

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SPORTSCHANNEL NEW ENGLAND)
LIMITED PARTNERSHIP d/b/a)
Comcast SportsNet New England,)
Plaintiff,)
)
v.)
)
FANCASTER, INC. and)
CRAIG KRUEGER,)
Defendants.)
GERTNER, D.J.

Civ. Action No. 09cv11884-NG

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

September 30, 2010

Fancaster, Inc. (“Fancaster”) has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (2) or, in the alternative, to stay or transfer. It claims that the Court lacks subject matter and personal jurisdiction. Craig Krueger (“Krueger”) moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim against him in his personal capacity. If the Court does not grant the motion to dismiss, Fancaster moves for a stay pending resolution of a related case in the District of New Jersey or a transfer to the District of New Jersey.

Plaintiff Sportschannel New England (“Sportschannel”) brings this action seeking a declaration of its rights in connection with the use of the word FANCASTER, which Fancaster, Inc. (“Fancaster”) had trademarked. It brings this suit in Massachusetts principally because Fancaster’s website, like all websites, is accessible in the Commonwealth.

For the reasons below, defendant’s Motion to Dismiss on personal jurisdiction (**document #17**) is **ALLOWED**. I need not address the other grounds offered.

I. BACKGROUND¹

The dispute centers around the trademark "FANCASTER." Krueger is the President of Fancaster, a company that has been in the business of providing wireless broadcasting services related to sports and entertainment since the 1980s. Fancaster currently offers sports-related information and videos through its website, Fancaster.com. In 1988, Krueger trademarked "FANCASTER" and assigned his interest in the trademark to Fancaster in 2007.

SportsNet is a Boston-based cable sports network. In 2001, it began a public service program called the "New England FanCaster Program" to educate local students aged 13-18 about careers in broadcasting. Recently it has taken steps to expand the use of its FanCaster name. It has been in negotiations with a major retailer to become a corporate sponsor of the program, and last year it began making videos of its FanCaster program available on Video On Demand.

On July 18, 2006, Krueger sent an email to SportsNet through the comments section of SportsNet's website. He asserted ownership over the fancaster trademark and told SportsNet that if it wanted to license the fancaster mark, it should contact Fancaster's counsel, or else stop use of the trademarked name. Email from Craig Krueger to Peter Weissman (July 18, 2006) (document #23-1). A few days later, Krueger also wrote to Richard Amann, the Chief Executive Officer of Canteen Media, to state that he intended to "secure a cease & desist or an injunction" against SportsNet and to "secure damage payment for unauthorized use" from SportsNet. Email from

¹ On a motion to dismiss for personal jurisdiction, the court may consider facts outside of the complaint. It will accept the facts alleged by the plaintiff in the complaint and subsequent pleadings as true and consider the facts presented by the defendant to the extent that they are undisputed. See Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 135 (1st Cir. 2006) ("We . . . take those 'specific facts affirmatively alleged by the plaintiff as true . . . and construe them in the light most congenial to the plaintiff's jurisdictional claim.' We also 'add to the mix the facts put forward by the defendants, to the extent that they are uncontradicted.'") (quoting Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998)).

Craig Krueger to Richard Amann (July 22, 2006) (document #23-2). On July 27, 2006, SportsNet's attorney contacted Fancaster asking for further information about its use of the trademark. Letter from Maren C. Perry to Craig Krueger (document #23-3). Fancaster did not provide the requested information, but instead responded that after review of SportsNet's use of the fancaster mark, it would not take further action so long as SportsNet limited its use to the community service program. Fancaster warned that if SportsNet expanded its use of the mark, or if Fancaster became aware of any confusion caused by the mark, it reserved its right to pursue legal remedies. Letter from Barbara J. Grahn to Maren C. Perry (Nov. 22, 2006) (document #23-5).

Fancaster recently contacted several website operations about their reporting on SportsNet's FanCaster program. It sent "cease and desist" letters to SchoolTube.net and emails to the Maynard, Massachusetts, Beacon Villager (at WickedLocal.com) requesting they remove content referring to the FanCaster program. Letter from Craig Krueger to Andrew Arizpe (Sept. 3, 200) (document #23-9); email from Craig Krueger to Mr. Floyd and Mr. Hastings (Sept. 3, 2009) (document #23-11).

