

persons, especially to the Plaintiff, the person whose photograph he used to promote the scam. Likewise, Plaintiff's reputation in the online marketing industry is relevant considering the Defendant is in the same industry and they have attended industry events together (but Defendant somehow claims to have never heard of Plaintiff).

In his Reply Brief, Defendant ignores the evidence that is inconvenient to his position, and essentially asks the Court to ignore the law by resolving all factual conflicts in Defendant's favor, refusing to draw any reasonable inferences in favor of Plaintiff, and by viewing the facts in the light most favorable to Defendant. See Digi-Tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd., 89 F.3d 519, 522 (1996) ("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's favor"; court must also draw all reasonable inferences in favor of the plaintiff); Denenberg v. Ruder, 2006 WL 379614 at *1 (D.Neb. Feb. 15, 2006) (same); Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991) (same). The facts, taken in the light most favorable to the Plaintiff, show Defendant David Sullivan was familiar with Plaintiff when he was using Plaintiff's copyrighted photograph to promote his scam. It is undisputed Plaintiff and Defendant have attended industry events together, and Plaintiff was a featured speaker at one or more of those events. (E.g., Filing No. 19-3, Ruckman Declaration, ¶ 5). When Ralph Ruckman initially contacted Defendant to inform him of Plaintiff's copyright infringement allegations, Defendant admitted that he knew exactly who Plaintiff was (and stated that he did not take Plaintiff's copyright infringement allegations seriously). (Ruckman Declaration, ¶ 7). On December 1, 2009, Defendant admitted he had visited Plaintiff's web site "less than five times in my life;" the web site contains Plaintiff's copyrighted photograph and many notices

the Plaintiff is located in Nebraska. Now in litigation, Defendant attempts to explain away his admissions by arguing that he meant to say he had visited Plaintiff's web site five times *in the preceding three weeks*, rather than "five times in his [entire] life." (See Filing No. 21-1, Sullivan Supplemental Declaration, ¶ 7). Defendant's argument is not credible, and any credibility determinations must be resolved in favor of Plaintiff for purposes of this Motion to Dismiss. Defendant also e-mailed Plaintiff on multiple occasions and referred to him by the nickname "Shoe," the nickname that persons in the internet marketing industry commonly use when referring to Plaintiff. Defendant's argument that he used that nickname in his e-mails to Mr. Schoemaker only because he heard Ralph Ruckman use that term during one phone call is also not credible.

B. Defendant misrepresents the facts of the Djordjevic case.

Defendant attempts to distinguish similar cases such as Denenberg v. Djordjevic by arguing that the Nebraska plaintiff in those cases had "far more jurisdictional evidence than Plaintiff has in this case." (Filing No. 20, p. 6). The opposite is true. Defendant argues personal jurisdiction was proper in those cases only because the defendants did not deny they had visited the plaintiff's web site and did not deny they personally copied the photographs. (Id., pp. 8-9). Defendant is simply mistaken about the facts of the Djordjevic case.

Like Defendant Sullivan in this case, Djordjevic filed an Affidavit denying that he played any role in visiting Plaintiff's web site or copying those images. Specifically, Djordjevic stated in support of his Motion to Dismiss that he "did not design or construct the web site, nor [had he] ever personally maintained the web site. In addition, [he had] never created or provided any written or photographic content for this web site." (Case No.

8:07cv150, Filing No. 10, ¶ 24). Djordjevic also stated, with respect to another allegedly infringing web site, that “at no time did [he] ever design, direct, contribute to, provide any verbal or photographic content for, maintain any portion of, or own any portion of the Surgeon web site.” (Id., ¶ 29). Notwithstanding Djordjevic’s denials, the Court resolved all factual conflicts in favor of the plaintiff and denied the Motion to Dismiss, finding personal jurisdiction was proper under the Calder effects test. Thus, this case is very similar to Djordjevic, where the Court denied the defendant’s Motion to Dismiss even though the defendant denied personal involvement.

Defendant also attempts to distinguish this case from Djordjevic, Ruder, and Berman by arguing the defendants in those cases engaged in “extensive copying,” while Defendant Sullivan’s copying in this case was less extensive. (See Defendant’s Reply Brief, Filing No. 20, pp. 6-7). Using one of Plaintiff’s copyrighted photographs to promote a scam is no different, for jurisdictional purposes, than using multiple photographs to mislead consumers. In fact, Defendant Sullivan’s infringing material reached a much wider audience than the alleged copyrighted material in the other cited cases, as Defendant Sullivan’s infringing advertisement was viewed by approximately four million consumers. (See Filing No. 17-1, Schoemaker Declaration, ¶ 24).

Strangely, Defendant attempts to compare this case to Denenberg v. LED Technologies, Case No. 8:09cv3182, a case in which a Motion to Dismiss is pending but has not yet been decided. In LED Technologies, the primary issue in dispute is whether the acts of a third party may be attributed to the defendant, for purposes of personal jurisdiction. (See Case No. 8:09cv3182, Filing No. 27, pp. 1-7; Filing No. 28, pp. 2-4; Filing No. 24, pp. 2-4; Filing No. 22, pp. 7-9; Filing No. 18, pp 6-8). That issue has not been

raised in this case, and LED Technologies is therefore inapposite. Here, there is direct evidence of Defendant's knowledge of and familiarity with the Plaintiff.

