

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

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Civil Action No. 02-WM-117 (CBS)

THE CONTINUING EPISCOPAL CHURCH and THE HOLY EASTERN
ORTHODOX CATHOLIC AND APOSTOLIC CHURCH IN NORTH AMERICA, INC.
Plaintiffs,

v.

MONTGOMERY GRIFFITH, aka MONTGOMERY GRIFFITH-MAIR, DIRECLYNX.INC.,
ANTHONY P. BEGONJA, SHAVER COMMUNICATIONS, INC., and UNITED LAYER,
INC.,
Defendants.

**RECOMMENDATION ON DEFENDANTS'
MOTIONS TO DISMISS AND PLAINTIFFS' MOTION
FOR INTERLOCUTORY INJUNCTION**

Magistrate Judge Craig B. Shaffer

THIS MATTER comes before the court on Defendant Begonja's Motion to Dismiss for Lack of Personal Jurisdiction, filed February 27, 2002, and *pro se* Defendant Griffith's Motion to Dismiss, filed on May 6, 2002. Both defendants have moved, pursuant to Fed.R.Civ.P. 12(b)(2), to dismiss Plaintiffs' Amended Complaint for lack of personal jurisdiction. In addition, Defendant Griffith has moved to dismiss the Amended Complaint for improper venue, pursuant to Fed.R.Civ.P. 12(b)(3). Also pending before the court is Plaintiffs' Motion for Interlocutory Injunction, filed on February 5, 2002, which seeks to "permanently restrain" Defendants from infringing on copyrights allegedly owned by Plaintiffs.

On February 27, 2002, Defendant Begonja filed a Motion to Strike Plaintiffs' Motion for Interlocutory Relief, arguing that Plaintiffs' motion is defective under Fed.R.Civ.P. 65(a). On

March 14, 2002, Plaintiffs filed their Response to Defendant Begonja's Motion to Dismiss for Lack of Personal Jurisdiction.¹ Pursuant to an Order of Reference, dated February 28, 2002, this matter was referred to the Magistrate Judge to conduct scheduling and pre-trial proceedings, but not to submit proposed recommendations for rulings on dispositive motions. On April 25, 2002, the District Court issued a Special Order of Reference to Magistrate Judge, to "conduct hearings, including evidentiary hearings, if necessary, and submit proposed findings of fact and recommendations for ruling on all dispositive motions." This court held a hearing on the pending motions to dismiss on June 4, 2002. Plaintiffs had not requested a hearing on their motion for injunctive relief. The court has reviewed the motions and response, the entire case file, and the applicable law and has considered the arguments of counsel and the *pro se* party. Having been sufficiently advised in the premises, the court recommends that Defendants' motions to dismiss be granted and that Plaintiff's Motion for Interlocutory Injunction be denied.

NATURE OF ACTION

Plaintiffs, The Continuing Episcopal Church and The Holy Eastern Orthodox Catholic and Apostolic Church in North America, Inc. allege in their Amended Complaint, filed on February 5, 2002, that Defendants Begonja and Griffith have unlawfully published on their respective domain web sites Plaintiffs' registered and non-registered copyrighted material and registered service marks. Plaintiffs further allege that Defendants Direclynx, Inc. and Shaver

¹Pursuant to D.C.COLO.LCivR 7.1(C), Plaintiffs had 20 days after the filing of Griffith's motion to file their response. Plaintiffs never filed any response to Defendant Griffith's motion to dismiss or asked for an extension of time to file a response.

Communications, Inc. host Begonja's and Griffith's web sites.² Plaintiffs are churches that engage in ministerial and evangelistic services and counseling. The Continuing Episcopal Church ("CEC") is a New Jersey corporation, headquartered in Loveland, Colorado. The Holy Eastern Orthodox Catholic and Apostolic Church in North America, Inc. ("THEOCACNA") is a Massachusetts corporation with its principal place of business in Arkansas.

Plaintiffs' Amended Complaint alleges that Defendants Begonja and Griffith hold themselves out as priests in unincorporated independent churches that also engage in ministerial and evangelistic services and counseling. Begonja is a resident of Texas, while Griffith is a resident of Arkansas. Defendant Direclynx is alleged to be an Arkansas corporation, with its principal place of business also in Arkansas. According to the Amended Complaint, Defendant Direclynx is "in the business of hosting domain websites" and hosts "domain websites 'archbishops.org.' and 'episcopal.cc' which are paid for by the Defendant Montgomery Griffith."