In 2008, Fancaster filed suit in the United States District Court for the District of New Jersey against Comcast Corp. and several Comcast affiliates alleging their use of the mark "FANCAST" in connection with the website www.fancast.com infringed their trademark. Dickstein Decl. Ex. 16 (document #23-16). Comcast counter-claimed against Fancaster and Krueger for declarations of non-use and abandonment. The action is pending, and discovery is almost complete.

SportsNet asserts that there is no relation between Comcast's FANCAST service and SportsNet's FanCaster program. Both are independently operated by separate subsidiaries of Comcast Corp. Larkin Aff. 15 (document #24). During a deposition in the New Jersey suit, Krueger testified that he believed that SportsNet had expanded its use of the mark beyond what it was at the time of the 2006 letter. Krueger Dep. vol. 3, 746:18, Oct. 15, 2009 (document #23-12). He also stated that he thought SportsNet had changed its logo to look more like that of Fancaster. *Id.* vol. 3, 747:14-16. As a result of Krueger's statement, SportsNet filed this suit for declaratory judgment.

Defendant Krueger has moved to dismiss for failure to state a claim because he does not have ownership over the trademark and would not have standing to bring an infringement suit. Fancaster has moved to dismiss for lack of personal jurisdiction on the grounds that their internet presence is not sufficient to confer jurisdiction over it in Massachusetts. Fancaster has also moved to dismiss for lack of subject matter jurisdiction, or in the alternative, to stay or transfer.

II. CLAIMS AGAINST KRUEGER

Defendants state that since Krueger assigned his right in the Fancaster mark to Fancaster in 2007, only Fancaster, and not Krueger in his personal capacity, has the right to bring a suit for infringement. SportsNet does not contest this point, and therefore, any claims against Krueger individually are **DISMISSED**.

III. STANDARD OF REVIEW

When analyzing a motion to dismiss for lack of personal jurisdiction, the court "accept[s] the allegations in the complaint as true and construe[s] the facts in the light most favorable to the plaintiff." *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 24 (1st Cir. 2008). The court "accepts

properly supported proffers of evidence by a plaintiff as true, provided that plaintiffs' jurisdictional pleadings do not rely on unsupported allegations.” Newman v. Eur. Aeronautic Def. & Space Co. Eads N.V., 700 F. Supp. 2d 156 (D. Mass. 2010) (internal citations omitted). “[A] plaintiff must proffer ‘evidence of specific facts’ with properly documented evidence.” Moore v. S. N.H. Med. Ctr., No. 08-11751, 2009 WL 5214879, at *1 (D. Mass. 2009).

The Court may consider evidence that plaintiff provided subsequent to the complaint and construe it in the light most favorable to the plaintiff. Platten v. HG Berm. Exempted Ltd., 437 F.3d 118, 135 (1st Cir. 2006). The Court may also consider evidence provided by the defendant in subsequent pleadings, so long as it is uncontested. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n, 142 F.3d 26, 34 (1st Cir. 1998) (“We then add to the mix facts put forward by the defendants to the extent that they are uncontradicted.”).

Although the court will construe the facts in the light most favorable to the plaintiff in a motion to dismiss, the plaintiff still has the burden to demonstrate every criteria required to establish jurisdiction. See U.S. v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2001).

IV. PERSONAL JURISDICTION

The issue is whether this Court in the District of Massachusetts has personal jurisdiction over Fancaster, a South Dakota corporation with its principal place of business in New Jersey that operates a website accessible in Massachusetts. Fancaster asserts that the Court lacks personal jurisdiction because it does not fall within any of the provisions of the Massachusetts long-arm statute, Mass. Gen. Laws ch.223A, § 3 (1994). It has not alleged to have contracted to supply services or goods to Massachusetts or caused any tortious injury in Massachusetts.

To exercise personal jurisdiction over a defendant, "(1) the Massachusetts long-arm statute must grant jurisdiction over each defendant, and (2) the exercise of jurisdiction must comport with Constitutional Due Process." N. Light Tech. v. N. Lights Club, 97 F. Supp. 2d 96, 104 (D. Mass. 2000). Because the long-arm statute of Massachusetts reaches the outer limits of due process, the Court may sidestep the first inquiry and focus exclusively on the constitutional analysis. See Berklee Coll. of Music, Inc. v. Music Indus. Educators, Inc., No. 09-11627, 2010 WL 3070150, at *2 (D. Mass. 2010); Gather, Inc. v. Gatheroo, LLC, 443 F. Supp. 2d 108, 113 (D. Mass. 2006).

