IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

JEREMY SCHOEMAKER,

Plaintiff,

v.

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

Defendant.

CASE NO. 8:09-cv-441

RESPONSE TO PLAINTIFF'S SUR-REPLY BRIEF REGARDING DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

Defendant is compelled to respond to Plaintiff's Sur-Reply (Filing No. 24) because Plaintiff relies on new cases to wrongly suggest that the Court should depart from Eighth Circuit precedent and expand the *Calder* "effects test" well past its limits.

The *Calder* effects test applies only where a plaintiff alleges that a defendant committed an intentional tort. *See Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991) (relying on *Calder* and not on established five factor jurisdiction test because an intentional tort was alleged); *Holland America v. Wartsila North America, Inc.*, 485 F.3d 450, 460 (9th Cir. 2007) ("It is well established that the effects test applies only to intentional torts"). However, simply ***alleging*** an intentional tort is not sufficient, or the Court would ***always*** have personal jurisdiction over intentional tort claims. The Eighth Circuit has stated that *Calder* applies where the alleged intentional acts were "***uniquely aimed*** at the forum state," and the "'***brunt***' of the injury would be felt there, as required by *Calder*." *Dakota Indus.,* 946 F.2d at 1391 (emphasis added). In other words, the plaintiff must show that the defendant has intentionally targeted the forum state for the *Calder* effects test to apply under *Dakota*.

In his Opposition Brief, Plaintiff acknowledged these requirements by trying to meet them. Plaintiff claimed that Defendant's statement that his websites were never specifically directed toward Nebraska was "false." Filing No. 17-1, ¶ 28. Plaintiff based his accusation solely on his belief that when an advertiser selects the United States as the location for an ad to be displayed through the AdBrite network, "the advertiser is ***forced*** to make a ***conscious decision*** regarding which states and metropolitan areas it wishes to do business in." Filing No. 17-1, ¶ 29 (emphasis added). Plaintiff claimed that the effects test was met because "[w]hen 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." Filing No. 16, p. 7.

Plaintiff's argument was a shot-in-the-dark, and it was wrong. In his Reply Brief, Defendant demonstrated that his banner advertisement was configured for the United States as a whole and was ***not*** uniquely aimed at Nebraska. Filing No. 20, p. 3. An AdBrite representative submitted a declaration confirming Defendant's position. Filing No. 21-6. Contrary to Plaintiff's unsupported ***allegations***, the ***evidence*** shows that Defendant did not select any "states or metropolitan areas" in Nebraska for his advertisement and did not make any "conscious decision" to target Nebraska residents.

Lacking evidence to meet the Eighth Circuit's necessary requirements, Plaintiff changed course, and for the first time, argued in his Sur-Reply Brief that if a defendant targets the United States as a whole, the defendant is subject to personal jurisdiction in the forum state, even though the defendant did not "uniquely aim" any conduct at the forum state. Taken to its logical conclusion, Plaintiff's test would mean that Defendant would be subject to personal jurisdiction in ***every*** state in the United States – essentially

"national jurisdiction." Not surprisingly, Plaintiff cites no Eighth Circuit authority to support this theory. Rather, Plaintiff cites five new cases – none of which are controlling authority. Plaintiff provides no reason for why this Court should depart from *Dakota Industries* and import tests from other jurisdictions.

Furthermore, even the non-controlling cases cited by Plaintiff do not support his position. First, *Joss v. Bridgestone Corp*. was a stream-of-commerce case, and the Court specifically stated that it was ***not*** analyzing the facts under *Calder*. 2009 WL 1323040, *10, fn.5 (D. Mont. May 11, 2009). Second, in the *Inset Systems, Inc. v. Instruction Set, Inc*. case, the *Calder* test was not mentioned in the opinion, and the Court found that it had jurisdiction under the Connecticut long-arm statute. 937 F.Supp. 161, 164 (D. Conn. 1996). Third, in *ALS Scan, Inc. v. Digital Services Consultants*, the Fourth Circuit found that *Calder* did ***not*** apply under the facts of that case. 293 F.3d 707, 715 (4th Cir. 2002).

