

## CHAPTER 5 INTERNET JURISDICTION

**As you read the following, consider and give your answer in writing at or before the start of the class to the following:**

1) Assume that a company sets up a web site to advertise its products and to give users information on how to reach the company and place an order. The site provides interactive responses to questions about products and the like. The company president asks whether this company be sued for selling defective goods in consumer's home state if consumer places an order for goods after reviewing them on the website? Is the answer different if the site allows purchases online and A did so?

2) B posts a comment on an AOL chatroom site that is allegedly defamatory of an individual, C, who lives in New Mexico. B is a Delaware resident. Can B be sued for defamation in New Mexico?

### **CYBERSELL, INC. v. CYBERSELL, INC., 130 F.3d 414 (9<sup>th</sup> Cir. 1997)**

RYMER, Circuit Judge.

We are asked to hold that the allegedly infringing use of a service mark in a home page on the World Wide Web suffices for personal jurisdiction in the state where the holder of the mark has its principal place of business. Cybersell, Inc., an Arizona corporation that advertises for commercial services over the Internet, claims that Cybersell, Inc., a Florida corporation that offers web page construction services over the Internet, infringed its federally registered mark and should be amenable to suit in Arizona because cyberspace is without borders and a web site which advertises a product or service is necessarily intended for use on a world wide basis. The district court disagreed, and so do we. Instead, applying our normal "minimum contacts" analysis, we conclude that it would not comport with "traditional notions of fair play and substantial justice," *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1485 (9th Cir.1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)), for Arizona to exercise personal jurisdiction over an allegedly infringing Florida web site advertiser who has no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else, over the Internet. We therefore affirm.

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Cybersell, Inc. is an Arizona corporation, which we will refer to as Cybersell AZ. It was incorporated in May 1994 to provide Internet and web advertising and marketing services, including consulting. The principals of Cybersell AZ are Laurence Canter and Martha Siegel, known among web users for first "spamming" the Internet. [FN1] Mainstream print media carried the story of Canter and Siegel and their various efforts to commercialize the web.

FN1. Spamming refers to the posting indiscriminately of advertisements to news groups on the web. Unlike crossposting, spamming individually posts the advertisement to each news group, requiring the recipient to delete the message

from each news group to which she has subscribed.

On August 8, 1994, Cybersell AZ filed an application to register the name "Cybersell" as a service mark. The application was approved and the grant was published on October 30, 1995. Cybersell AZ operated a web site using the mark from August 1994 through February 1995. The site was then taken down for reconstruction.

Meanwhile, in the summer of 1995, Matt Certo and his father, Dr. Samuel C. Certo, both Florida residents, formed Cybersell, Inc., a Florida corporation (Cybersell FL), with its principal place of business in Orlando. Matt was a business school student at Rollins College, where his father was a professor; Matt was particularly interested in the Internet, and their company was to provide business consulting services for strategic management and marketing on the web. At the time the Certos chose the name "Cybersell" for their venture, Cybersell AZ had no home page on the web nor had the PTO granted their application for the service mark.

As part of their marketing effort, the Certos created a web page at <http://www.cybsell.com/cybsell/index.htm>. The home page has a logo at the top with "CyberSell" over a depiction of the planet earth, with the caption underneath "Professional Services for the World Wide Web" and a local (area code 407) phone number. It proclaims in large letters "Welcome to CyberSell!" A hypertext link [FN2] \*416 allows the browser to introduce himself, and invites a company not on the web--but interested in getting on the web--to "Email us to find out how!"

FN2. A hypertext link allows a user to move directly from one web location to another by using the mouse to click twice on the colored link.

Canter found the Cybersell FL web page and sent an e-mail on November 27, 1995 notifying Dr. Certo that "Cybersell" is a service mark of Cybersell AZ. Trying to disassociate themselves from Canter and Siegel, the Certos **changed the name** of Cybersell FL to WebHorizons, Inc. on December 27 (later it was changed again to WebSolvers, Inc.) and by January 4, 1996, they had replaced the CyberSell logo at the top of their web page with WebHorizons, Inc. The WebHorizons page still said "Welcome to CyberSell!"

Cybersell AZ filed the complaint in this action January 9, 1996 in the District of Arizona, alleging trademark infringement, unfair competition, fraud, and RICO violations. On the same day Cybersell FL filed suit for declaratory relief with regard to use of the name "Cybersell" in the United States District Court for the Middle District of Florida, but that action was transferred to the District of Arizona and consolidated with the Cybersell AZ action. Cybersell FL moved to dismiss for lack of personal jurisdiction. The district court denied Cybersell AZ's request for a preliminary injunction, then granted Cybersell FL's motion to dismiss for lack of personal jurisdiction. [FN3] Cybersell AZ timely appealed.

## II

The general principles that apply to the exercise of personal jurisdiction are well known. As there is no federal statute governing personal jurisdiction in this case, the law of Arizona applies. Under Rule 4.2(a) of the Arizona Rules of Civil Procedure, an

Arizona court

may exercise personal jurisdiction over parties, whether found within or outside the state, to the maximum extent permitted by the Constitution of this state and the Constitution of the United States.

The Arizona Supreme Court has stated that under Rule 4.2(a), "Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution." *Uberti v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358, *cert. denied*, 516 U.S. 906, 116 S.Ct. 273, 133 L.Ed.2d 194 (1995). Thus, Cybersell FL may be subject to personal jurisdiction in Arizona so long as doing so comports with due process.

A court may assert either specific or general jurisdiction over a defendant. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). Cybersell AZ concedes that general jurisdiction over Cybersell FL doesn't exist in Arizona, so the only issue in this case is whether specific jurisdiction is available.

