

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA**

JEREMY SCHOEMAKER,

CASE NO. 8:09-cv-441

Plaintiff,

v.

**REPLY BRIEF IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS
COMPLAINT FOR LACK OF
PERSONAL JURISDICTION**

DAVID SULLIVAN, INDIVIDUALLY AND
D/B/A BIG BLUE DOTS LLC,

Defendant.

INTRODUCTION

Plaintiff’s opposition is long on personal attacks, but short on jurisdictional facts. Plaintiff labors to portray Defendant as an unscrupulous online scam artist. Plaintiff’s Opposition (Filing No. 16), pp. 1-2, 5-7, 14-15; Declaration of Jeremy Schoemaker (Filing No. 17), ¶ 31-33. Meanwhile, Plaintiff proclaims himself to be “a well-known, successful, honest internet marketing expert” who is “the most trusted name in the internet money-making industry.” Plaintiff’s Opposition, pp. 2, 14. However, neither of these portrayals has any relevance to the issue before the Court: whether it has personal jurisdiction over Defendant under the *Calder v. Jones* “effects” test.

Plaintiff bears the burden of establishing that this Court has personal jurisdiction over the Defendant. Despite engaging in extensive character assassination, Plaintiff has not presented sufficient evidence to carry his burden. Specifically, Plaintiff has not presented any evidence that Defendant visited Plaintiff’s website **before** November 6, 2009, the date when Defendant was first notified of Plaintiff’s copyright infringement claims. Moreover, Plaintiff has not presented any evidence that **Defendant** was

responsible for copying the picture at issue from the Plaintiff's website. Defendant has asserted that the picture was embedded in a banner advertisement that a third-party provided to Defendant. Plaintiff has not disputed this fact.

Despite lacking any evidence that Defendant went to Plaintiff's website and intentionally copied a copyrighted picture, Plaintiff equates this case with other copyright cases where there **was** unrebutted evidence of intentional copying. The Plaintiff's reliance on this Court's decisions in the *Denenberg* line of cases is misplaced. In each of the *Denenberg* cases, the plaintiff presented evidence that the defendant had visited and copied pictures from the plaintiff's website. The defendants in those cases did not deny those facts. Here, there is no such evidence, and Plaintiff's attempt to hale a California resident into Court in Nebraska must fail.

STATEMENT OF ADDITIONAL FACTS

The banner advertisement containing the thumbnail photograph of Plaintiff was created by a third-party in October of 2009. Supplemental Declaration of David Sullivan, ¶ 2 ("Supp. Sullivan Decl.") Defendant did not personally create the banner advertisement. *Id.* Defendant did not personally copy the photograph of Plaintiff from any website. *Id.* Defendant did not know that the photograph depicted Plaintiff or that the photograph was protected by copyright. *Id.* Defendant incorrectly assumed that the photograph had been licensed for use in the banner advertisement or was in the public domain. *Id.* Details on the check, such as Plaintiff's address and watermark were not discernible on the thumbnail version of the photograph contained in the banner advertisement. *Id.*, ¶ 5.

Defendant used the banner advertisement on the AdBrite advertising network from October 15, 2009 to November 6, 2009. *Id.*, ¶ 3. The banner advertisement was configured to cover the United States as a whole. Declaration of Melissa Helm, ¶ 3 (“Helm Decl.”) The banner advertisement was not configured by AdBrite to target Nebraska specifically or any city or region in Nebraska. *Id.*, ¶ 3. Defendant has never configured an advertisement on the AdBrite network to target specific states within the United States. Rather, Defendant has always targeted countries as a whole. Supp. Sullivan Decl., ¶ 3

Defendant was notified of the alleged infringement on November 6, 2009 by Ralph Ruckman of Convert2Media, Inc., an affiliate of AdBrite. *Id.*, ¶ 4. Prior to November 6, 2009, Defendant did not know Plaintiff or what Plaintiff looked like, did not know that the photograph in the banner advertisement depicted Plaintiff, and did not know that the photograph was protected by copyright. *Id.*, ¶ 4-5. Further, prior to November 6, 2009, Defendant had not visited either of Plaintiff’s websites. *Id.*, ¶ 4-5. Defendant spoke with Mr. Ruckman several days later, and Mr. Ruckman advised Defendant to contact Plaintiff and work things out. *Id.*, ¶ 6. Mr. Ruckman referred to Plaintiff by his nickname, “Shoe,” and provided Defendant with Plaintiff’s email addresses. *Id.*