C. Many jurisdictional facts are undisputed.

The Court must evaluate the facts in the light most favorable to Plaintiff and resolve all factual conflicts in Plaintiff's favor. Even so, many of the facts supporting personal jurisdiction are not disputed. Although Defendant Sullivan went out of his way to file a supplemental declaration and deny some facts set forth in Plaintiff's evidence, Defendant Sullivan did not deny his involvement in the wide-reaching internet scam designed to trick consumers into paying substantial recurring fees for a worthless product. Defendant does not deny telling Ralph Ruckman that he knew exactly who Plaintiff was when Ruckman first contacted him to inform him of the copyright infringement allegations. Defendant also does not deny attending the same industry events as Plaintiff, where Plaintiff was a featured speaker. It was not a mere coincidence that the Defendant chose to use Plaintiff's photograph to sell his online money-making kits --- Defendant specifically elected to use that photograph in a deliberate attempt to capitalize on the good will Plaintiff has built up over many years by confusing consumers into believing the worthless online money-making kits were sponsored by, or affiliated with, the Plaintiff, who is well known for his success at making money online.

Plaintiff has clearly made out a prima facie case of personal jurisdiction under the Calder effects test, and Defendant's Motion to Dismiss should be denied.

D. Defendant admits he targeted Nebraska residents with his fraudulent advertisements and web sites.

Defendant also attempts to avoid personal jurisdiction by arguing that he did not intend to trick *only* Nebraska consumers --- he says he intended to trick consumers *in all*

fifty states and targeted his advertisements at consumers in each state. According to Defendant, by widening the scope of his scam, he can avoid personal jurisdiction everywhere since he did not target residents of a single state. That the Defendant is an equal opportunity scam artist, and intended to harm people in multiple states (including Nebraska), rather than in just a few states, does not defeat Plaintiff's personal jurisdiction claim here. See, e.g., Simon v. Philip Morris, Inc., 86 F.Supp.2d 95 (E.D.N.Y. 2000) (citations omitted). In Simon, a British holding company sought dismissal for lack of personal jurisdiction. The plaintiff argued personal jurisdiction was proper under the "effects test." In denying the foreign company's motion to dismiss for lack of personal jurisdiction, the Court explained that the Calder "effects test" supported personal jurisdiction:

That BAT trained its sights on a larger, more diffuse target---smokers and their families in all fifty states as opposed to only one---does not render the "effects" test inapplicable. Calder's reasoning does not hinge on the fact that only one plaintiff living in only one state was involved. The main point of the case is its distinction between intentional and negligent wrongdoing for purposes of assessing minimum contacts.

Simon, 86 F.Supp.2d at 132 (citing Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d at 1390 (8th Cir.); Cole v. Tobacco Institute, 47 F.Supp.2d 812, 815-16 (E.D.Tex.) (rejecting defendant's argument that Calder effects test does not apply where intentional wrongdoing was aimed at more than one state). The Cole court expressly rejected the argument that by aiming one's wrongdoing at multiple states, a tortfeasor can avoid personal jurisdiction under the Calder effects test:

[Defendant] maintains, consequently, that if its intentional wrongdoing was aimed at more than one state, then the Calder test is not met. This, however, goes against common sense. It implies that a party can avoid liability by multiplying its wrongdoing. On the contrary, as stated in Commonwealth of Massachusetts v. Philip Morris Inc., Civ. No. 95-7378-J (Super.Ct.Middlesex

Co. March 20, 1998), "Where the wrongdoer is committing an intentional tort, and knows where the effects of that intentional tort will be felt, it does not offend due process to hale that wrongdoer into court in the places where he knew his wrongdoing would cause injury." Id. at 15. And:

The fact that the alleged intentional wrong was directed at many states instead of just one should not have the result that [Defendant] can not be sued anywhere in the United States. Calder does not suggest such a result. Rather, under Calder, the fact that [Defendant] aimed its alleged wrongdoing at the entire United States gives it the requisite "minimum contacts" with each state where that alleged wrongdoing caused injury. Id. at 15.

Cole, 47 F.Supp.2d at 815-16 (citing Massachusetts v. Philip Morris, slip op. at 15). See also Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D.Conn. 1996)

(defendant purposefully directed its advertising activities at Connecticut, and subjected itself to personal jurisdiction in Connecticut, by placing advertisements on internet in all states, including Connecticut); ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) ("a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts."); Joss v. Bridgestone Corp., 2009 WL 1323040 (D.Mont. May 11, 2009) (personal jurisdiction proper in Montana where Japanese defendant "purposely intended and directed its activities at every state in this country, including Montana"; defendant cannot "reap the rewards of its strategy...without being subjected to the responsibilities accompanying such success.").

CONCLUSION

For purposes of Defendant's Motion to Dismiss, the Court must view the facts in the light most favorable to Plaintiff. Those facts show Defendant knew who Plaintiff was when

he used Plaintiff's photograph to promote his scam. Personal jurisdiction is proper under the Calder effects test.

Moreover, Defendant purposely directed his fraudulent advertisements at Nebraska and other states. Defendant cannot escape personal jurisdiction here by targeting a wider audience of victims --- the fact remains that the Defendant intended for Nebraska residents to view his fraudulent advertisements and act on those ads. Such conduct constitutes purposeful availment / purposeful direction and also subjects Defendant to personal jurisdiction in Nebraska.

Plaintiff respectfully requests an Order denying Defendant's Motion to Dismiss, and allowing this Nebraska plaintiff to proceed with this action.

Dated this 11th day of March, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 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:

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