

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

JEREMY SCHOEMAKER,

CASE NO. 8:09-cv-441

Plaintiff,

v.

**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

Defendant David Sullivan respectfully requests that the Court dismiss Plaintiff Jeremy Schoemaker's Complaint because this Court lacks personal jurisdiction over Defendant. Plaintiff has asserted that Defendant, a resident of California, used Plaintiff's photograph on Defendant's website without authorization. Plaintiff has asserted a claim for copyright infringement under the Copyright Act, and three claims under Nebraska state law.

The Court lacks personal jurisdiction over Defendant because he is not a Nebraska resident, has no contacts with Nebraska, has not purposefully availed himself of the benefits and protections of Nebraska, and has not intentionally committed a tort expressly aimed at Nebraska that was calculated to cause harm to Plaintiff in Nebraska. Because the Court lacks personal jurisdiction over Defendant, it must dismiss Plaintiff's Complaint.

SUMMARY OF FACTS

Defendant, a California resident, is an online marketer who makes money through advertising the products and services of others by publishing banner advertisements on various websites. See Declaration of David Sullivan (“Sullivan Decl.”) at ¶¶ 2, 6. Defendant does not make his own banner advertisements but instead accesses pre-prepared banner advertisements made by third parties. *Id.* at ¶ 6. Between October 15, 2009 to November 6, 2009, Defendant ran an online work-from-home advertising campaign with a banner advertisement containing a “thumbnail” sized photograph of Plaintiff. *Id.* at ¶ 7.

When Defendant accessed that banner advertisement, Defendant was unaware that the photograph was protected by copyright. *Id.* at ¶ 8. Also, Defendant was unaware of the identity of the person in the photograph. *Id.* In addition, Defendant was unaware of the place of residence of the person depicted in the photograph. *Id.* In short, Defendant did not know that the photograph depicted Plaintiff, or that Plaintiff lives in Nebraska. *Id.*

Defendant has no personal or business contacts with Nebraska. *Id.* at ¶¶ 3-5. Defendant has not purposefully availed himself of any benefits or protections of Nebraska. *Id.* at ¶ 5. Defendant took no action directed specifically at Nebraska. *Id.* at ¶ 5.

On November 19, 2009, thirteen days after Defendant had discontinued use of the banner advertisement, Defendant received a cease-and-desist letter from Plaintiff in regard to the banner advertisement. *Id.* at ¶¶ 11-12. Defendant promptly complied with the demands set forth in Plaintiff’s letter by providing information which indicated that

the banner advertisement had generated only fourteen sales and \$560 in revenue. *Id.* at ¶¶ 11-12. After further correspondence between the parties, Plaintiff filed this lawsuit.

ARGUMENT

I. THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT LACKS PERSONAL JURISDICTION OVER DEFENDANT.

A. Applicable Law.

A federal court cannot exercise authority over a nonresident defendant unless it has personal jurisdiction over that defendant. *Minnesota Mining & Mfg. Co. v. Nippon Carbide Indus. Co.*, 63 F.3d 694, 696 (8th Cir. 1995). The plaintiff has the burden to present *prima facie* evidence of the defendant's minimum contacts with the state that support personal jurisdiction. *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 42 (8th Cir. 1988) (*per curiam*). On a motion to dismiss for lack of personal jurisdiction, the evidence is viewed with all reasonable inferences taken in favor of the nonmoving party. *Id.*

A federal district court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; *and* (2) exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution. See *Minnesota Mining & Mfg. Co. v. Nippon Carbide Indus. Co., Inc.*, 63 F.3d 694, 696-97 (8th Cir. 1995); *Wessels, Arnold & Henderson v. Nat'l Medical Waste, Inc.*, 65 F.3d 1427, 1431 (8th Cir. 1995); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387-88 (8th Cir. 1991).

Nebraska's long-arm statute provides as follows:

A court may exercise personal jurisdiction over a person:

- (1) Who acts directly or by an agent, as to a cause of action arising from the person:
 - (a) Transacting any business in this state;
 - (b) Contracting to supply services or things in this state;
 - (c) Causing tortious injury by an act or omission in this state;
 - (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
 - (e) Having an interest in, using, or possessing real property in this state; or
 - (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
- (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Neb. Rev. Stat. § 25-536 (2003) (the “Nebraska Long-Arm Statute”).