The Amended Complaint further alleges that these web sites

unlawfully and without permission publish . . . the Plaintiffs' registered copyrighted material, non-registered copyrighted material on which registration has been applied for, and registered service marks of the Plaintiffs. . . . In as much as the Defendant Montgomery Griffith is offering competing services to the public, there is a high likelihood of confusion in the minds of the public as to the source of the services which he is offering.

Plaintiffs allege that Defendant Begonja operates a domain web site, "ind-movement.org," on which he publishes links to Plaintiffs' registered and non-registered copyrighted material and improperly uses Plaintiffs' registered service marks. Begonja allegedly is "publishing deceptively named links which misrepresent and cast the target copyrighted material of the

²On February 27, 2002, Plaintiffs voluntarily dismissed with prejudice the claims against Shaver Communications, Inc.

Plaintiffs into a false light.” (Amended Complaint ¶ 9). Attached to the Amended Complaint are purported pages printed from Defendants’ web sites. Notably, the Amended Complaint does not contain a “short and plain statement of the grounds upon which the court’s jurisdiction depends.” *See* Fed.R.Civ.P. 8(a).

It should be noted that on April 5, 2002, Plaintiffs filed a Motion for Leave to File Amended Complaint on New Defendant, which sought to join Defendant Begonja’s new Internet service provider, United Layer, Inc. With the exception of a single new paragraph relating to the proposed defendant United Layer, Inc., Plaintiffs’ Twice Amended Complaint is identical to their Amended Complaint and does not set forth any additional well-pled facts relating to Defendants Begonja and Griffith. On April 5, 2002, this court denied without prejudice Plaintiffs’ Motion for Leave to File Amended Complaint on New Defendant for failure to comply with Fed.R.Civ.P. 5. For purposes of the pending motions to dismiss, the court will treat the Amended Complaint as the operative pleading.

Defendants Begonja and Griffith have moved separately to dismiss the pending action for lack of subject matter jurisdiction. Defendant Griffith also has moved to dismiss for improper venue.

DEFENDANTS’ MOTIONS TO DISMISS

A. Standard of Review

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a motion to dismiss may be granted if the court does not have personal jurisdiction over a party. While a plaintiff bears the burden of establishing personal jurisdiction over a non-resident defendant, that burden is light. *See Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). “When the issue is raised

before trial and decided on the basis of affidavits and other written materials, a plaintiff need only make a prima facie showing.” *Wise v. Lindamood*, 89 F. Supp.2d 1187, 1189 (D. Colo. 1999). All disputed facts and all reasonable inferences must be drawn in the plaintiff’s favor. *Behagen v. Amateur Basketball Ass’n of U.S.A.*, 744 F.2d 731, 733 (10th Cir. 1984). “However, ‘only the well pled facts of plaintiff’s complaint, as distinguished from mere conclusory allegations, must be accepted as true.” *Wise v. Lindamood*, 89 F. Supp.2d at 1189. The court also should accept as true those facts presented in defendant’s affidavits that remain unrefuted by plaintiff. *See Glass v. Kemper Corp.*, 930 F. Supp. 332, 337 (N.D.Ill. 1996).

B. Discussion

The Amended Complaint alleges copyright violations, which would suggest claims arising under the Constitution or laws of the United States. *See* 28 U.S.C. § 1331. During oral argument on June 4, 2002, Plaintiffs’ counsel also invoked the District Court’s diversity jurisdiction under 28 U.S.C. § 1332. However, the court notes that the Amended Complaint describes Plaintiff THEOCACNA’s principal place of business as Arkansas. *See Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 914 (10th Cir. 1993) (for purposes of diversity jurisdiction, a corporation is deemed a citizen of the state where it has its principal place of business). Defendants Griffith and Direclynx also are alleged to be residents of Arkansas. Based upon Plaintiffs’ own allegations, there does not appear to be complete diversity among the parties, which precludes jurisdiction under section 1332. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (general diversity statute applies only where the citizenship of each plaintiff is diverse from the citizenship of each defendant).

In this federal question case, the court may exercise jurisdiction over a non-resident

defendant only if the applicable state long-arm statute confers jurisdiction and the exercise of jurisdiction is consistent with constitutional due process. As to the first issue, the court must look to Colorado's long-arm statute and its enumerated grounds for jurisdiction.³ However, Colorado's statute has been construed liberally to permit personal jurisdiction to the full extent permitted by the due process clause of the United States Constitution. *See Waterval v. District Court*, 620 P.2d 5, 8 (Colo. 1980). Thus, the court must simply determine whether the exercise of personal jurisdiction over Defendants Begonja and Griffith in this case is consistent with due process.