We use a three-part test to determine whether a district court may exercise specific jurisdiction over a nonresident defendant:

(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[;] (2)[t]he claim must be one which arises out of or results from the defendant's forum-related activities[; and] (3)[e]xercise of jurisdiction must be reasonable.

*Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995) (citations omitted).

Cybersell AZ argues that the test is met because trademark infringement occurs when the passing off of the mark occurs, which in this case, it submits, happened when the name "Cybersell" was used on the Internet in connection with advertising. Cybersell FL, on the other hand, contends that a party should not be subject to nationwide, or perhaps worldwide, jurisdiction simply for using the Internet.

A

[2] Since the jurisdictional facts are not in dispute, we turn to the first requirement, which is the most critical. As the Supreme Court emphasized in *Hanson v. Denckla*, "it \*417 is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958). We recently explained in *Ballard* that the "purposeful availment" requirement is satisfied if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents. "It is not required that a defendant be physically present within, or have physical contacts with, the forum, provided that his efforts 'are purposefully directed' toward forum residents."

*Ballard*, 65 F.3d at 1498 (citations omitted).

We have not yet considered when personal jurisdiction may be exercised in the context of cyberspace, but the Second and Sixth Circuits have had occasion to decide whether personal jurisdiction was properly exercised over defendants involved in transmissions over the Internet, see *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.1996); *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y.1996), *aff'd*, 126 F.3d 25 (2d Cir.1997), as have a number of district courts. Because this is a matter of first impression for us, we have looked to all of these cases for guidance. Not surprisingly, they reflect a broad spectrum of Internet use on the one hand, and contacts with the forum on the other. As *CompuServe* and *Bensusan* seem to represent opposite ends of the spectrum, we start with them. [FN4]

CompuServe is a computer information service headquartered in Columbus, Ohio, that contracts with individual subscribers to provide access to computing and information services via the Internet. It also operates as an electronic conduit to provide computer software products to its subscribers. Computer software generated and distributed in this way is often referred to as "shareware." Patterson is a Texas resident who subscribed to CompuServe and placed items of "shareware" on the CompuServe system pursuant to a "Shareware Registration Agreement" with CompuServe which provided, among other things, that it was "to be governed by and construed in accordance with" Ohio law. During the course of this relationship, Patterson electronically transmitted thirty-two master software files to CompuServe, which CompuServe stored and displayed to its subscribers. Sales were made in Ohio and elsewhere, and funds were transmitted through CompuServe in Ohio to Patterson in Texas. In effect, Patterson used CompuServe as a distribution center to market his software. When Patterson threatened litigation over allegedly infringing CompuServe software, CompuServe filed suit in Ohio seeking a declaratory judgment of noninfringement. The court found that Patterson's relationship with CompuServe as a software provider and marketer was a crucial indicator that Patterson had knowingly reached out to CompuServe's Ohio home and benefitted from CompuServe's handling of his software and fees. Because Patterson had chosen to transmit his product from Texas to CompuServe's system in Ohio, and that system provided access to his software to others to whom he advertised and sold his product, the court concluded that Patterson purposefully availed himself of the privilege of doing business in Ohio.

By contrast, the defendant in *Bensusan* owned a small jazz club known as "The Blue Note" in Columbia, Missouri. He created a general access [FN5] web page that contained information about the club in Missouri as well as a calendar of events and ticketing information. Tickets were not available through the web site, however. To order tickets, web browsers had to use the names and addresses of ticket outlets in Columbia or a telephone number for charge-by-phone ticket orders, \*418 which were available for pick-up on the night of the show at the Blue Note box office in Columbia. Bensusan was a New York corporation that owned "The Blue Note," a popular jazz club in the heart of Greenwich Village. Bensusan owned the rights to the "The Blue Note" mark. Bensusan sued King for trademark infringement in New York. The district court distinguished King's passive web page, which just posted information, from the defendant's use of the Internet in *CompuServe* by observing that whereas the Texas

Internet user specifically targeted Ohio by subscribing to the service, entering into an agreement to sell his software over the Internet, advertising through the service, and sending his software to the service in Ohio,

FN5. A general access site requires no authentication or access code for entry. *Bensusan*, 937 F.Supp. at 297. Thus, the site is accessible to anyone who has access to the Internet.

King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide-or even worldwide- but, without more, it is not an act purposefully directed toward the forum state.

*Bensusan*, 937 F.Supp. at 301 (citing the plurality opinion in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1992)). Given these facts, the court reasoned that the argument that the defendant "should have foreseen that users could access the site in New York and be confused as to the relationship of the two Blue Note clubs is insufficient to satisfy due process." *Id.* at 301.

"Interactive" web sites present somewhat different issues. Unlike passive sites such as the defendant's in *Bensusan*, users can exchange information with the host computer when the site is interactive. Courts that have addressed interactive sites have looked to the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site" to determine if sufficient contacts exist to warrant the exercise of jurisdiction. See, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa.1997) (finding purposeful availment based on Dot Com's interactive web site and contracts with 3000 individuals and seven Internet access providers in Pennsylvania allowing them to download the electronic messages that form the basis of the suit); *Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328, 1332-33 (E.D.Mo.) (browsers were encouraged to add their address to a mailing list that basically subscribed the user to the service), *reconsideration denied*, 947 F.Supp. 1338 (1996).