Due process requires that the defendant has maintained "minimum contacts" with Massachusetts "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945). The Court must look to the quality and quantity of the potential defendant's contacts with the forum. See Gather, 443 F. Supp. at 113 (citing Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999)).

The Court may exercise either general or specific jurisdiction over a defendant. Where, as here, the defendant is not alleged to have continuous and systematic activity in Massachusetts, the inquiry will focus on whether the due process requirements for specific jurisdiction have been met. See Berklee Coll. of Music, 2010 WL 3070150, at *2.

The First Circuit has developed a three-part inquiry to assess specific jurisdiction. The court must ask (i) whether the claims are "related to" defendant's activities in Massachusetts; (ii) whether the defendants have purposefully availed themselves of the laws of Massachusetts; and (iii) whether the exercise of jurisdiction would be reasonable. Platten, 437 F.3d at 135. This due process inquiry is rooted in principles of fairness so that courts exercise jurisdiction only over those

defendants who could reasonably anticipate being “haled into court.” Venture Tape Corp. v. McGills Glass Warehouse, 292 F. Supp. 2d. 230, 233 (D. Mass. 2003).

Applying this analysis to Fancaster, the Court holds that exercising jurisdiction over Fancaster would violate due process. Plaintiff alleges that three elements combine to establish personal jurisdiction: (i) Fancaster’s interactive website accessible to Massachusetts residents, (ii) Fancaster’s correspondence with SportsNet reserving its right to file suit, and (iii) Fancaster’s recent email to a Massachusetts newspaper about an article on SportsNet’s FanCaster program. For the reasons below, the Court disagrees and finds that this evidence does not establish that Fancaster sought to do business in Massachusetts, nor that it claimed the protections of Massachusetts law. See Sterilite Corp. v. Spectrum, Inc., No. 94-10320, 1997 WL 398036, at *6 (D. Mass. 1997). Fancaster could not have expected to be haled into court in every jurisdiction in which its website is accessed or in every jurisdiction in which it sends a letter to enforce its trademark.

A. Relatedness

In a personal jurisdiction inquiry, the first step is to ask whether the claims are related to defendant’s activity in the forum. To determine whether the action “arises from” defendant’s activities in this forum, the Supreme Judicial Court of Massachusetts applies the “but for” test. Would the plaintiff bring the action but for the defendant’s activities within the state? Tatro v. Manor Care, Inc., 416 Mass. 763, 768 (Mass. 1994). In this case, “but for” the Fancaster website, the letter to the plaintiff threatening suit in the event of expansion of its use, and email to a local newspaper, the plaintiff claims, it would not have brought this declaratory judgment action.

Defendants counter that the source of this controversy is not the accessibility of Fancaster's website, but rather the issuance of the trademark. They cite to Sterilite, where the court allowed the defendant's motion to dismiss for lack of personal jurisdiction on the grounds that the "real transaction" at issue in the lawsuit was the grant of a patent rather than the sales of infringing products. 1997 WL 398036, at *4. But the instant trademark case is different. The principle issue here is the likelihood of confusion between SportsNet's FanCaster Program and Fancaster.com. To the extent that the SportsNet program principally operates in Massachusetts, the Court will be asked to determine the likelihood that Massachusetts residents are or will be confused between Fancaster.com and SportsNet's program. The action therefore "arises from" the exposure of Massachusetts residents to the Fancaster website.

The Court thus finds that the trademark action is related to Fancaster's presence in the forum.

B. Purposeful Availment

That the action is related to the presence of the website in the forum, however, is not sufficient to satisfy due process. Plaintiff must show that defendants purposefully availed themselves of the law of Massachusetts. See Platten, 437 F.3d at 135. Plaintiff alleges that defendant's interactive website, as well as two emails and one letter into the forum regarding its trademark, satisfy this requirement. I disagree.

1. Website

The key issue, and one that has not been addressed by the First Circuit or the Supreme Court, is whether a website located outside of the forum and which forum residents can access satisfies the purposeful availment test for personal jurisdiction. See Broadvoice v. TP Innovations,

No. 10-10229, 2010 WL 3377328, at *3 (D. Mass. 2010). Does a website owner purposefully avail itself of conducting business in Massachusetts when its website is accessed in Massachusetts or even interacts with Massachusetts residents?