Based upon the allegations set forth in the Amended Complaint, there does not appear to be any basis for general jurisdiction over Defendant Begonja or Defendant Griffith. General jurisdiction arises from a defendant's continuous and systematic activity in the forum state. *Wise v. Lindamood*, 89 F. Supp.2d at 1189-90. To establish general jurisdiction, the non-resident's activities must create a "substantial connection" with the forum state, from which the court can conclude that the defendant has "purposely avail[ed] itself of the privilege of conducting activities within the forum." *Id.* Random, attenuated, or fortuitous activities by the defendant will not be sufficient to establish general jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

Defendant Begonja contends that he is a resident of Sachse, Texas, and pastor of the Fullness of Life Community Church, which holds worship services only in the Dallas/Fort Worth area. Begonja claims that he has never lived or worked in Colorado and has never owned

³Acts which will subject a non-resident to the jurisdiction of Colorado courts include "the transaction of any business within this state" and "the commission of a tortious act within this state." *See* C.R.S. §13-1-124(1)(a) and (b).

property or held a bank account in Colorado. With the sole exception of a new car purchased in 1989 while en route to California, Begonja has never transacted business in Colorado. Defendant Begonja states that he operates his “ind-movement.org” web site from his home in Texas, and that his site presently is hosted by an Internet hosting provider in San Francisco, California. Defendant Begonja further states that his web site has never been hosted by an Internet provider in Colorado. *See* Declaration of the Very Rev. Tony Begonja. Plaintiffs have not offered any facts or competent evidence that would refute these assertions. *See OMI Holdings, Inc. v. Royal Insurance Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998) (once personal jurisdiction is challenged, plaintiff may sustain his *prima facie* burden by presenting facts via affidavits or other written materials); *TJS Brokerage & Co., Inc. v. Mahoney*, 940 F. Supp. 784, 787 (E.D. Pa. 1996) (once personal jurisdiction has been challenged, plaintiff’s jurisdictional allegations must be supported with appropriate affidavits or documents).

Defendant Griffith has not submitted an affidavit in support of his jurisdictional challenge. However, Griffith states in his motion that he resides in Arkansas and has never entered or had contact with the State of Colorado. The exhibits that Plaintiffs attached to their Amended Complaint do not refute these assertions. The Amended Complaint does not allege any facts that would demonstrate continuous and systematic activity by Defendant Griffith in Colorado. In that regard, Plaintiffs concede that Defendant Griffith’s web sites are hosted by a corporation with its principal place of business in Arkansas. Given that Plaintiffs have the burden of establishing a *prima facie* showing of personal jurisdiction, I find insufficient facts to establish the existent of general jurisdiction for either of the moving defendants.

As an alternative basis for personal jurisdiction, specific jurisdiction is predicated upon a

defendant's minimum contacts with the forum that give rise to the cause of action. *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 455 (10th Cir. 1996). The court must consider whether "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King v. Rudzewicz*, 471 U.S. at 472. The Supreme Court has held that the foreseeability of causing injury in the forum state is not sufficient to establish the requisite minimum contacts. Rather, the contacts must result from the defendant's own actions and must create a "substantial connection with the forum." *Id.* at 475.

Construing the well-pled facts of the Amended Complaint in a light most favorable to Plaintiffs, it is alleged that Defendants Begonja and Griffith operate web sites outside this forum on which they unlawfully and without permission publish Plaintiffs' registered and non-registered copyrighted materials and use Plaintiffs' registered service marks. Plaintiffs further allege in the Amended Complaint that Defendants' transmission of information on those web sites creates a high likelihood in the minds of the public as to the source of the materials that Defendants are publishing. Finally, Plaintiffs contend that on October 22, 2001, they mailed a letter to each defendant directing them to cease and desist their unlawful publication of Plaintiffs' materials. Only Defendant Griffith acknowledged receipt of that letter. *See Wise v. Lindamood*, 89 F. Supp.2d at 1192-93 (refusing to find specific jurisdiction based upon isolated "cease and desist" letters). None of these allegations or facts are sufficient to establish specific jurisdiction in this case.

In articulating jurisdictional principles applicable to Internet-related conduct, the Tenth Circuit has distinguished between interactive and passive web sites. *See Soma Med. Int'l v.*

Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999). An interactive site occurs where the owner clearly conducts business between different fora over the Internet. *SCC Communications Corp. v. Anderson*, 195 F. Supp.2d 1257, 1260 (D. Colo. 2000). Whether a site is considered interactive will depend to a great extent on the degree or “level of interactivity and commercial nature” of the information exchanged on the site. As the level of interactivity increases, it becomes more reasonable to conclude that the defendant purposely directed activities toward the forum. *Id.* at 1261. In contrast, a passive site

is one where the owner has merely posted information on a site accessible to a user in a different forum. Access from a foreign forum alone does not subject a site’s owner to the jurisdiction of that forum. The creation of a passive web site, by itself, is not considered an act purposefully directed toward the forum state.

