

IN THE 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.

Case No. 1:09-cv-11884-NG

**DEFENDANTS' REPLY TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION, LACK OF PERSONAL JURISDICTION, IMPROPER
VENUE, AND FOR FAILURE TO STATE A CLAIM FOR RELIEF
OR, IN THE ALTERNATIVE, TO STAY OR TRANSFER VENUE**

SportsChannel's Supplemental Memorandum violates the Protective Order in the New Jersey litigation by referencing confidential material from that case, and the Court should not consider the aspects of its argument based on that violation. The arguments are unavailing in any event, as they either rest upon aspirational (but unfulfilled) business plans or focus on post-filing website changes, contradicting the rule that personal jurisdiction is determined at the time the lawsuit is initiated. SportsChannel has not met its burden to show personal jurisdiction.

I. The Court Should Not Consider the 2008 Fancaster Business Plan Or Any Argument Based On It.

On December 18, 2008, the court in the New Jersey litigation entered a Protective Order governing the treatment and use of confidential information produced by the parties in that litigation. Specifically, the Protective Order provides that:

Confidential and Highly Confidential Information may be disclosed only to those persons identified in paragraphs 9 and 10, respectively, below. Any person obtaining access to Confidential and Highly Confidential Information in connection with this action **shall use that information only in and for purposes of this action, and shall not use such Confidential and Highly Confidential Information for any other purpose, including the**

furtherance of that person's business interests, or **in any administrative or other judicial proceeding**, absent express leave of this Court. If any person violates any of the terms hereof, the aggrieved party may seek any appropriate relief from this or any other Court having jurisdiction over the person.

(Protective Order ¶ 2.)¹ The Protective Order limits the dissemination of protected information to the parties, witnesses, and court personnel "in this action," *i.e.*, the New Jersey litigation, and places the burden of ensuring compliance on the parties' counsel. (Protective Order ¶¶ 9, 13.)

Confidential Information may be designated by placing the word Confidential "on each page of the document entitled to such designation." (Protective Order ¶ 4.) The cover page of Fancaster's 2008 Business Plan prominently displays a warning of confidentiality, but the word "confidential" does not appear on each page:

CONFIDENTIAL

This business plan has been prepared by Fancaster, Inc. solely for its internal planning purposes and for informing certain accredited investors of the progress and plans of the Company. The information contained herein is CONFIDENTIAL and may not be used for any other purpose, nor may it be disclosed in whole or in part to persons other than the recipient without the prior written consent of Fancaster, Inc. Recipient agrees to return this document to Fancaster, Inc. upon request.

2008 Fancaster Business Plan, Exh. 3 to Decl. of Tal E. Dickstein (under seal). This explicit warning is repeated on document's second page. Confidential business plans, of course, are the type of information that is considered worthy of protection. *See* Fed. R. Civ. P. 26(c).

SportsChannel's use in this litigation of the 2008 Business Plan that its counsel obtained through discovery in the New Jersey litigation is a clear violation of the Protective Order.

SportsChannel has used Confidential Information for purposes other than the New Jersey

¹ A copy of the Protective Order was attached as Exhibit A to the Joint Motion to Seal Exhibit 3 to the Declaration of Tal E. Dickstein, filed on May 4, 2010 (Docket No. 40). On May 5, 2010, the Court granted that motion and placed the document under seal. We do not, therefore, include the Business Plan with this memorandum.

litigation, has taken advantage of SportsChannel's counsel's representation of Comcast in New Jersey to obtain and disclose Confidential Information to their client in this case, and has disclosed Confidential Information to court personnel in this case.² This illustrates, among other things, the problems and opportunities for abuse that arise from the pendency in different jurisdictions of suits involving overlapping parties, counsel, and issues.

SportsChannel has taken the position that the Business Plan is not protected because the word "confidential" did not appear on each page. Although that might be plausible if the entire document were not confidential on its face, SportsChannel's hyper-technical approach has led it to ignore the spirit of the order and the explicit warning on the cover page in order to sidestep a valid court order. The Court should reject this view; protective orders are "subject to reasonable interpretation," and courts "are not and should not be compelled to accept 'twisted interpretations' or 'tortured constructions'" but should "give effect to its purpose and spirit." *Grove Fresh Distributors, Inc. v. John Labatt Limited*, 888 F. Supp. 1427, 1438 (N.D. Ill. 1995).

Paragraph 2 of the Protective Order specifies that a party aggrieved by a violation "may seek any appropriate relief from this or any other Court having jurisdiction over" any person that violates it. (Protective Order ¶ 2.) In *Grove Fresh*, the court held that failure to seek clarification combined with an untenable interpretation of a court order was strong evidence of willfulness justifying sanctions. *Id.* at 1439. SportsChannel similarly should have sought clarification if it was in legitimate doubt as to the status of the document, as it no doubt would have wished Fancaster's counsel to do if the situation had been reversed.

² Of course, the public filing of that document in this litigation constitutes a separate violation of the Protective Order. However, the parties subsequently agreed that the Business Plan should be sealed, in recognition of its confidential nature. Fancaster does not contend that the violation was intentional and does not seek sanctions for it.

Fancaster does not seek sanctions, but far more limited relief. This Court has authority to order SportsChannel's counsel to withdraw its Supplemental Memorandum and the Dickstein Declaration entirely and to remove all references to and all arguments relying on the 2008 Business Plan. Rather than impose that extra burden, Fancaster simply asks that the Court refuse to consider the 2008 Business Plan and SportsChannel's arguments based on that document.