Most circuits and lower courts have adopted a test developed in 1997 in a trademark infringement case involving an internet domain name. Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D.Pa. 1997). Zippo creates a sliding scale in which the likelihood of personal jurisdiction is “directly proportionate” to the level of interactivity of the website. Id. at 1124; Gather, 443 F. Supp. 2d at 115; Jagex Ltd. v. Impulse Software, No. 10-10216, 2010 WL 3257919, at *3 (D. Mass. 2010). At one end of the spectrum, personal jurisdiction is clearly established where a defendant conducts regular business over the internet, for example by entering into contracts with foreign users to transmit files to their home computers for a fee. Zippo, 952 F. Supp. at 1124 (citing Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)). At the other end of the spectrum are passive websites that do no more than share information. Id. at 1124.

And in the middle of the spectrum are interactive websites where a user exchanges information with a host computer. Id. Here, the Zippo court examines the “level of interactivity” and the “commercial nature of the exchange of information” on the site. Id. Mere interactivity is not enough. Something more is required. Id. at 1124 (finding that defendant’s electronic commerce with residents of the forum constitutes purposeful availment). See also McBee v. Delica Co., Ltd., 417 F.3d 107, 124 (1st Cir. 2005) (“[s]omething more . . . such as interactive features which allow the successful online ordering of the defendant's products” is sufficient to establish personal jurisdiction).

Zippo and its progeny do not provide much guidance to courts in determining what kind of “something more” is required to render an interactive website subject to a court’s personal jurisdiction. While courts have found that passive websites do not expose themselves to jurisdiction of every forum, they have been less clear about how much interactivity does. The Seventh Circuit explains,

With the omnipresence of the Internet today, it is unusual to find a company that does not maintain at least a passive website. Premising personal jurisdiction on the maintenance of a website, without requiring some level of “interactivity” between the defendant and consumers in the forum state, would create almost universal personal jurisdiction because of the virtually unlimited accessibility of websites across the country.

Jennings v. AC Hydraulic, 383 F.3d 546, 550 (7th Cir. 2004) (declining to determine how much “interactivity” would be sufficient to establish personal jurisdiction). In the era of Facebook, where most websites now allow users to “share” an article, choose to “like” a particular page, add comments, and email the site owners, the Jennings reasoning may now extend to moderately interactive sites as well. If virtually every website is now interactive in some measure, it cannot be that every website subjects itself to litigation in any forum -- unless Congress dictates otherwise.

Interactivity alone cannot be the linchpin for personal jurisdiction.

In this case, Fancaster describes its website as passive, while plaintiff describes the website as a new media platform that directly markets itself to and invites Massachusetts residents to interact with each other and the site. The website is, in fact, somewhere in between, and at best moderately interactive at the time of filing. It allowed individuals to register to receive emails and updates; users could in turn email the site operator. Users could play basic trivia and “vote” on

videos. While Fancaster aspired to allow users to upload their own videos, it did not yet have this capability. Every video had been posted by an administrator.

Plaintiff argues that any one of these features renders the site subject to jurisdiction in Massachusetts. Indeed, courts in the past have found the ability to email the site owner sufficient to establish personal jurisdiction. See Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 45 (D. Mass. 1997) (exercising jurisdiction over a Colorado company whose website encouraged users, including Massachusetts residents, to email the company). Thirteen years after Hasbro, however, virtually every website has a “contact us” page. Similarly, most websites now ask users to “register” and provide their basic contact information. Websites often allow users to view videos posted by administrators and “fan” a page, article, or video. **I refuse to find that every website with these characteristics subjects itself to universal jurisdiction.**

Another place to look for “something more” is the more traditional approach, which looks to the defendant’s acts to determine whether he purposefully availed himself of Massachusetts protection through his business activities, activities that suggest he foresaw being “haled into court” here. See Venture Tape, 292 F. Supp. 2d. at 233. **In that event, the Court will consider not only the level of “interactivity” of the website -- as all websites are now at least moderately interactive -- but also the “commercial nature” of the exchange of information.** See Zippo, 952 F. Supp. at 1124. The Court will ask whether the website purposefully directs its business towards forum residents. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); Toys “R” Us, Inc. v. Step Two, 318 F.3d 446, 454 (3d Cir. 2003) (“[T]he mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant ‘purposefully availed’ itself of conducting activity in the

forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.”)

Plaintiff further points to the fact that some of the videos on Fancaster.com were “tagged” with labels that included “Boston” and “Red Sox” along with other cities and sports teams. These tags, it suggests, indicate that Fancaster is directly targeting forum residents. See Burger King, 471 U.S. at 476. They cite to Sports Auth. Mich., Inc. v. Justballs, Inc., where the court found that a New Jersey website purposefully availed itself of business in Michigan when it targeted Michigan residents by selling sports memorabilia with logos of Michigan athletic teams, such as the Detroit Lions, the Detroit Tigers, and the University of Michigan. 97 F. Supp. 2d 806, 812 (E.D. Mich. 2000).