Defendant did not contact Plaintiff immediately because Defendant believed that the discontinuation of the banner advertisement would end the matter. *Id.*, ¶ 7. However, Defendant received a cease-and-desist letter from Plaintiff’s attorney on November 19, 2009, which was followed by several additional communications. *Id.* On November 24, 2009, Plaintiff’s attorney sent an email containing the question

“Approximately how many times have you visited Mr. Schoemaker’s web sites, www.shoemoney.com and/or www.shoemoneymedia.com?” *Id.*, Exhibit C. Defendant replied on December 1, 2009, by saying “I’ve visited Shoemoney’s site less than 5 times in my life; nothing personal, I just don’t read a lot of internet marketing blogs.” *Id.*, Exhibit D. Plaintiff’s attorney did not ask **when** Defendant had visited Plaintiff’s websites, and, thus, Defendant did not emphasize that all of Defendant’s visits occurred on or after November 6, 2009. *Id.*

Defendant sent two emails and one Facebook communication to Plaintiff on December 1 and 2, 2009 in an attempt to resolve the matter. *Id.*, ¶ 8. Defendant referred to Plaintiff as “Shoe” in these emails because Mr. Ruckman had used the nickname, and because Plaintiff’s post-November 6, 2009 visits to Plaintiff’s website had confirmed that this nickname is widely used by site visitors. *Id.*, ¶¶ 6, 8.

ARGUMENT

I. PLAINTIFF HAS FAILED TO MEET HIS BURDEN OF ESTABLISHING PERSONAL JURISDICTION UNDER *CALDER*.

Plaintiff relies entirely on the “effects” test set forth in *Calder v. Jones*, 465 U.S. 789 (1984). However, Plaintiff’s purported evidence falls woefully short of meeting the *Calder* standard, as applied by the Eighth Circuit.

In *Calder*, the Supreme Court ruled that a state may exercise specific personal jurisdiction over a defendant who intentionally performs harmful acts for the purpose of having the harmful effects felt in the forum state. *Calder*, 465 U.S. at 790. In *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390-91 (8th Cir. 1991), the Eight Circuit approved an effects test for personal jurisdiction in situations in which a defendant intentionally and expressly performs acts that the defendant knows will have

“a potentially devastating impact on the plaintiff” and which defendant performs “for the very purpose of having the consequences felt in the forum state.” *Id.*

Once jurisdiction has been controverted or denied, the plaintiff bears the burden of proving facts to support the Court’s exercise of personal jurisdiction. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004) (“The plaintiff’s ‘prima facie showing’ must be tested, not be the pleadings alone, but by the affidavits and exhibits presented with the motions and in opposition thereto” (citations omitted)).

Plaintiff has not met this burden. The evidence does not establish that Defendant knew his actions would have a potentially devastating impact on the Plaintiff in Nebraska. Defendant has affirmatively stated that he did not visit Plaintiff’s website **before** receiving notice of Plaintiff’s copyright infringement claims on November 6, 2009. It is true that Defendant told Plaintiff’s counsel on December 1, 2009 that he had visited Plaintiff’s website five times. But all five of those visits occurred on or after November 6, 2009. Plaintiff seems to acknowledge this deficiency by arguing that “[b]efore Plaintiff filed this lawsuit, Defendant David Sullivan admitted that he had on multiple occasions visited the Plaintiff’s web site...” Filing No. 16, p. 13 (emphasis added). Plaintiff simply has presented no evidence that Defendant visited Plaintiff’s website before receiving notice of Plaintiff’s claims.¹

Plaintiff’s jurisdiction argument also fails because there is no evidence that **Defendant** copied the picture from Plaintiff’s website. Defendant has stated that he did

¹ Plaintiff attempts to circumvent this lack of evidence by relying on an oversized screen-shot of the photograph at issue, which shows that the check in the photograph was addressed to “Lincoln, NE” and has a watermark that says “ShoeMoney.com.” Plaintiff’s Opposition, p. 4. However, the screen-shot is exponentially larger than the actual thumbnail photograph that appeared in the banner advertisement. The address and watermark were not visible in the thumbnail photograph, which was the only version of the photograph that Defendant saw before November 6, 2009. Supp. Sullivan Decl., ¶ 5. The banner advertisement containing the thumbnail photograph is shown in Exhibit B to the Declaration of David Sullivan, dated February 5, 2010 (Filing No. 9-3).

not create the banner advertisement that contained the picture at issue. Plaintiff has presented no **evidence** to rebut Defendant's statements. Without showing that Defendant visited Plaintiff's website or actually copied the picture from the website, Plaintiff has not presented sufficient evidence to show that Defendant knew that Plaintiff lived in Nebraska when the alleged infringement occurred.