Cybersell AZ points to several district court decisions which it contends have held that the mere advertisement or solicitation for sale of goods and services on the Internet gives rise to specific jurisdiction in the plaintiff's forum. However, so far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state. See, e.g., *Smith v. Hobby Lobby Stores*, 968 F.Supp. 1356 (W.D.Ark.1997) (no jurisdiction over Hong Kong defendant who advertised in trade journal posted on the Internet without sale of goods or services in Arkansas). Rather, in each, there has been "something more" to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.

*Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 (D.Conn.1996), is the case most favorable to Cybersell AZ's position. Inset developed and marketed computer software throughout the world; Instruction Set, Inc. (ISI) provided computer technology and support. Inset owned the federal trademark "INSET"; but ISI obtained

"INSET.COM" as its Internet domain address for advertising its goods and services. ISI also used the telephone number "1-800-US-INSET." Inset learned of ISI's domain address when it tried to get the same address, and filed suit for trademark infringement in Connecticut. The court reasoned that ISI had purposefully availed itself of doing business in Connecticut because it directed its advertising activities via the Internet and its toll-free number toward the state of Connecticut (and all states); Internet sites and toll-free numbers are designed to communicate with people and their businesses in every state; an Internet advertisement could reach as many as 10,000 \*419 Internet users within Connecticut alone; and once posted on the Internet, an advertisement is continuously available to any Internet user.

Cybersell AZ further points to the court's statement in *EDIAS Software International, L.L.C. v. BASIS International Ltd.*, 947 F.Supp. 413 (D.Ariz.1996), that a defendant "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction." *Id.* at 420. In that case, EDIAS (an Arizona company) alleged that BASIS (a New Mexico company) sent advertising and defamatory statements over the Internet through e-mail, its web page, and forums. However, the court did not rest its minimum contacts analysis on use of the Internet alone; in addition to the Internet, BASIS had a contract with EDIAS, it made sales to EDIAS and other Arizona customers, and its employees had visited Arizona during the course of the business relationship with EDIAS.

Some courts have also given weight to the number of "hits" received by a web page from residents in the forum state, and to other evidence that Internet activity was directed at, or bore fruit in, the forum state. See, e.g., *Heroes, Inc. v. Heroes Found.*, 958 F.Supp. 1 (D.D.C.1996) (web page that solicited contributions and provided toll-free telephone number along with the defendant's use on the web page of the allegedly infringing trademark and logo, along with other contacts, provided sustained contact with the District), *amended by* No. Civ.A. 96-1260(TAF) (1997); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So.2d 1351 (Fla.Dist.Ct.App.1994) (declining jurisdiction where defendant consumer subscribed to plaintiff's travel reservation system but was solicited and serviced in-state by the supplier's local representative).

In sum, the common thread, well stated by the district court in *Zippo*, is that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo*, 952 F.Supp. at 1124.

## B

Here, Cybersell FL has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name "CyberSell," which Cybersell AZ was in the process of registering as a federal service mark. While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents.

Cybersell FL did nothing to encourage people in Arizona to access its site, and

there is no evidence that any part of its business (let alone a continuous part of its business) was sought or achieved in Arizona. To the contrary, it appears to be an operation where business was primarily generated by the personal contacts of one of its founders. While those contacts are not entirely local, they aren't in Arizona either. No Arizonan except for Cybersell AZ "hit" Cybersell FL's web site. There is no evidence that any Arizona resident signed up for Cybersell FL's web construction services. It entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from Cybersell AZ. Cybersell FL did not have an "800" number, let alone a toll-free number that also used the "Cybersell" name. The interactivity of its web page is limited to receiving the browser's name and address and an indication of interest--signing up for the service is not an option, nor did anyone from Arizona do so. No money changed hands on the Internet from (or through) Arizona. In short, Cybersell FL has done no act and has consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law.

We therefore hold that Cybersell FL's contacts are insufficient to establish **\*420** "purposeful availment." Cybersell AZ has thus failed to satisfy the first prong of our three-part test for specific jurisdiction. We decline to go further solely on the footing that Cybersell AZ has alleged trademark infringement over the Internet by Cybersell FL's use of the registered name "Cybersell" on an essentially passive web page advertisement. Otherwise, every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located. That would not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state. See *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir.1985) (series of phone calls and letters to California physician regarding plaintiff's injuries insufficient to satisfy first prong of test).

### III

Cybersell AZ also invokes the "effects" test employed in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), and *Core-Vent Corp. v. Nobel Industries*, 11 F.3d 1482 (9th Cir.1993), with respect to intentional torts directed to the plaintiff, causing injury where the plaintiff lives. However, we don't see this as a *Calder* case. Because Shirley Jones was who she was (a famous entertainer who lived and worked in California) and was libeled by a story in the *National Enquirer*, which was published in Florida but had a nationwide circulation with a large audience in California, the Court could easily hold that California was the "focal point both of the story and of the harm suffered" and so jurisdiction in California based on the "effects" of the defendants' Florida conduct was proper. *Calder*, 465 U.S. at 789, 104 S.Ct. at 1486. There is nothing comparable about Cybersell FL's web page. Nor does the "effects" test apply with the same force to Cybersell AZ as it would to an individual, because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does." *Core-Vent*, 11 F.3d at 1486. Cybersell FL's web page simply was not aimed intentionally at Arizona knowing that harm was likely to be caused there

to Cybersell AZ. [FN6]

FN6. Likewise unpersuasive is Cybersell AZ's reliance on *Panavision International v. Toeppen*, 938 F.Supp. 616 (C.D.Cal.1996), where the court found the "purposeful availment" prong satisfied by the effects felt in California, the home state of Panavision, from Toeppen's alleged out-of-state scheme to register domain names using the trademarks of California companies, including Panavision, for the purpose of extorting fees from them. Again, there is nothing analogous about Cybersell FL's conduct.

