

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

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John Doe,	)	Civil No. 09-05-C-543
	)	
Plaintiff,	)	
	)	
vs.	)	<b>ORDER GRANTING</b>
	)	<b>DEFENDANT'S MOTION</b>
Ed Falk,	)	<b>TO DISMISS</b>
	)	
Defendant.	)	

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Defendant Ed Falk's Motion to Dismiss for Lack of Personal Jurisdiction was heard on February 28, 2006. The Court reviewed the entire record, heard and considered the testimony given at the hearing, and is fully informed in the premises.

**BACKGROUND**

Plaintiff John Doe (Doe) brought an action against Defendant Ed Falk (Falk) alleging defamation and intentional interference with prospective business advantage arising out of information contained on Falk's website, [www.rahul.net/falk](http://www.rahul.net/falk) ("the Falk Website"). Falk resides in California, and has resided in California continuously for over 19 years. Falk has neither lived in the State of North Dakota, nor has he visited North Dakota. He does not engage in business in North Dakota, and has never owned real or personal property within the State.

In or around 1994 Falk began taking part in online discussions regarding Usenet Spam. Falk's online discussions were aimed at eliminating spam and the problems associated therewith, including problems with pornographic spam. "Spam" is a colloquial term used to describe unwanted electronic junk mail and newsgroup postings, and can also be used to refer to any sort of unwanted message sent via the Internet to a large group of people. Spam usually takes the form of unsolicited commercial advertisements for various products and services. In response to inaction from Internet service providers, Falk wrote a program, and began monitoring sources of

spam. His program would collect the spam and generate a daily report to send to the service provider. Falk also posted these daily summaries to a newsgroup site. Over time, his list of service providers and spammers grew to over 400. He then created the Falk Website to present information regarding the fight against spam. Each Internet service provider and/or spammer was given a case file within the Falk Website. Falk has indicated that his investigations were at all times dedicated to: "(1) identifying the spammer, (2) informing the spammers' service providers that the providers' services were being used to send spam, and (3) maintaining a careful history of those companies that permitted spammers to continue to operate using their computer resources."

In or around 1997 Falk added Netzilla to his list of spammers being tracked and began to compile a case file. On his Website, Falk listed all of the domain names he could associate with Netzilla. To accumulate this information, Falk testified that he ran a "whois" lookup on Netzilla.net. "Whois" is a public registry accessible through the Internet. It allows a person to check public records for ownership of Internet sites. The Falk Website indicates that the "whois" lookup identified Netzilla as being owned by Intel Telecom Corporation, with Doe listed as the contact person. Falk additionally ran "whois" lookups for Intel Telecom and Sexzilla.com, which is another domain name Falk believed to be associated with Netzilla. The results of those searches likewise provided links to Doe. Falk's "whois" searches lead him to believe that Doe operated the Netzilla site. Falk thought these search results were conclusive, and did nothing further to personally verify that Netzilla was owned by Doe. Falk's Website specifically connects Doe to Netzilla.net and Sexzilla.com, and lists Doe's address and telephone number, as well as the names and addresses of persons believed to be affiliated with him.

In addition to the "whois" queries that provided information as to ownership of the sites, Falk gathered additional information to determine who the network service provider(s) were for

Netzilla.net and Sexzilla.com. To accomplish this, Falk, or someone in the Usenet newsgroup, ran a "traceroute". A "traceroute" traces the path that packets of data take to get from one host to another. The traceroutes hit servers located in North Dakota. (Falk was unaware of the location of the servers.)

Falk's compilation of data on Netzilla.net additionally led to information that Netzilla owned the domain name Newsfeeds.com. Newsfeeds.com participates in message-based communications through an anti-spam Usenet newsgroup. Falk has communicated with Newsfeeds.com's abuse department via the Usenet newsgroups by directing messages to Newsfeeds.com or replying to them. Falk has directed comments and questions towards Newsfeeds.com, replied to other user's comments about Newsfeeds.com, and invited Newsfeeds.com's reply or action in response. Information obtained about Newsfeeds.com indicated to Falk that Newsfeeds.com was based out of Las Vegas, when in reality, its servers are located in Fargo, North Dakota. Newsfeeds is incorporated in Nevada but operates its servers in North Dakota. Falk admits running at least one traceroute that would have gone through the Newsfeeds server, but he was not aware that server was located in North Dakota. Newsfeeds advertised that it provided uncensored and unmonitored access to the Internet.

If printed out, the Falk Website would consist of approximately 13,500 pages. The Netzilla case file maintained on the site consists of approximately 9 pages. (Exhibit A to Aff. of Brad Allison). Doe's name is mentioned on those 9 pages approximately 21 times. North Dakota is not specifically mentioned on the Falk Website except that it lists North Dakota as Doe's address.