The courts of Nebraska have generally interpreted the Nebraska Long-Arm Statute as extending to the limits of Constitutional due process. *Stucky v. Stucky*, 185 N.W.2d 656 (Neb. 1971); *Wagner v. UniCord Corp.*, 526 N.W.2d 74 (Neb. 1995). Therefore, in addition to performing an analysis under the language of the Nebraska Long-Arm Statute itself to determine whether Defendant is subject to its personal jurisdiction, the Court also must decide whether subjecting Defendant to suit in Nebraska would be consistent with the Due Process Clause of the Fourteenth Amendment. *Wessels, Arnold & Henderson*, 65 F.3d at 1431.

The Due Process Clause of the Fourteenth Amendment permits a federal district court to exercise personal jurisdiction over a nonresident defendant when (1) that defendant has purposefully availed himself of the benefits and protections of the forum state by establishing “minimum contacts” with the forum state; and (2) the court’s

exercise of personal jurisdiction over that defendant does not offend “traditional notions of fair play and substantial justice.” *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). Under the first prong of the *International Shoe* test, the purposeful availment requirement ensures that a defendant will not be “haled into a jurisdiction solely as a result of “‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts or because of the ‘unilateral activity of another party or a third person,’” and therefore specific jurisdiction is proper “where the contacts proximately result from actions by the defendant himself that create a ‘substantial connection’ with the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Under the second prong of the *International Shoe* test, the due process components of the Fourteenth Amendment of the United States Constitution require that a nonresident defendant’s conduct and connection with the forum state must be such that he “should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In the Eighth Circuit, courts consider five factors to determine whether a district court’s exercise of jurisdiction over a non-resident defendant is consistent with Constitutional due process. The three primary factors are: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; and (3) the relation of the cause of action to the contacts. *Aftanase v. Economy Baler Co.* 343 F.2d 187, 197 (8th Cir. 1965); *Burlington Indus. v. Maples Indus.*, 97 F.3d 1100, 1102 (8th Cir. 1996). Courts in the Eighth Circuit also consider two additional factors: (4) the interest of the forum state, and (5) the convenience of the parties. *Burlington Indus.*, 97 F.3d at 1102.

The first three factors listed are of primary concern in deciding whether a court may reasonably assert personal jurisdiction, and the fourth and fifth factors have only secondary importance. *Burlington Indus.*, 97 F.3d at 1102; *see also Land-O-Nod Co. v. Bassett Furniture Indust., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983). The third factor is crucial because it allows a court to determine whether the personal jurisdiction is specific or general. *Burlington Indus.*, 97 F.3d at 1102 (citing *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 819 (8th Cir. 1994)). In the Eighth Circuit, a court can find specific personal jurisdiction when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the plaintiff's cause of action. A court can find that it has general personal jurisdiction when a nonresident defendant's contacts with the forum state, though unrelated to the plaintiff's cause of action, are nevertheless "continuous and systematic." *Bell Paper Box*, 22 F.3d at 819.

B. The Court Lacks General Personal Jurisdiction Over Defendant.

The Court lacks general personal jurisdiction over Defendant because he does not have continuous and systematic general business contacts with Nebraska. "The threshold for satisfying the requirements for general jurisdiction is substantially greater than that for specific jurisdiction." *Corry v. CFM Majestic Inc.* 16 F.Supp.2d 660 (E.D.Va.,1998) (citing 16 James Wm. Moore et al., *Moore's Federal Practice* § 108.40 (3d ed. 1997) and *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-15 (1984)). In *Helicopteros*, the U.S. Supreme Court stated that general personal jurisdiction was "reasonable and just" when a defendant has "continuous and systematic general business contacts" consisting of things such as maintaining an office in the forum from which the defendant conducts business and in which the defendant holds company directors' meetings, maintaining bank accounts in the forum from which

checks are distributed, and engaging a bank in the forum to act as a transfer agent. *Helicopteros*, 466 U.S. at 414-15 (discussing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)). Courts typically assert general jurisdiction only over nonresidents who are “essentially domiciled within the forum state.” *Corry*, 16 F.Supp.2d at 663 (citing *Moore's Federal Practice* § 108.41[3] (“The threshold for ‘continuous and systematic’ contact usually requires at least an office in the forum state”)).