#### IV

We conclude that the essentially passive nature of Cybersell FL's activity in posting a home page on the World Wide Web that allegedly used the service mark of Cybersell AZ does not qualify as purposeful activity invoking the benefits and protections of Arizona. As it engaged in no commercial activity and had no other contacts via the Internet or otherwise in Arizona, Cybersell FL lacks sufficient minimum contacts with Arizona for personal jurisdiction to be asserted over it there. Accordingly, its motion to dismiss for lack of personal jurisdiction was properly granted.

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### **LAKIN V. PRUDENTIAL SECURITIES, 348 F.3d 704 (8th Cir.(Mo. 2003)**

SMITH, Circuit Judge.

**\*\*1** Appellants filed suit in Missouri state court, alleging claims of negligence, breach of contract, and breach of fiduciary duties. After removal, Appellee Prudential Savings Bank ("Prudential Savings") moved for dismissal for lack of personal jurisdiction. Appellants resisted the motion and filed a request for jurisdictional discovery. The district court then granted Prudential Securities' motion and denied appellants' request. We affirm in part, reverse in part, and remand for jurisdictional discovery.

#### I.

Beginning in 1991 a group of individuals-including Martin Frankel, John Hackney, Gary Atnip, and others-acquired and ran several insurance companies. After acquiring the companies, they allegedly engaged in an elaborate looting scheme, which converted and misappropriated the assets and funds of these insurance companies. **\*706** The insurance companies are now insolvent and in receivership. Appellants serve as the court-appointed receivers of these insurance companies, which are located in their respective states-Missouri, Mississippi, Tennessee, and Oklahoma.

Appellee Prudential Savings is a federally-chartered savings bank. Its principal place of business and its home office are located in the State of Georgia. In December 1998, as part of the scheme, Hackney opened a custody account at Prudential Savings on behalf of Franklin American Life Insurance Company ("FAL"), a Tennessee-domiciled insurance company. On December 28, 1999, the account received a deposit of approximately \$69 million; allegedly that money was later transferred to another bank account in Tennessee and then to Frankel's Swiss bank

account.

After the alleged fraud was exposed and the insurance companies went insolvent, appellants filed a complaint against Prudential Savings and others [FN1] in Missouri state court. In pertinent part, the suit alleged that Prudential Savings was negligent and breached its contractual and fiduciary duties to FAL when it allegedly permitted the \$69 million to be released to Frankel without proper instruction from FAL's officers. After the suit was filed, the case was removed to the United States District Court for the Western District of Missouri.

Prudential Savings then filed a motion to dismiss for lack of personal jurisdiction, arguing that it has only one physical office-located in Georgia- and that it has virtually no contact with Missouri residents. Appellants countered that from December 1998 to June 2001, Prudential Savings did have sufficient contacts with the State of Missouri. Appellants noted that Prudential Savings maintained home-equity loans and lines of credit to Missouri residents totaling around \$10 million, or one percent of its loan portfolio. In addition, appellants noted that Prudential Savings maintained a Web site-[www.prudential.com/banking](http://www.prudential.com/banking) [FN2]-on which Prudential Savings' services are offered to Missouri residents. As an alternative, appellants requested leave for jurisdictional discovery. The district court, however, disagreed with appellants, granted Prudential Services' motion to dismiss, and denied appellants' motion for jurisdictional discovery. For the reasons stated below, we affirm in part, reverse in part, and remand for jurisdictional discovery.

## II.

**\*\*2** [1] We review *de novo* whether appellants have presented a *prima facie* case [FN3] of personal jurisdiction, viewing the evidence in the light most favorable to the appellants and resolving all factual conflicts in their favor. *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558, 561 (8th Cir.2003). As we sit in diversity for this suit, our analysis of personal jurisdiction involves two steps. We first must consider whether the State of Missouri would accept jurisdiction under the facts of this case. *Sondergard v. Miles, Inc.*, 985 F.2d **\*707** 1389, 1392 (8th Cir.1993). Then, we must determine whether that exercise of jurisdiction comports with Constitutional Due Process restrictions. *Id.*

### A. Jurisdiction

The Supreme Court has noted that states exercise two broad types of personal jurisdiction: specific jurisdiction and general jurisdiction. *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). Specific jurisdiction refers to jurisdiction over causes of action that "arise out of" or "relate to" a defendant's activities within a state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). General jurisdiction, "on the other hand, refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose." *Sondergard*, 985 F.2d at 1392 (citation omitted); *see also Helicopteros*, 466 U.S. at 414 & n. 9, 104 S.Ct. 1868.

Appellants first argue that they have established a *prima facie* case of specific jurisdiction. However, a *prima facie* case of specific personal jurisdiction can only be

established if Prudential Savings "has purposefully directed [its] activities at [Missouri] residents," and the claim of this suit either "arises out of" or "relates to" these activities. *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174 (citation omitted); see also *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874, 876 (Mo.1982) (en banc) (extending the Missouri long-arm statute to the extent permissible under the Due Process Clause). Here, the cause of action alleged-that Prudential Savings was negligent and breached its contractual and fiduciary duties to FAL-is entirely unrelated to Prudential Securities' activities in Missouri. Rather, the cause of action "arises out of" and "relates to" activities in the State of Tennessee. As a result, appellants' argument for specific jurisdiction fails.