Id. at 1260.

Defendant Begonja claims that his web site contains information about the “autocephalous” movement of apostolic succession churches.⁴ In addition, Defendant Begonja’s web site provides directories and information about individuals, organizations and publications relating to the “independent movement,” as well as hypertext links to web sites operated by or containing information on those same individuals and groups. According to Begonja, apart from Plaintiff CEC and its principal, Colin James, III, his “ind-movement.org.” site contains listings for three living clergy members in Colorado, one listing for a deceased clergy member who lived in Colorado, and two denominations that, on information and belief, are in Colorado. Defendant Begonja does not offer or advertise any goods or services for sale on his web site, does not

⁴According to Defendant Begonja, autocephalous churches are small, independent that churches not affiliated with major denominations. Apostolic succession churches claim the ancestry of the consecration of their clergy has an unbroken lineage back to original biblical apostles.

charge any fees to be listed in his directories, and receives no business revenue from his site. Defendant does provide on his web site a “guestbook” in which users can leave questions or comments concerning the site and its contents. *See* Declaration of the Very Rev. Tony Begonja. Based upon these rebutted facts, the court concludes that Defendant Begonja operates a “passive web site,” which standing alone will not form the basis for specific jurisdiction.

Pro se Defendant Griffith has not provided a similar affidavit in support of his motion to dismiss. Given that Plaintiffs bear the burden of establishing a *prima facie* basis for personal jurisdiction, the absence of an affidavit from Defendant Griffith is not dispositive of the issue. Plaintiffs have not alleged or offered evidence to show that Defendant Griffith offers or advertises any goods or services for sale on his web site, charges any fees to users of his site, or derives any revenue from listings on his site. While Plaintiffs have offered documents that suggest hyperlinks between the defendants’ individual web sites and other Internet locations, such hyperlinks will not convert these “essentially passive web pages” into interactive sites that would provide minimum contacts sufficient to establish personal jurisdiction. *Cf. SCC Communications Corp. v. Anderson*, 195 F. Supp.2d at 1261.

The record before the court indicates that Defendants’ web sites are non-commercial in nature and do not have any inherent connection to Colorado. Moreover, Plaintiffs have not offered any evidence or alleged any facts that would suggest these Defendants have other non-Internet related contacts with Colorado. In their response to Defendant Begonja’s Motion to Dismiss, Plaintiffs summarily claim that “Begonja carries on business in Colorado,” that “Begonia appeals to Coloradans for money on his internet site; he promises to use this money received for specific purposes.” Defendant Begonja acknowledges that since Plaintiffs’ initiated

the present litigation, his web site has solicited financial contributions to pay for legal fees and expenses directly related to this case. Donors can make contributions through hyperlinks to an unaffiliated web site, "PayPal. com." According to Begonja, he has only received contributions from four individuals, none of whom is a Colorado resident. *See* Second Declaration of the Very Rev. Tony Begonja. These requests for contributions were not specifically targeted at Coloradans and do not equate to "carrying on business in Colorado." More importantly, Plaintiffs' Response studiously fails to acknowledge that Defendant's appeal for contributions to a legal defense fund were initiated after the pending lawsuit was filed. *Cf. Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d at 459 n. 9 (only those facts that arose before "the time the complaint was filed" are pertinent to the analysis of general jurisdiction). Plaintiffs have not argued that their claims result from alleged injuries that 'arise out of or relate to' those recent requests for contributions. *See Burger King v. Rudzewicz*, 471 U.S. at 472.

During oral argument, Plaintiffs' counsel invoked for the first time, as an alternative basis for personal jurisdiction, the "effects doctrine" recognized in *Calder v. Jones*, 465 U.S. 783 (1984). Plaintiffs also filed on June 11, 2002, their "Brief Re: Jurisdiction," which addresses the effects doctrine. Notably, Plaintiffs' brief cites no supporting authorities and makes reference only to *SCC Communications*. On June 4th, Plaintiffs' counsel argued that the court should infer the existence of harmful effects directed toward them from their Amended Complaint, which seeks compensatory, punitive, and exemplary damages for Defendants' "wilful and flagrant contravention of Plaintiffs' rights." In the June 11th brief, Plaintiffs cite documents attributed to Defendants' web sites which make allegedly disparaging references to Plaintiff CEC "of Colorado Spring and Loveland, USA" and Colin James. Plaintiffs argue from these