In this case, however, Fancaster is not selling a product. In fact, the website is not -- at least at the time of filing -- a commercial enterprise at all. See Broadvoice, 2010 WL 3377328, at *4 (defendant’s website not subject to personal jurisdiction of Massachusetts where it is not of a commercial nature nor aimed at Massachusetts residents any more than the rest of the world.). Fancaster labels its videos with the name of sports teams around the country to allow users, including Massachusetts residents, to find teams. It is not specifically reaching out into the forum to attract users. The site does not, for example, use the registration information to email users about their local team or provide information specifically about Massachusetts to Massachusetts users. Cf. Gather, 443 F. Supp. 2d. at 116. The Court finds therefore that Fancaster has not substantially directed its activities to the forum state to constitute purposeful availment. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997).

Like the Jennings court, this Court declines to decide exactly how much interactivity or commercial activity directed to a forum is required to establish personal jurisdiction. See 383 F.3d at 550. I hold merely that a website with the features that are now common, including a registration page, simple trivia, ability to email the website operators, stream-line video, and “fan” or “share” a page or video, cannot be sufficient to enable the site’s owners to be haled into court in any forum in which it’s accessible. Such a result would render virtually every website subject to universal personal jurisdiction. See Jennings, 383 F.3d at 550 (“This scheme would go against the grain of the Supreme Court’s jurisprudence which has stressed that, although technological advances may alter the analysis of personal jurisdiction, those advances may not eviscerate the constitutional limits on a state’s power to exercise jurisdiction over nonresident defendants.”) (citing Hanson v. Denckla, 357 U.S. 235, 250-51 (1958)). Fancaster has not -- at least through its website -- purposefully availed itself of conducting business in Massachusetts to satisfy the requirements of personal jurisdiction.

2. Letters

The next question, then, is whether Fancaster’s correspondence with SportsNet reserving the right to enforce the trademark and their more recent email to the publishers of the Maynard, Massachusetts, Beacon Villager about SportsNet’s FanCaster program constitute purposeful availment of conducting business in the forum.

Plaintiff cites to the First Circuit’s decision in Nova Biomedical Corp. v. Moller to support its contention that Fancaster’s communications into the forum about their trademark constitute purposeful acts sufficient to subject itself to personal jurisdiction. 629 F.2d 190, 197 (1st Cir. 1980). Nova, however, is inapposite. Nova held only that sending a threatening patent

infringement letter can in some instances constitute the transaction of business within the meaning of the long arm statute -- not that the letter alone satisfies the due process requirements for personal jurisdiction. Nova, 629 F.2d at 197 (holding that sending threatening patent infringement letters “can, in certain circumstances, constitute the transaction of business within the meaning of the Massachusetts' long arm statute” but that “[w]hether a patentee is thereafter subject to jurisdiction will depend on whether he possesses sufficient contacts with the forum to satisfy due process.”); GSI Lumonics, Inc. v. BioDiscovery, Inc., 112 F. Supp. 2d 99, 110 (D. Mass. 2000) (an infringement letter into a forum may constitute transaction of business under the long-arm statute but is not enough to satisfy due process). In Nova, unlike here, the defendant was already conducting patent-related activity in the forum, including selling products involving the patent in the suit to other companies in the forum and entering into a cross-licensing agreement about the patent with another Massachusetts corporation. These other activities amounted to sufficient contacts to satisfy due process, and the threatening letters arose from these patent-related activities. See Sterilite, 1997 WL 398036, at *4 n.2.

This case is closer to Sterilite than to Nova. In Sterilite, this Court declined to subject the defendant Spectrum to personal jurisdiction where Spectrum had sent a letter to Sterilite in the forum seeking to clarify a potential patent infringement. 1997 WL 398036, at *5 (“[S]ubjecting Spectrum to jurisdiction in Massachusetts on these grounds provides a disincentive for parties to ever attempt to seek information or reconcile claims through written communications.”). Apart from the letter, Sterilite had only indirect contacts with the state through freight-on-board (“F.O.B.”) shipments and retailers’ sales of their product. Id. at 6.