Appellants next argue that the facts of this case-specifically Prudential Securities' Web site and its home-equity loans and lines of credit to Missouri residents [FN4]-are sufficient to establish general jurisdiction over Prudential Securities. Thus, we must examine whether Missouri "has authorized the exercise of general jurisdiction over non-resident corporations, and whether it would apply the doctrine in this case." *Sondergard*, 985 F.2d at 1392.

FN4. Appellants also cite a third factor-Mo. Rev. Stat. § 351.572.2 (2000)-as a reason to support general jurisdiction over Prudential Securities. We find this argument to be misplaced and without merit.

The Missouri Supreme Court has long held that a "foreign corporation present and conducting substantial business in Missouri" is subject to the jurisdiction of Missouri courts. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 167 (Mo.1999) (en banc) (citing cases holding the same from 1907 forward). Missouri courts have interpreted the phrase "present and conducting substantial business" to mean that jurisdiction will be established if a non-resident corporation has "substantial" and "continuous" contacts with the State of Missouri. [FN5] *Sloan-Roberts v. Morse Chevrolet, Inc.*, 44 S.W.3d \*708 402, 409 (Mo.Ct.App.2001) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945)); see also *Shouse v. RFB Constr. Co., Inc.*, 10 S.W.3d 189, 193 (Mo.Ct.App.1999). This is identical to the federal due process requirements. See *Int'l Shoe*, 326 U.S. at 318, 66 S.Ct. 154; see also *Helicopteros*, 466 U.S. at 415, 104 S.Ct. 1868; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

**\*\*3** Having determined that Missouri courts have authorized general jurisdiction, we must now determine if a Missouri court would apply the doctrine in this case. Generally, Missouri courts-like most courts-are hesitant to "exercise general jurisdiction over non-resident defendants." *Sloan-Roberts*, 44 S.W.3d at 410; see also *Davis v. Baylor Univ.*, 976 S.W.2d 5, 7-8 (Mo.Ct.App.1998). Nevertheless, after reviewing the relevant factors and the applicable law, we conclude that appellants could establish a case of general personal jurisdiction if they are permitted to take jurisdictional discovery on remand.

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## 2. Internet Contacts

Second, appellants assert that Prudential Securities' Web site should render it subject to general jurisdiction. Missouri courts have not yet addressed whether a Web site may provide sufficient "minimum contacts" to invoke personal jurisdiction. [FN9] Neither have we. However, many of our sister circuits have. Unfortunately, the majority of these cases address whether a Web site can provide sufficient contacts to invoke specific jurisdiction. *E.g.*, *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, (3d Cir.2003) (specific jurisdiction in trademark infringement case); *ALS Scan, Inc. v. Digital Serv. Consult., Inc.*, 293 F.3d 707 (4th Cir.2002) (same); *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2d Cir.1997) (same); *Cybersell, Inc., v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir.1997) (same); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.1996) (same); see also *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir.2002) (specific jurisdiction for defamation action).

FN9. In one opinion, however, the Missouri Court of Appeals mentioned the level of interactivity of a Web site-apparently alluding to the *Zippo* test. See *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 830, 835 (Mo.Ct.App.2000) ("In the summer and fall of 1997, Beer Nuts' website fell in the middle range of websites accessible on the web in terms of its sophistication and interactivity."). As it appeared only in the factual summary, however, it played no part in the court's specific personal jurisdiction determination. Thus, it is not binding upon us.

The great majority of these cases have adopted the analytical framework of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa.1997). In *Zippo*-also a case of specific jurisdiction-the court examined the few cases that had previously addressed the issue of whether a Web site could provide sufficient contacts for specific personal jurisdiction. It applied the results of these cases to the traditional personal jurisdiction analytical framework, noting that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet." 952 F.Supp. at 1124. In order to measure the nature and quality of the commercial activity, the court created a "sliding scale" to measure the likelihood of personal jurisdiction. It noted:

**\*\*5** 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. At 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 **\*711** 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.* (citations omitted).

We agree with our sister circuits that the *Zippo* model is an appropriate approach in cases of specific jurisdiction-i.e., ones in which we need only find "minimum contacts." However, we are presented with a case of general personal jurisdiction-i.e., one in

which we must find "substantial and continuous" contacts. The circuits that have addressed which analytical model to apply to a case of general jurisdiction have split on whether to accept the *Zippo* "sliding scale." Compare *L.L. Bean*, 341 F.3d at 1079 (applying *Zippo* and finding general jurisdiction); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C.Cir.2002) (same); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296-97 (10th Cir.1999) (applying *Zippo*, but finding no general jurisdiction) with *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir.2002) (noting that the *Zippo* sliding scale "is not well adapted to the general jurisdiction inquiry"); *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F.Supp.2d 1082, 1091 (E.D.Mo.2001) (noting that while the "sliding scale suggested by the court in *Zippo* may be a relevant factor in assessing general jurisdiction, it is not alone determinative") (footnote omitted).

We agree with the courts that do not apply the "sliding scale" presumptively for cases of general jurisdiction. Certainly, we believe that a consideration of the "nature and quality" of a Web site and a determination of whether it is "interactive," "does business," or is merely "passive" is an important factor in our analysis. However, we have long held that the "nature and quality" of contacts is only one factor to consider. Instead, we consider a variety of factors—depending on the circumstance—in a personal jurisdiction analysis. *Aftanase v. Econ. Baler Co.*, 343 F.2d 187, 197 (8th Cir.1965) (creating the five factors to consider for personal jurisdiction and applying them depending on their relevance to the case).