Only two of Plaintiff's five new cases actually found jurisdiction appropriate under *Calder*: *Simon v. Philip Morris*, *Inc*., 86 F.Supp.2d 95 (E.D.N.Y. 2000) and *Cole v. The Tobacco Institute*, 47 F. Supp.2d 812 (E.D. Texas 1999). Both *Simon* and *Cole* involved the same defendant, B.A.T. Industries ("BAT"), a British holding company, which was the parent of tobacco companies in the United States. The BAT cases were class action suits involving thousands of plaintiffs who brought suits in several states.

In *Simon* and *Cole*, the courts found that they had ***several*** legal bases for asserting personal jurisdiction over BAT – not just *Calder*. For example, the *Simon* Court described BAT as "a sophisticated holding company presiding over a multinational corporate empire whose operations span the globe," a company "regnant

in the cigarette industry in the United States and throughout the world," whose "conduct has supranational effects," and therefore a company that "must accept the price of its international ascendancy by defending suits here in the United States, where it has allegedly been responsible for massive damage." *Simon*, 86 F.Supp.2d at 98.

While the *Simon* and *Cole* courts exercised personal jurisdiction over BAT under a "national" jurisdiction theory, the vast majority of courts faced with suits against BAT determined that they ***lacked*** personal jurisdiction over BAT. For example, the District Court for the District of Columbia dismissed BAT because the plaintiff had failed to show that BAT had "purposefully" or "expressly targeted" its activities at residents of the District of Columbia. *United States v. Philip Morris Inc.*, 116 F.Supp.2d 116, 129 (D. D.C. 2000). By requiring evidence that BAT targeted the District, the Court implicitly rejected Plaintiff's "national" jurisdiction theory. The *Philip Morris* Court was not alone:

> Many other courts have considered the question of personal jurisdiction over BAT Ind. The ***overwhelming*** number of them have found that they did not have jurisdiction over BAT Ind. *See, e.g., Lyons v. Philip Morris, Inc.,* 225 F.3d 909 (8th Cir.2000); *Laborers Local 17 Health and Benefit Fund v. Philip Morris Inc.,* 26 F.Supp.2d 593 (S.D.N.Y.1998) (*rev'd on other grounds, Laborers Local 17 Health and Benefit Fund v. Philip Morris Inc.,* 172 F.3d 223 (2nd Cir.1999); *County of Cook v. Philip Morris, Inc.,* No. 97-L-04550 (Ill. Cir. Ct. Cook Co.) (Neville, J.); *State of Hawaii v. Brown & Williamson Tobacco Corp.,* Civil No. 97-0441- 01 (Haw.Cir.Ct.); *State of Indiana v. Philip Morris, Inc.,* No. 49D07- 9702-CT-000236 (Ind.Super. Ct. Marion Co.); *State of California v. Philip Morris, Inc.,* No. 980864 (Cal.Super.Ct.); *State of Arizona v. American Tobacco Co.,* No. CV-96-14769 (Ariz.Super. Ct. Maricopa Co.); and *State of Nevada v. Philip Morris, Inc.,* No. 9700306 (Nev. Dist. Ct. Washoe Co.).

Id. at 129, n.15 (emphasis added). Indeed, the Eighth Circuit upheld the District of Minnesota's dismissal of BAT where the plaintiff had not shown that BAT had engaged in conduct "purposefully directed" towards Minnesota residents. *Lyons*, 225 F.3d at 915.

Plaintiff's "national" jurisdiction theory must fail because it is not supported by Eighth Circuit precedent. The Eighth Circuit test is what governs here, not district court decisions from New York or Texas that are questionable in light of the vast majority of cases going the other way on the same issue. Defendant denies that he uniquely aimed any conduct at Nebraska or knew that the brunt of his actions would be felt here. Plaintiff has presented no actual evidence to contradict Defendant's evidence. As a result, the Court should grant Defendant's motion to dismiss.

Dated this 22nd day of March, 2010.

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd 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:

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