Defendant does not have contacts with Nebraska that would make him subject to general personal jurisdiction under the due process standard of *Helicopteros*, the Eighth Circuit’s multi-factor test, or the Nebraska Long-Arm Statute. Defendant does not reside in Nebraska and has been to Nebraska only once, on a business trip unrelated to his current business. Sullivan Decl. at ¶¶ 2-3. Defendant does not transact business in Nebraska. *Id.* at ¶¶ 3-5. Defendant does not make contracts to supply goods or services in Nebraska. *Id.* at ¶¶ 3-5. Defendant does not regularly solicit business, engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered in Nebraska. *Id.* at ¶¶ 3-5. Defendant does not own or have any possessory interest in real property in Nebraska. *Id.* at ¶¶ 3-5. And, Defendant has not made any contracts to insure a person, property, or risk located in Nebraska. *Id.* at ¶¶ 3-5. Simply put, Defendant is not “essentially domiciled” in Nebraska. Thus, the Court does not have general personal jurisdiction over Defendant.

C. The Court Lacks Specific Personal Jurisdiction Over Defendant.

In the Eighth Circuit, “specific jurisdiction refers to jurisdiction over causes of action that ‘arise out of’ or ‘relate to’ a defendant’s activities within a state.” *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 707 (8th Cir. 2003) (quoting *Burger King*, 471 U.S. at 472). To support specific personal jurisdiction, Plaintiff must show that Defendant has activities that either take place within Nebraska or are purposefully directed towards Nebraska in a way that indicates purposeful availment of the benefits and protections of Nebraska. Plaintiff discusses two related activities by Defendant in the Complaint: (1) Defendant’s website and (2) Defendant’s use of the banner advertisement on the website. Neither of these activities took place within Nebraska or were purposefully directed towards Nebraska. Therefore, the Court lacks specific personal jurisdiction over Defendant.

1. Defendant Does Not Conduct Activities In Nebraska Through His Website And Does Not Purposely Direct His Website Towards Nebraska Residents.

To determine when the nature and quality of a defendant’s presence on the Internet establishes sufficient minimum contacts with the forum state to support specific personal jurisdiction, the Eighth Circuit has adopted the sliding-scale test set forth in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997). *See Lakin*, 348 F.3d at 711-12. The *Zippo* Court described the test as follows:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. As the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by

interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 710-11 (quoting *Zippo*, 952 F.Supp. at 1124).

Under *Lakin* and *Zippo*, Plaintiff must prove that Defendant's website was more than merely accessible to Nebraska residents to support an exercise of specific personal jurisdiction. Plaintiff must show that Defendant conducted activities in Nebraska through his website or purposely directed his website at Nebraska. In practical terms, Plaintiff must show that Defendant used his website to enter into business contracts with residents of Nebraska which involve the knowing and repeated transmission of computer files over the Internet in a manner that would establish sufficient minimum contacts with Nebraska. *Lakin*, 348 F.3d at 711.

Plaintiff cannot meet his burden. Defendant does not conduct business activities in Nebraska through his website.¹ The website was not created in Nebraska and is not maintained by a Nebraska web hosting company. Sullivan Decl. at ¶ 5. Defendant has neither used his website to enter into contracts with residents of Nebraska, nor has he used his website to transmit files over the internet to Nebraska residents. *Id.* at ¶ 5.

Defendant's website is informational and is not highly interactive. The website only provides information to Internet users who are interested in it. Indeed, the only interactive aspect of Defendant's website is the ability to click on advertising links that will take Internet users to **other** sites. Such minimal interactivity is insufficient to support personal jurisdiction. See, e.g., *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 337 (5th Cir. 1999) (noting that the mere presence of an email hyperlink would not save

¹ Plaintiff attached a printout of the website (<http://world-jobs-report.com>) to the Complaint as Exhibit B.

personal jurisdiction claim). The mere availability of Defendant's website to Nebraska residents is insufficient to support specific personal jurisdiction under the *Zippo* and *Lakin* standard, because availability and accessibility alone do not indicate direct business contacts which would demonstrate purposeful availment of the benefits and protections of Nebraska.

Nor has Defendant purposely directed his website towards Nebraska residents. Specific personal jurisdiction is conferred if "the defendant purposely directed its activities at the forum state and the claim arose out of or relates to those activities." *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008). Defendant's website is conspicuously labeled "San Diego Herald News" in the header. If the website indicates activities directed at any forum, that forum is California – not Nebraska. There is no reference to Nebraska anywhere on the website. There is no direct address to internet users in Nebraska on the website and no direct solicitation of Nebraska consumers. In short, no aspect of the website is specifically or purposely directed at Nebraska or internet users in Nebraska. Thus, the Court lacks specific jurisdiction over Defendant.