We first discussed the factors in *Aftanase*. In this 1965 case, Judge Harry Blackmun [FN10] analyzed and summarized the controlling United States Supreme Court cases on the subject of personal jurisdiction. *Id.* at 195-96 (summarizing *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *Perkins*, 342 U.S. at 437, 72 S.Ct. 413; *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950); *Int'l Shoe*, 326 U.S. at 310, 66 S.Ct. 154). Judge Blackmun then observed that each of these cases established "general" instead of "precise guidelines," but that each of the cases had several factors, which the Supreme Court repeatedly identified. *Id.* at 197. Specifically, Judge Blackmun noted that:

**\*\*6** [A]t one time or another in the opinions, three primary factors, namely, the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts, are stressed, and that two others, the interest of the forum **\*712** state and convenience of the parties, receive mention.

*Id.* It is apparent that the primary factors relate to our consideration of a defendant's contacts. [FN11] At a minimum, in a specific jurisdiction case we will consider the last two of the primary factors—"the nature and quality of the contacts, and [their] source and connection" to "the cause of action." In such a case, the *Zippo* test would function appropriately. However, in a general jurisdiction case, we do not consider the "source and connection" to "the cause of action," but rather we consider the "nature and quality of the contacts" as well as the "quantity of the contacts." *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 819 (8th Cir.1994) (citations omitted) (distinguishing general jurisdiction from specific jurisdiction). This is precisely why the *Zippo* test alone is insufficient for the general jurisdiction setting.

FN11. It is equally apparent that the secondary factors, i.e., "the interest of the forum state and convenience of the parties" relate to our consideration of "traditional notions of fair play and substantial justice" in our reasonableness analysis. We consider these factors in Part II.B, *infra*.

Under the *Zippo* test, it is possible for a Web site to be very interactive, but to have no quantity of contacts. In other words, the contacts would be continuous, but not *substantial*. This is untenable in a general jurisdiction analysis. As one court has noted, the *Zippo* test "is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction ...." *Revell*, 317 F.3d at 471. As a result, we will first apply the *Zippo* test and then also look at the quantity of those contacts with Missouri residents.

Prudential Securities' Web site-www.prudential.com/banking-falls under the middle category of *Zippo*-a sophisticated, interactive Web site in which a user can exchange information with the host computer. Not only can Missouri consumers review detailed company, service, and financial information about Prudential Savings, they can also exchange electronic mail; establish and access secure online accounts; and calculate home-mortgage rates. More importantly, Missouri consumers are also able to complete online applications for home-equity loans and lines of credit. The site states that it provides electronic responses to the inquiry within three to five business days. Through its Web site Prudential Savings could have continuous, significant contacts with Missouri residents. In fact, because its site is available twenty-four hours a day, it is possible for Prudential Securities "to have contacts with the [State of Missouri] that are 'continuous and systematic' to a degree that traditional foreign corporations can never even approach." *Gorman*, 293 F.3d at 513.

**\*\*7** However, this is not sufficient for general jurisdiction. As noted, we must also consider the quantity of contacts that Prudential Securities'-through its Web site-has with Missouri residents. However, appellants were unable to conduct jurisdictional discovery prior to the district court's grant of Prudential Savings' motion to dismiss. As a result, the record contains no indication of: the number of times that Missouri consumers have accessed the Web site; the number of Missouri consumers that have requested further information about Prudential Savings' services; the number of Missouri consumers that have utilized the online loan-application services; the number of times that a Prudential Savings representative has responded to Missouri **\*713** residents after they have applied for a loan; the number and amounts of home-equity or other loans that resulted from online-application submission by Missouri consumers, or which are secured by Missouri property.

Appellants did make such a motion. The district court, however, denied it. To not grant it was, in our view, an abuse of discretion. *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1388 (8th Cir.1993) (applying an "abuse of discretion" standard when reviewing the denial of a request for jurisdictional discovery); see also *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402-03 (4th Cir.2003) (same standard of review in an Internet personal jurisdiction case); *Harris Rutsky & Co. Ins. Servs., v. Bell & Clements, Ltd.*, 328 F.3d 1122, 1135 (9th Cir.2003)

(same standard of review and remanding for further jurisdictional discovery); *Toys "R" Us, Inc.*, 318 F.3d at 455-58 (same standard of review and remanding for further jurisdictional discovery in an Internet personal jurisdiction case); *Gorman*, 293 F.3d at 513 (affirming on a different issue, but noting that it would otherwise remand for jurisdictional discovery in an Internet personal jurisdiction case); *Shouse*, 10 S.W.3d at 194-95 (Missouri appellate court remanding for jurisdictional discovery). As a result, if appellants can meet the second factor-i.e., the due process inquiry-then remand to the district court for further jurisdictional discovery is the appropriate disposition for this case.

### B. Due Process

Regardless of the number of contacts to support general jurisdiction, we will only reverse the order of the district court if the assertion of jurisdiction would be reasonable and not offend notions of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154. In making this determination, we must consider "the burden on [Prudential Securities], the interests of [Missouri], and the [appellants'] interest in obtaining relief." *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cal.*, 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Schilling v. Hum. Supp. Serv.*, 978 S.W.2d 368, 371 (Mo.Ct.App.1998). Additionally, we must also weigh "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Asahi Metal*, 480 U.S. at 113, 107 S.Ct. 1026 (citation omitted); *Schilling*, 978 S.W.2d at 371.