Further, Plaintiff's argument under *Calder* fails because there is no evidence that Defendant intentionally targeted the banner advertisement specifically at Nebraska or any part of Nebraska. Without such evidence, Plaintiff's cannot show that Defendant performed intentional acts "for the very purpose of having their consequences felt in the forum state." *Dakota Indus.*, 946 F.2d at 1391.

II. PLAINTIFF'S RELIANCE ON THE *DENENBERG* CASES IS MISPLACED.

A. The *Denenberg* Cases Involved Evidence That Plaintiff Has Not Presented In This Case.

Plaintiff's attempt to link this case to prior decisions by this Court in copyright infringement cases must fail. The plaintiff in those cases had far more jurisdictional evidence than Plaintiff has in this case. Specifically, Plaintiff cites to *Denenberg v. Ruder*, 2006 WL 379614 (D. Neb. Feb. 15, 2006) and *Denenberg v. Djordjevic*, 2007 WL 4525011 (D. Neb. Dec. 18, 2007) and argues that the facts in those cases are "substantially similar" or "nearly identical" to the facts in this case. In the process, Plaintiff ignores critical differences between the facts in those cases and the facts as Plaintiff has presented them to this Court.

In *Ruder* and *Djordjevic*, the defendants copied large numbers of photographs from the plaintiff's website. Ruder copied "numerous pictures" belonging to Denenberg without authorization. *Ruder*, 2006 WL 379614, at *1. Moreover, "after Denenberg

sent Ruder a cease-and-desist letter, Ruder allegedly removed the infringing pictures from his website, but printed copies of the pictures and used the pictures in his office when consulting with patients.” *Id.*

Djordjevic involved two websites: on one Djordjevic displayed “over 30 pairs of Denenberg’s before and after photos as well as a number of other Denenberg photos,” and on another Djordjevic displayed “at least 9 pairs of before and after Denenberg photos.” *Djordjevic*, 2007 WL 4525011, at *1. Moreover, in *Djordjevic*, one of the defendant’s websites expressly targeted potential patients in Nebraska: “the June 2006 version indicates ‘Surgeon To The Stars serves the major metropolitan areas of and for the following services: ... For Nebraska Cosmetic Surgery, Plastic Surgery, Cosmetic Surgery, Plastic Surgery [sic], Reconstructive Surgery, Cosmetic Surgeon Resources for the following communities: Omaha, Nebraska, Lincoln, Ne., Kearney, Ne....’” *Id.* The defendant’s website also provided “information about travel arrangements and how to get to Djordjevic’s office from the Los Angeles International Airport.” *Id.*

Here, unlike *Ruder* and *Djordjevic*, there is no evidence of extensive copying. Plaintiff is alleging that Defendant copied **one** photograph in thumbnail form. Indeed, unlike in *Ruder* and *Djordjevic*, Plaintiff is not even attempting to argue that Defendant himself did the copying. Further, unlike in *Ruder*, there is no evidence that Defendant continued to use Plaintiff’s picture for any purpose after receiving notice of the alleged infringement from Mr. Ruckman.

Unlike in *Djordjevic*, there is no evidence in this case that Defendant directed his website towards Nebraska residents. Defendant never mentioned Nebraska or any named community or geographical area of Nebraska on his website. Further,

Defendant never expressly targeted Nebraska with his banner advertisement. Rather, his account was implemented to target the United States as a whole. Helm Decl. at ¶ 3. While Plaintiff argues that Defendant *could* have selected to target Nebraska on the AdBrite system, Plaintiff notably provides no evidence that Defendant actually *did* target Nebraska. To the contrary, all of the evidence shows that Defendant selected the United States as his target market.

B. The Pending *Denenberg v. LED Technologies, LLC* Case Is More Comparable Than The *Denenberg* Cases That Plaintiff Relies Upon.

The irony of Plaintiff's reliance on the *Denenberg* cases to argue for jurisdiction here is that Plaintiff's counsel currently has a motion to dismiss pending before this Court *against* Dr. Denenberg in another copyright infringement case. *Denenberg v. LED Technologies, LLC*, Case No. 8:09-cv-3182, (J. Bataillon) Filing No. 12. In the motion, Plaintiff's counsel expressly distinguishes the prior *Denenberg* cases on three grounds: (1) LED Technologies denies visiting Dr. Denenberg's website before receiving notice of infringement; (2) LED Technologies did not create the advertisement that contained the copyrighted image, but purchased the advertisement from a third-party believing that the third-party had permission to use the image; and (3) LED Technologies denied any intentional wrongdoing, unlike the defendants in the other *Denenberg* cases. *See id.* at 3-8.