II. SportsChannel's Reliance on Non-Existent Features of the Fancaster.com Website Does Not Support Personal Jurisdiction.

Putting aside the Protective Order violation, SportsChannel's strained efforts to establish personal jurisdiction simply emphasize its failure to meet the statutory and constitutional standard.

SportsChannel's reliance on wishful forward-looking statements of future plans for the website is unavailing. When, as here, specific jurisdiction is at issue, the due process elements of fair notice, purposeful availment, and relatedness all require that the analysis be limited to contacts that at the time the cause of action arose, and later-occurring events are irrelevant.

Harlow v. Children's Hosp., 432 F.2d 60, 61-62 (1st Cir. 2005).³

Similarly, it is self-evident that a claim may "arise from" alleged transaction of business in Massachusetts under the long-arm statute only if the transaction occurred *before* the claim arose. In *White v. Alpine Adventures, Inc.*, 2007 WL 4248127 (Mass. Super. Ct. Nov. 9, 2007), the court rejected the exact approach that SportsChannel takes here:

Other evidence White provides to support his claim that Alpine transacted business in Massachusetts consists of printouts from Alpine's website dated variously June 27, 2007, and July 3, 2007, almost a full year after White was injured. Of the testimonials

³ See also *Copp. V. Freudenberg-NOK*, 2006 WL 1867125 at *4 (D.NH 2006); 4 Wright & Miller, *Fed. Prac. & Proc.* § 1051 (3d ed.) (date of commencement is important for determining whether personal jurisdiction exists). Cf. *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H & Co. Kg.*, 295 F.3d 59, 66 (1st Cir. 2002) ("[F]or purposes of specific jurisdiction, contacts should be judged when the cause of action arose, regardless of a later lessening or withdrawal.")

printed from the website and dated before or around August 13, 2006, only three are from Massachusetts residents. Thus the court cannot tell if, at the time White was injured, the website was interactive and allowed viewers to make reservations, buy coupons and gift certificates, and included additional testimonials from Massachusetts residents.

White, 2007 WL 4248127 at *1. The problem is not only that SportsChannel relies on features of the website added five months after it filed its complaint. More fundamentally, SportsChannel has offered no evidence of what the website was when it filed its complaint in November 2009.

Realizing that it cannot show personal jurisdiction based on the *relevant* facts, SportsChannel attempts to divert the Court's attention to forward-looking statements of possible future website features in Fancaster's April 2008 Business Plan. SportsChannel's focus on the April 2008 plan is telling – SportsChannel's counsel knows that the same forward-looking statements were repeated in April 2009 and October 2009, but by referring to the 2008 plan, SportsChannel subtly but incorrectly implies that they have come to pass. As Mr. Krueger has previously affirmed, users are *not* able to upload content, and all content on the site was created and posted by Fancaster. Similarly, users cannot vote on non-existent user-generated content, and may not receive automatic email or SMS text messages when users post content to the website because they cannot post content. (Third Supplemental Krueger Declaration ¶¶ 7-9.) Fancaster.com does not display advertisements targeted to the user's location. SportsChannel's suggestion that Fancaster "aims" to generate increased revenue through geographically-targeted advertisements (SportsChannel Suppl. Memo. at 4) is meaningless because whatever it might "aim" to do someday, it does not yet do it and did not do it in November 2009.

As for tagging videos with the names of Boston teams, this "targets" Massachusetts only if one accepts SportsChannel's counsel's apparent continued belief that there can be no fans of

Boston teams anywhere outside of Massachusetts. Tags generically target those interested in such materials wherever they may reside.⁴ (Third Supplemental Krueger Declaration ¶ 10.)

SportsChannel similarly depends on website printouts that it acknowledges were from April 2010. They reflect an interface and features added after the redesign in December 2009. They do not reflect the website when SportsChannel filed its complaint. SportsChannel's failure to produce evidence of *that* website is telling. (Third Supplemental Krueger Declaration ¶ 11.)

One further clarification is required. Mr. Krueger has affirmed that registration requires a username and email address. In his Second Supplemental Declaration, Mr. Krueger noted that zip codes and country were added on April 8, 2010. In its Supplemental Memorandum, SportsChannel states that users must provide their name, address and birth date. Although Mr. Krueger only requested that zip code and country be added, at some point after those were added, a contractor for Fancaster's web developer apparently took it upon himself to add the more intrusive personal information. Mr. Krueger learned of this addition from SportsChannel's memorandum and has asked for it to be removed. (Third Supplemental Krueger Decl. ¶¶ 4-6.)

SportsChannel has not met its burden of establishing that personal jurisdiction existed in November 2009. Its frantic attempts to camouflage that fact do no more than underscore its failure. The Court should dismiss the complaint.

CONCLUSION

For the foregoing and previously discussed reasons, the Court should dismiss the complaint for lack of subject-matter jurisdiction under the Declaratory Judgment Act and for lack of personal jurisdiction. In the alternative, the Court should stay this litigation pending the outcome of the New Jersey litigation or transfer it to New Jersey.

⁴ There are undoubtedly (though inexplicably) New York Yankees fans in Massachusetts.

Dated: May 7, 2010

Respectfully submitted,

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Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on May 7, 2010.

/s/ Mitchell J. Matorin