**\*\*8** [4] A consideration of these factors demonstrates that there is adequate evidence in the record to conclude-if minimum contacts are present- that asserting jurisdiction over Prudential Securities would not violate due process. First, Missouri has a significant interest in giving insolvent insurance companies a forum in which to litigate their claims. Moreover, while it might be a burden for Prudential Securities to have to travel to Missouri, given the nature of this litigation, it does not seem overly burdensome. This litigation involves eight defunct insurance companies, who are fighting over twenty-two accounts from four different states. However, as alleged by appellants, the underlying evidence for each is the same; each of the accounts was managed by the same broker. As a result, it would be a waste of judicial resources to have the parties relitigate this single insurance claim again in Georgia. It is much more efficient for all parties to have the litigation centered in one location. Therefore, as the record stands, the exercise of general jurisdiction does not offend "notions of fair play and substantial justice." However, it is possible that on remand other facts might come **\*714** to light, which would require a different result.

### III.

We therefore affirm the district court's ruling that it lacked specific jurisdiction over Prudential Securities, reverse its ruling on general jurisdiction, and remand this matter to the district court for jurisdictional discovery and proceedings consistent with this opinion.

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**YOUNG v. NEW HAVEN ADVOCATE**, 315 F.3d 256 (4<sup>th</sup> Cir. 2002)

MICHAEL, Circuit Judge.

The question in this appeal is whether two Connecticut newspapers and certain of their staff (sometimes, the "newspaper defendants") subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles that, in the context of discussing the State of Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison. Our recent decision in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir.2002), supplies the standard for determining a court's authority to exercise personal jurisdiction over an out-of-state person who places information on the Internet. Applying that standard, we hold that a court in Virginia cannot constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did **\*259** not manifest an intent to aim their websites or the posted articles at a Virginia audience. Accordingly, we reverse the district court's order denying the defendants' motion to dismiss for lack of personal jurisdiction.

I.

Sometime in the late 1990s the State of Connecticut was faced with substantial overcrowding in its maximum security prisons. To alleviate the problem, Connecticut contracted with the Commonwealth of Virginia to house Connecticut prisoners in Virginia's correctional facilities. Beginning in late 1999 Connecticut transferred about 500 prisoners, mostly African-American and Hispanic, to the Wallens Ridge State Prison, a "supermax" facility in Big Stone Gap, Virginia. The plaintiff, Stanley Young, is the warden at Wallens Ridge. Connecticut's arrangement to incarcerate a sizeable number of its offenders in Virginia prisons provoked considerable public debate in Connecticut. Several Connecticut legislators openly criticized the policy, and there were demonstrations against it at the state capitol in Hartford.

Connecticut newspapers, including defendants the New Haven Advocate (the Advocate) and the Hartford Courant (the Courant), began reporting on the controversy. On March 30, 2000, the Advocate published a news article, written by one of its reporters, defendant Camille Jackson, about the transfer of Connecticut inmates to Wallens Ridge. The article discussed the allegedly harsh conditions at the Virginia prison and pointed out that the long trip to southwestern Virginia made visits by prisoners' families difficult or impossible. In the middle of her lengthy article, Jackson mentioned a class action that inmates transferred from Connecticut had filed against Warden Young and the Connecticut Commissioner of Corrections. The inmates alleged a lack of proper hygiene and medical care and the denial of religious privileges at Wallens Ridge. Finally, a paragraph at the end of the article reported that a Connecticut state senator had expressed concern about the presence of Confederate Civil War memorabilia in Warden Young's office. At about the same time the Courant published three columns, written by defendant-reporter Amy Pagnozzi, questioning the practice of relocating Connecticut inmates to Virginia prisons. The columns reported

on letters written home by inmates who alleged cruelty by prison guards. In one column Pagnozzi called Wallens Ridge a "cut-rate gulag." Warden Young was not mentioned in any of the Pagnozzi columns.

On May 12, 2000, Warden Young sued the two newspapers, their editors (Gail Thompson and Brian Toolan), and the two reporters for libel in a diversity action filed in the Western District of Virginia. He claimed that the newspapers' articles imply that he "is a racist who advocates racism" and that he "encourages abuse of inmates by the guards" at Wallens Ridge. Young alleged that the newspapers circulated the allegedly defamatory articles throughout the world by posting them on their Internet websites.

The newspaper defendants filed motions to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(2) on the ground that the district court lacked personal jurisdiction over them. In support of the motions the editor and reporter from each newspaper provided declarations establishing the following undisputed facts. The Advocate is a free newspaper published once a week in New Haven, Connecticut. It is distributed in New Haven and the surrounding area, and some of its content is published on the Internet. The Advocate has a small number of subscribers, \*260 and none of them are in Virginia. The Courant is published daily in Hartford, Connecticut. The newspaper is distributed in and around Hartford, and some of its content is published on the Internet. When the articles in question were published, the Courant had eight mail subscribers in Virginia. Neither newspaper solicits subscriptions from Virginia residents. No one from either newspaper, not even the reporters, traveled to Virginia to work on the articles about Connecticut's prisoner transfer policy. The two reporters, Jackson of the Advocate and Pagnozzi of the Courant, made a few telephone calls into Virginia to gather some information for the articles. Both interviewed by telephone a spokesman for the Virginia Department of Corrections. All other interviews were done with people located in Connecticut. The two reporters wrote their articles in Connecticut. The individual defendants (the reporters and editors) do not have any traditional contacts with the Commonwealth of Virginia. They do not live in Virginia, solicit any business there, or have any assets or business relationships there. The newspapers do not have offices or employees in Virginia, and they do not regularly solicit or do business in Virginia. Finally, the newspapers do not derive any substantial revenue from goods used or services rendered in Virginia.