The facts of this case are more similar to *LED Technologies* than to the prior *Denenberg* cases. Like LED Technologies, Defendant denies visiting Plaintiff's website before receiving notice of infringement and did not create the advertisement containing the picture at issue. Moreover, like LED Technologies, Defendant denies that he *intentionally* infringed Plaintiff's copyright. Defendant made a mistake in believing that

the picture of Plaintiff was either properly licensed or in the public domain. Supp. Sullivan Decl., ¶ 2. Once Defendant was informed of the copyright, he ceased all use of the photograph. These facts indicate that Defendant's behavior has no similarity to the intentional deceptive and deliberately harmful acts performed by the defendants in the prior *Denenberg* cases.

Moreover, as in *LED Technologies*, Plaintiff has no evidence that Defendant expressly targeted his advertisement at Nebraska. Defendant denies doing any act for the very purpose of having its consequences felt in Nebraska. Defendant's banner advertisement was configured by Defendant's AdBrite representatives to target the United States as a whole and not Nebraska specifically. Helm Decl., ¶ 3. The fact that Plaintiff was able to access Defendant's website from Nebraska does not indicate that Plaintiff performed any act for the very purpose of having its consequences felt in Nebraska because Defendant's website was accessible from anywhere in the world. Thus, Plaintiff has failed to establish a critical element in the Eighth Circuit's interpretation of *Calder*.

At most, the evidence shows that, like *LED Technologies*, Defendant engaged in "mere untargeted negligence" by not checking to see if the picture was copyrighted before using it. The Eighth Circuit has explained that under the *Calder* test, there is a "sharp distinction between 'mere untargeted negligence' and 'intentional, and allegedly tortious, actions' aimed expressly at the forum state." *Dakota Indus., Inc.*, 946 F.2d at 1390-91. Deliberate, intentional, and allegedly tortious actions which are performed for the very purpose of having their consequences felt in the forum state can be a basis for

specific personal jurisdiction, but actions which constitute mere untargeted negligence cannot. *Id.*

In the instant case, Defendant's actions at most constitute mere untargeted negligence. Despite Plaintiff's efforts to personally disparage Defendant, the evidence shows only that Defendant made a mistake – he used a banner advertisement prepared by a third-party under the incorrect assumption that the photograph in the advertisement was either licensed or in the public domain. Without evidence that Defendant visited Plaintiff's website **before** November 6, 2009, Plaintiff cannot prove that Defendant's actions were intentional or were done for the very purpose of having the consequences of that act felt by the Plaintiff in Nebraska.

CONCLUSION

This is a case in which Defendant failed to check on whether the photograph was copyrighted and mistakenly assumed that it was not or that it was licensed by the third party who made the banner advertisement. Defendant did nothing intentionally harmful towards Plaintiff or towards Nebraska, and Plaintiff has presented no evidence that Defendant performed an act with the knowledge that it would have a potentially devastating impact on Plaintiff and that the brunt of the injury would be suffered in Nebraska. Consequently, Defendant's actions consist of mere untargeted negligence and do not rise to the level of intentional and allegedly tortious actions aimed expressly at the forum state which is required for specific personal jurisdiction under the *Calder* effects test. Accordingly, the Court should dismiss Plaintiff's Complaint without prejudice.

Dated this 8th day of March, 2010.

DAVID SULLIVAN, INDIVIDUALLY AND D/B/A
BIG BLUE DOTS LLC, Defendant

By: s/ John A. Sharp

John A. Sharp (NE# 23111)

of BAIRD HOLM LLP

1500 Woodmen Tower

Omaha, NE 68102-2068

Phone: 402-344-0500

Fax: 402-344-0588

Email: jsharp@bairdholm.com

and

Paul E. Thomas (MN# 279778)

Grant D. Fairbairn (MN# 327785)

FREDRIKSON & BYRON, P.A.

200 South Sixth Street, Ste. 4000

Minneapolis, MN 55402-1425

Phone: 612-492-7000

Fax: 612-492-7077

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 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 following:

Patrick S. Cooper, Esq.
Fraser Stryker PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102-2663

s/ John A. Sharp