On or around August 25, 2004 counsel for Doe sent a cease and desist letter to Falk demanding that he remove certain allegedly defamatory content from his Website. Falk posted this letter on the Website. A follow-up letter on October 14, 2005 demands that the entire site be

shut down and removed from the Internet. Falk has indicated that these letters led him to believe that a lawsuit against him might be a possibility, but he did not know for sure whether a suit would be filed, or where it would be filed.

In or around November, 2004, Falk received an email from an attorney in Fargo, North Dakota, Michelle Donarski. At that time, Donarski was not Falk's attorney, but instead was soliciting Falk's assistance in another lawsuit initiated by Doe against her client. Donarski indicated in her email to Falk that she had reviewed the Falk Website, specifically the information contained therein regarding Doe. Falk indicates that he probably responded to Donarski first by telling her that the information on the website was accurate, by sending a second email containing information, and by sending a third email to follow up.

On February 18, 2005 Doe filed the present action. That same day, or shortly thereafter, Falk was contacted by a reporter for the Fargo Forum, and consented to a telephonic interview. The reporter informed him that a suit had been filed in North Dakota. Falk indicated that was the first he had heard that Doe had followed through with his threats to file suit. After an article on the lawsuit appeared in the Fargo Forum, Falk updated his website by providing a hyperlink to the Forum article. Falk further admits that he visited the Fargo Forum website, but did not register there.

The Falk Website is not interactive in the sense that a user accessing the site cannot add information. However, the site is not static. Falk updates the information contained therein on a sporadic basis. The site contains an abundance of information regarding spam and spammers. It does not offer any products for sale, though it does contain approximately 3000 hyperlinks to either other websites or information within the Falk Website. Of the 3000 hyperlinks on the Falk Website, approximately 9 relate to Netzilla.net.

### ISSUE PRESENTED

Whether this Court has personal jurisdiction over the Defendant.

### ANALYSIS

#### A. Types of Personal Jurisdiction

North Dakota's Long Arm Statute is found at N.D.R.Civ.P. 4(b)(2) which provides in pertinent part:

- (2) Personal Jurisdiction Based Upon Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:
- \* \* \*
  - (C) committing a tort within or without this state causing injury to another person or property within this state. ...

To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction. Atkinson v. McLaughlin, 343 F.Supp.2d 868, 870 (D.N.D. 2004) (*citations omitted*). The plaintiff's prima facie showing must be tested, not by the pleadings alone, but by the affidavits and exhibits presented with the motions and in opposition thereto. Id. (*citing Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004)). Questions of personal jurisdiction must be decided on a case-by-case basis, depending on the particular facts and circumstances. Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, ¶ 9, 699 N.W.2d 421, 424 (*quoting Ensign v. Bank of Baker*, 2004 ND 56, 676 N.W.2d 786).

Doe asserts that the following contacts by Falk constitute a prima facie showing of jurisdiction: (1) Falk maintained a website "targeting" North Dakota; (2) Falk engaged in Internet exchanges and/or postings with people in North Dakota through Newsfeeds.com; (3) Falk hit servers in North Dakota by running traceroutes; (4) Falk consented to a telephonic

interview with a reporter from the Fargo Forum; (5) Falk submitted information to Michelle Donarski for the purpose of litigation in North Dakota, and he was not a party to that litigation.

North Dakota has identified five factors used in determining personal jurisdiction over a nonresident defendant: (1) the nature and quality of the nonresident defendant's contacts with the forum state; (2) the quantity of the nonresident defendant's contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties. Ensign v. Bank of Baker, 2004 ND 56, ¶ 12, 676 N.W.2d 786, 791. The first three factors are of primary concern. Id. States may exercise two broad types of personal jurisdiction: specific jurisdiction and general jurisdiction. Id. (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn. 8-9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). General jurisdiction is proper "when the defendant has engaged in a high level of continuous and systematic contacts in the forum state." Ensign, 2004 ND 56, ¶ 13, 676 N.W.2d at 791. A North Dakota court may exercise specific personal jurisdiction over nonresident defendants only if they purposefully directed their activities towards North Dakota. Id. at ¶ 15 (citations omitted).

General jurisdiction over Falk in this matter is not appropriate because, as a nonresident, it is undisputed that he has not engaged in continuous contacts with North Dakota. See e.g., Ensign, 2004 ND 56, ¶ 13, 676 N.W.2d at 791 (noting that most courts are hesitant to exercise personal jurisdiction over nonresident defendants). Therefore, to find personal jurisdiction, it is necessary to find that Falk purposefully availed himself of the jurisdiction of this state by directing his activities towards North Dakota, such that specific jurisdiction is appropriate.

