurisdiction is further supported by the fact that the defendant committed the copyright infringement in Nebraska. “The tort of copyright infringement occurs **where the owner of the copyright suffers damage,**” i.e., “**where the owner is located.**” Ottis v. Fischer Price, 627 F.Supp.2d 1040, 1045 (D.Neb. 2008) (emphasis added); Proxibid, Inc. v. BigGavel.com, Inc., 2008 WL 2165184 (D.Neb. May 21, 2008) (same); Denenberg v. Berman, 4:02cv7, Filing No. 32, p. 5 (emphasis added). Here, the Plaintiff suffered harm in his home state of Nebraska, and thus the infringement occurred here in Nebraska.

In addition, “Nebraska has a significant interest in discouraging injuries in its state and in providing an efficient forum for redress of such injuries.” Proxibid, 2008 WL 2165184 at \*6. As such, the “assertion of personal jurisdiction [in Nebraska] is reasonable and fair.” Id.

## V. CONCLUSION

The Defendant knowingly perpetrated a scam using the Plaintiff’s good name to trick innocent consumers into purchasing a “free” money-making kit. The consumers were then billed hundreds of dollars and received nothing of value in return.

Construing the evidence in the light most favorable to the Nebraska plaintiff, drawing all inferences in favor of Plaintiff, and resolving all factual conflicts in favor of Plaintiff, the evidence shows the Defendant knew he would be causing harm to the Plaintiff in Nebraska by using Plaintiff’s image to promote his scam. Not only did the Defendant



visit the Plaintiff's web site containing the photograph and containing prominent notices that the Plaintiff is located in Nebraska, the Plaintiff sent multiple e-mails to the Plaintiff and referred to him by his nickname "Shoe," a name that a total stranger would certainly not use when referring to Mr. Schoemaker. In addition, the Defendant used an advertising network that enabled him to geographically target Nebraska residents with his deceptive advertisements, which shows that the Defendant specifically directed his wrongful conduct at Nebraska. The Defendant's argument that he did not even know the Plaintiff is contradicted by Defendant's comments to Mr. Ruckman, Plaintiff's admission that he had visited Plaintiff's web site on numerous occasions, and the fact that the Plaintiff and Defendant have even attended industry events together. It is entirely fair to require the Defendant to answer for his wrongs here in Nebraska, where he knew his conduct would cause harm. Requiring Plaintiff to seek redress in California would be unfair.

For the reasons stated above, Plaintiff Jeremy Schoemaker respectfully requests an Order denying the Defendant's Motion to Dismiss for lack of personal jurisdiction.

Dated this 26th day of February, 2010.

Respectfully submitted,

JEREMY SCHOEMAKER, Plaintiff

By: /s/ Patrick S. Cooper  
Troy F. Meyerson #21756  
Patrick S. Cooper #22399  
FRASER STRYKER PC, LLO  
500 Energy Plaza  
409 South 17<sup>th</sup> Street  
Omaha, NE 68102  
(402) 341-6000 phone  
(402) 341-8290 fax  
[tmeyerson@fslf.com](mailto:tmeyerson@fslf.com)  
[pcooper@fslf.com](mailto:pcooper@fslf.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on February 26, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the counsel listed below:

John Sharp  
BAIRD HOLM, LLP  
1500 Woodmen Tower  
1700 Farnam Street  
Omaha, NE 68102

Grant Fairbairn  
Paul Thomas  
Fredrikson, Byron Law Firm  
200 South 6<sup>th</sup> Street  
Suite 4000, Pilsbury Center  
Minneapolis, MN 55402

/s/ Patrick S. Cooper

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