In this case, Fancaster corresponded with SportsNet and ultimately decided to allow SportsNet to use the name. Fancaster's counsel wrote a letter to SportsNet's counsel in New York:²

Upon further review of your client's limited use of the FANCASTER mark, our client has determined that it will take no further action at this time. So long as your client limits its use of the FANCASTER mark to a "community service program that educates young new England sports fans about careers in sports television," as described on your client's website, our client is willing to forego any further action at this time. However, should your client expand its use of the FANCASTER mark, or if our client becomes aware of any actual confusion caused by your client's use of the FANCASTER mark, Fancaster, Inc. and Mr. Krueger reserve the right to assert their trademark rights against your client, and to pursue all legal remedies available to them.

Letter from Barbara J. Grahn to Maren C. Perry (Nov. 22, 2006) (document #23-5). This letter does not comprise "purposeful availment." It merely reserves the right to enforce a trademark at some point in the future. As I articulated in Sterilite, a letter sent into the forum that seeks to clarify or make note of a potential conflict does not constitute purposeful availment, particularly where the defendant has few other activities in the forum. 1997 WL 398036, at *5.

To be sure, the email to the Massachusetts Beacon Villager does go one step further to ask the newspaper to either remove the use of the name "Fancaster" as a noun or to delete the article. See email from Craig Krueger to Mr. Floyd and Mr. Hastings (Sept. 3, 2009) (document #23-11). However, this email is still not sufficient to establish personal jurisdiction. These activities amount to the mailing (or emailing) of "cease and desist" letters, which alone cannot constitute purposeful

² Note that the fact that the letter was sent to New York, and not to Massachusetts, is irrelevant. The letter was sent to a resident of Massachusetts via its agent or counsel. See Inamed Corp. v. Kuzmak, 249 F.3d 1356, 1361 (Fed. Cir. 2001) ("[B]ecause [plaintiff's] attorney was [plaintiff's] agent for the purpose of receiving the correspondence, the fact that he was located in New York is immaterial.")

availment under due process. See Measurement Computing Corp., 304 F. Supp. 2d. at 181 (quoting Red Wing Shoe, Inc. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1361 (Fed. Cir. 1998) (“A patentee should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement.”)). Such a result would imply that a holder of a national trademark is subject to universal personal jurisdiction if he wants that trademark to be enforced.

The Court therefore finds that the holder of a trademark has the right to enforce his trademark without subjecting himself to personal jurisdiction in forums in which he has limited or no substantial contacts otherwise. GSI Lumonics, 112 F. Supp. 2d at 110 (noting “that the mailing of an infringement notice standing alone has rarely been deemed sufficient to satisfy the constitutional standard.” After sending a letter, whether a “patentee is thereafter subject to jurisdiction will depend on whether he possesses sufficient contacts with the forum to satisfy due process.”). Here, the plaintiff does not allege that Fancaster has presence in the forum other than its website.

Plaintiff suggests that the *combination* of Fancaster’s web presence in the state and the letters to the forum constitute purposeful availment to satisfy due process. As described above, I find that Fancaster is not purposefully availing itself of conducting business in the forum through its relatively interactive non-commercial website. Likewise, I find that the holder of a trademark may send letters to notify others of its ownership without subjecting itself to personal jurisdiction in forums in which he has no or limited contact otherwise. It logically follows, then, that the operator or owner of a moderately interactive website with a trademark name may send letters to

enforce its trademark without subjecting itself to universal personal jurisdiction. To hold Fancaster subject to jurisdiction in Massachusetts would violate due process.

C. Reasonableness

In the final analysis of personal jurisdiction, the Court would ask whether exercising jurisdiction would be reasonable. Since I have found no personal jurisdiction because the defendant did not purposefully avail itself of conducting business in the forum, I need not reach the question of whether the Gestalt factors have been met.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to File a Reply Brief is **GRANTED** (**document #41**); Fancaster's Motion for Protective Order Barring Depositions and for Partial Stay of Discovery (**document #46**) is **MOOT**. Defendant's Motion to Dismiss (**document #17**) is **ALLOWED**.

SO ORDERED.

Date: October 1, 2010

/s/ Nancy Gertner

NANCY GERTNER, U.S.D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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ORDER OF DISMISSAL

For the reasons set forth in the accompanying Memorandum and Order, Defendant's Motion to Dismiss (**document #17**) is **ALLOWED** and this case is **DISMISSED**.

SO ORDERED.

Date: September 30, 2010

16 / Nancy Gertner
NANCY GERTNER, U.S.D.C.