#### **B. Purposeful Availment in Internet Cases**

The Courts generally utilize two tests when analyzing jurisdiction issues involving the Internet. See e.g., Wagner v. Miskin, 2003 ND 69, ¶ 17, 660 N.W.2d 593, 598 (acknowledging

tests utilized by courts). Some courts apply the "sliding scale" test articulated in Zippo Mfg. Co. v. Zippo Dot Com. Inc., 952 F.Supp. 1119, 1124 (W.D.Pa. 1997), while others apply the "effects test" derived from Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

#### 1. "Sliding Scale" Test

In some jurisdictions, a "sliding scale" test has been adopted in Internet cases to determine whether the courts have personal jurisdiction over a non-resident defendant. This test involves an examination of the active versus passive nature of the web site. Atkinson v. McLaughlin, 343 F.Supp.2d 868, 872 (D.N.D. 2004).

At one end of the spectrum are situations where the defendant clearly does business over the Internet. If the defendant enters into contacts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on the 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 is determined by examining the level of interactivity and commercial nature of the exchange of information.

Zippo Mfg. Co. v. Zippo Dot Com. Inc., 952 F.Supp.1119, 1124 (W.D.Pa. 1997). *See also* Lakin v. Prudential Securities, Inc., 348 F.3d 704, 710-11 (8th Cir. 2003).

Doe does not rely upon the sliding scale test as a basis for jurisdiction in this case, because he argues that this case is not commercial in nature. Falk does not offer any products for sale on the Falk Website, nor does he conduct any business through the Website. Rather, the Falk Website is a source of information regarding spam. The Website is not interactive in the sense that a user accessing the site cannot add information. Therefore, even though Doe does not rely on the sliding scale test as a basis for personal jurisdiction, jurisdiction would not be proper based upon this test due to the passive nature of the Falk Website.

## 2. "Effects" Test

Doe does however argue that the "effects test" first articulated in Calder provides the basis for personal jurisdiction over Falk in this case. See Calder v. Jones, 465 U.S. 783, 789 (1984) (finding the forum state to be the focal point of the defendant's actions and the harm suffered, and therefore finding that jurisdiction was proper based on the "effects" of the defendant's out- of-state contact with the forum state). Specific personal jurisdiction may be premised upon "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state." Core-Vent v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993) (citing Calder, 465 U.S. at 790). See also Atkinson v. McLaughlin, 343 F.Supp.2d 868, 877-78 (D.N.D. 2004) (examining the focus of the website, whether it targeted North Dakota, and its effects in North Dakota). Express aiming exists where "the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082 (9th Cir. 2000).

Each of the contacts by Falk in this case that are relied upon by Doe to constitute a prima facie case can be analyzed to discern whether any or all of them would suffice to confer personal jurisdiction under the Calder effects test.

### a. Website "targeting" North Dakota

Doe asserts that the Falk Website targets North Dakota. However, it is clear when viewing the entire Falk Website (13,500 pages) that the target and focus of the site is spam, not Doe or North Dakota. The Falk Website does contains a case file regarding Netzilla.net that makes references and connections to persons and/or entities in North Dakota. The focus of the 11 page Netzilla case file is spam generated by Netzilla. It is not a case file focusing on North Dakota. The mention of North Dakota is a result of public information searches conducted by

Falk and/or his peers on Usenet that revealed connections between Netzilla and North Dakota. The site contains no call to action to North Dakotans, and contains no mention of North Dakota other than listing the state as the address of Doe and/or entities linked to Doe. The Falk Website, which could be viewed by anyone in the world with access to an Internet connection, does not specifically target North Dakota, and does not make out a prima facie case to confer specific personal jurisdiction under the effects test.

b. *Internet exchanges/postings through Newsfeeds.com with Individuals in North Dakota*

Falk communicated with persons in North Dakota through the Newsfeeds.com abuse department through Usenet newsgroup postings and exchanges. However, it is undisputed that when Falk ran inquiries regarding Newsfeeds.com, the results led him to believe that Newsfeeds was located in Las Vegas. In fact, the evidence demonstrates that Newsfeeds.com is incorporated in Nevada, but operates in Fargo, North Dakota. Some spammers try to hide their true identities. For example, Sexzilla.com is now registered to a domain broker in the Cayman Islands. Falk was not aware at the time of the postings and exchanges that Newsfeeds.com's servers were located in North Dakota, nor was he aware that the Usenet exchanges were taking place with persons located in North Dakota. In order for this Court to find personal jurisdiction over Falk under the effects test, Doe must show that Falk expressly aimed the offensive communications at the State of North Dakota, knowing that the communications would cause harm to Doe in North Dakota. Doe has not pointed to any evidence that Falk knew at the time of the communications that Newsfeeds was located in North Dakota, which is an essential element to finding personal jurisdiction under the effects test. Consequently, the exchanges through Newsfeeds.com do not assist in establishing a prima facie case to confer specific personal jurisdiction under the effects test.