2. Defendant Did Not Direct A Harmful Act At Plaintiff With The Intention Of Causing Harmful Effects In Nebraska.

Plaintiff alleges that specific personal jurisdiction is proper in Nebraska because of Defendant's use of the photograph of Plaintiff on Defendant's website. Complaint at ¶ 21 ("Defendant's conduct caused harm to Schoemaker, and Defendant directed that harm at Schoemaker with the knowledge that said harm would directly impact Schoemaker in the State of Nebraska."). Plaintiff asserts that Defendant directed harm at Plaintiff, and that Defendant acted intentionally, "with the knowledge," that the harm would impact Plaintiff in Nebraska. Plaintiff's allegation suggests that he will argue that

the Court should apply the “effects test” for specific personal jurisdiction. The Supreme Court has found 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 v. Jones*, 465 U.S. 783 (1984).

On a motion to dismiss for lack of personal jurisdiction, the evidence is viewed with all reasonable inferences taken in favor of the nonmoving party. *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d at 42. Under this standard, Plaintiff may argue that the Court must look on Plaintiff’s allegations in paragraph 21 of the Complaint as true for the purpose of deciding this motion. However, Plaintiff’s allegations in paragraph 21 merely state the elements of the *Calder* test and assert a legal conclusion that Defendant acted “with the knowledge” that harm would impact Plaintiff in Nebraska. Complaint at ¶ 21. The Court is not bound to accept as true a formulaic recitation of the elements of a cause of action and a legal conclusion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286, (1986) (“Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation”)). Defendant will demonstrate below that the facts of the instant case do not support specific personal jurisdiction under the *Calder* test.

In *Calder*, two Florida journalists wrote an allegedly libelous article about Shirley Jones, a famous singer and actress who lived in California. Ms. Jones brought suit against the Florida journalists in California. The *Calder* Court found that California was “the focal point both of the story and of the harm suffered” because Jones’s “television

career was centered in California” and her “emotional distress and the injury to her professional reputation was suffered in California.” *Calder*, 465 U.S. at 789-90. Because the Florida journalists knew that their article “would have a potentially devastating impact” on Jones and “knew that the brunt of that injury would be felt by respondent [Jones] in the State in which she lives and works,” the Court found that personal “jurisdiction over petitioners [the journalists] is therefore proper in California based on the ‘effects’ of their Florida conduct in California.” *Calder*, 465 U.S. at 789-90.

The Eighth Circuit has analyzed *Calder* and noted that the Supreme Court “made 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. As a result, the *Dakota* Court 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.*

The *Calder* effects test does not apply in this case for several reasons. First, the journalists in *Calder* knew who Ms. Jones was when they wrote their allegedly libelous article. Conversely, when Defendant began using the banner advertisement on October 15, 2009, he did not know Plaintiff and did not know the identity of the person depicted in the picture. Sullivan Decl. at ¶ 8.

Second, given that Defendant did not know who Plaintiff was, Defendant certainly did not know that Plaintiff lived in Nebraska when he began using the banner advertisement. *Id.* at ¶ 8. Unlike the journalists in *Calder*, who knew that Ms. Jones

lived in California when they wrote their article, Defendant could not have intentionally directed harm at Plaintiff in Nebraska or known that the brunt of that harm would be felt in Nebraska without knowing who Plaintiff was or where Plaintiff lived.

Third, even if Defendant had known that Plaintiff lived in Nebraska before this dispute arose, Defendant did not know that the photograph at issue was protected by copyright. Defendant assumed that the photograph was either licensed or in the public domain. *Id.* at ¶ 8. In other words, Defendant did not use the photograph with the intent of causing harm because, at the time, Defendant did not know that use of the photograph required permission or that an unauthorized use would cause harm. *Id.* at ¶ 8.

CONCLUSION

Defendant respectfully requests that the Court dismiss the Complaint for lack of personal jurisdiction. Defendant does not have sufficient minimum contacts with Nebraska to support personal jurisdiction, has not purposefully availed himself of the benefits and protections of Nebraska, and has not intentionally directed any acts towards Nebraska that would allow Defendant to be haled into this Court under the Due Process clause. The only apparent connection between this case and the State of Nebraska is that Plaintiff resides in Nebraska. There is not enough of a connection between Defendant and the State of Nebraska to support a finding of personal jurisdiction under the Nebraska Long-Arm Statute or the United States Constitution. Thus, the Court should dismiss Plaintiff's Complaint without prejudice.

Dated this 5th day of February, 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 5th day of February, 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, Nebraska 68102-2663

s/ John A. Sharp

DOCS/957252.1