c. *Traceroutes – Hitting Servers in North Dakota*

Falk has indicated that he gathered additional information to determine who the network service provider(s) were for Netzilla.net and Sexzilla.com. To accomplish this, Falk, or someone in the Usenet newsgroup, ran a “traceroute”. At least one of the traceroutes hit servers located in North Dakota. The fact that Falk ran a traceroute that touched servers in North Dakota provides, at best, a tenuous connection to North Dakota.

Specific personal jurisdiction is premised upon intentional actions expressly aimed at the forum state. By running the traceroutes in question, Falk was attempting to gather information as to the whereabouts and identities of the network service providers for Netzilla.net and Sexzilla.com. Falk’s intent in running these traceroutes was not invidious. He did not expressly aim any action at North Dakota, nor did he intentionally target any server in North Dakota. He was merely trying to glean information, the results of which led to a North Dakota connection. To attempt to base specific personal jurisdiction on such a tenuous connection does not comport with due process. Accordingly, the fact that Falk’s traceroutes hit servers in North Dakota does not assist in establishing a prima facie case to confer specific personal jurisdiction under the effects test.

d. *Telephonic Interview with North Dakota Reporter at Fargo Forum*

The lawsuit in this case was filed with the Court on February 18, 2005. On that same day, or shortly thereafter, Falk was contacted by a reporter at the Fargo Forum, and consented to a telephonic interview. The Forum subsequently ran an article regarding this case, and the article contains a quote from Falk referencing Doe and his involvement with Internet spam.

Specific personal jurisdiction “stems from the defendant’s having certain minimum contacts with the forum state so that the court may hear a case whose issues arise from those minimum contacts.” Black’s Law Dictionary 870 (8th ed. 1990). This type of jurisdiction over a

defendant may be established upon a showing that the defendant purposefully established contact with the forum state and that the basis of the lawsuit arose out of those contacts. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

Falk did not initiate the contact with the Fargo Forum. Instead, he was contacted by a reporter for the Forum and asked to comment on litigation in which he was named as a party. Finding that contact with North Dakota to be sufficient to form the basis of personal jurisdiction does not comport with due process. Additionally, this contact with North Dakota occurred after the lawsuit had been filed by Doe, and therefore could not have formed the basis of the lawsuit. Specific personal jurisdiction requires that the cause of action arise out of the defendant's contacts with the forum state. In this case, the cause of action had already arisen, and the lawsuit had been filed when Falk consented to a telephonic interview with the Forum. Consequently, the telephonic interview does not assist in establishing a prima facie case to confer specific personal jurisdiction under the effects test.

e. *Submission of Information to North Dakota Attorney in Unrelated Litigation*

Similarly, Doe asserts that Falk's contact with Attorney Michelle Donarski in November, 2004 provides a sufficient basis to assert personal jurisdiction. Donarski contacted Falk through email on a matter unrelated to this lawsuit, informing him that she was representing a client who had been sued by Doe. Donarski indicated in her email to Falk that she had reviewed the Falk Website, specifically the information contained therein regarding Doe. Falk indicates that he probably responded to Donarski first by telling her that the information on the website was accurate, by sending a second email containing information, and by sending a third email to follow up.

Not only did Falk fail to initiate the correspondence with Donarski, Doe's cause of action against Falk does not stem from any contact that Falk had with Donarski prior to the litigation. Instead, Doe's allegations against Falk are a result of information contained on the Falk Website. Falk did not purposefully establish contact with North Dakota in having electronic communications with Donarski, Falk did not know that engaging in communication with Donarski would cause harm in North Dakota, and further, these communications do not form the basis of the lawsuit. Accordingly, the communications between Falk and Donarski do not assist in establishing a prima facie case to confer specific personal jurisdiction under the effects test.


In summary, none of the contacts cited by Doe, either individually or collectively, are sufficient to form the basis for specific personal jurisdiction in this case under the Calder "effects test."

#### DECISION

IT IS ORDERED that Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is GRANTED, and the Plaintiff's claims against Ed Falk, are dismissed.

Dated this 9 day of March, 2006.

BY THE COURT:



FRANK L. RACEK  
District Court Judge  
East Central Judicial District