In responding to the declarations of the editors and reporters, Warden Young pointed out that the newspapers posted the allegedly defamatory articles on Internet websites that were accessible to Virginia residents. In addition, Young provided copies of assorted print-outs from the newspapers' websites. For the Advocate, Young submitted eleven pages from newhavenadvocate.com and newmassmedia.com for January 26, 2001. The two pages from newhavenadvocate.com are the Advocate's homepage, which includes links to articles about the "Best of New Haven" and New Haven's park police. The nine pages from newmassmedia.com, a website maintained by the publishers of the Advocate, consist of classified advertising from that week's newspapers and instructions on how to submit a classified ad. The listings include advertisements for real estate rentals in New Haven and Guilford, Connecticut, for

roommates wanted and tattoo services offered in Hamden, Connecticut, and for a bassist needed by a band in West Haven, Connecticut. For the Courant, Young provided nine pages from hartfordcourant.com and ctnow.com for January 26, 2001. The hartfordcourant.com homepage characterizes the website as a "source of news and entertainment in and about Connecticut." A page soliciting advertising in the Courant refers to "exposure for your message in this market" in the "best medium in the state to deliver your advertising message." The pages from ctnow.com, a website produced by the Courant, provide news stories from that day's edition of the Courant, weather reports for Hartford and New Haven, Connecticut, and links to sites for the University of Connecticut and Connecticut state government. The website promotes its online advertising as a "source for jobs in Connecticut." The website printouts provided for January 26, 2001, do not have any content with a connection to readers in Virginia. ....

## II.

### A.

A federal court may exercise personal jurisdiction over a defendant in the manner provided by state law. See *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir.1997); Fed.R.Civ.P. 4(k)(1)(A). Because Virginia's long-arm statute extends personal jurisdiction to the extent permitted by the Due Process Clause, see *English & Smith v. Metzger*, 901 F.2d 36, 38 (4th Cir.1990), "the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." *Stover v. O'Connell Assocs., Inc.*, 84 F.3d 132, 135-36 (4th Cir.1996). The question, then, is whether the defendant has sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). A court may assume power over an out-of-state defendant either by a proper "finding [of] specific jurisdiction based on conduct connected to the suit or by [a proper] finding [of] general jurisdiction." *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711 (4th Cir.2002). Warden Young argues only for specific jurisdiction, so we limit our discussion accordingly. When a defendant's contacts with the forum state "are also the basis for the suit, those contacts may establish specific jurisdiction." *Id.* at 712. In determining whether specific jurisdiction exists, we traditionally ask (1) whether the defendant purposefully availed itself of the privileges of conducting activities in the forum state, (2) whether the plaintiff's claim arises out of the defendant's forum-related activities, and (3) "whether the exercise of personal jurisdiction over the defendant would be constitutionally reasonable." *Id.* at 712. See also *Christian Sci. Bd.*, 259 F.3d at 216. The plaintiff, of course, has the burden to establish that personal jurisdiction exists over the out-of-state defendant. *Young v. FDIC*, 103 F.3d 1180, 1191 (4th Cir.1997).

### B.

We turn to whether the district court can exercise specific jurisdiction over the newspaper defendants, namely, the two newspapers, the two editors, and the two reporters. To begin with, we can put aside the few Virginia contacts that are not Internet based because Warden Young does not rely on them. Thus, Young does not

claim that the reporters' few telephone calls into Virginia or the Courant's eight Virginia subscribers are sufficient to establish personal jurisdiction over those defendants. Nor did the district court rely on these traditional contacts.

[7] Warden Young argues that the district court has specific personal jurisdiction over the newspaper defendants (hereafter, the "newspapers") because of the following contacts between them and Virginia: (1) the newspapers, knowing that Young was a Virginia resident, intentionally discussed and defamed him in their articles, (2) the newspapers posted the articles on their websites, which were accessible in Virginia, and (3) the primary effects \*262 of the defamatory statements on Young's reputation were felt in Virginia. Young emphasizes that he is not arguing that jurisdiction is proper in any location where defamatory Internet content can be accessed, which would be anywhere in the world. Rather, Young argues that personal jurisdiction is proper in Virginia because the newspapers understood that their defamatory articles, which were available to Virginia residents on the Internet, would expose Young to public hatred, contempt, and ridicule in Virginia, where he lived and worked. As the district court put it, "[t]he defendants were all well aware of the fact that the plaintiff was employed as a warden within the Virginia correctional system and resided in Virginia," and they "also should have been aware that any harm suffered by Young from the circulation of these articles on the Internet would primarily occur in Virginia."

Young frames his argument in a way that makes one thing clear: if the newspapers' contacts with Virginia were sufficient to establish personal jurisdiction, those contacts arose solely from the newspapers' Internet-based activities. Recently, in *ALS Scan* we discussed the challenges presented in applying traditional jurisdictional principles to decide when "an out-of-state citizen, through electronic contacts, has conceptually 'entered' the State via the Internet for jurisdictional purposes." *ALS Scan*, 293 F.3d at 713. There, we held that "specific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at [the forum state] and causing injury that gives rise to a potential claim cognizable in [that state]." *Id.* at 714. We noted that this standard for determining specific jurisdiction based on Internet contacts is consistent with the one used by the Supreme Court in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). *ALS Scan*, 293 F.3d at 714. *Calder*, though not an Internet case, has particular relevance here because it deals with personal jurisdiction in the context of a libel suit. In *Calder* a California actress brought suit there against, among others, two Floridians, a reporter and an editor who wrote and edited in Florida a National Enquirer article claiming that the actress had a problem with alcohol. The Supreme Court held that California had jurisdiction over the Florida residents because "California [was] the focal point both of the story and of the harm suffered." *Calder*, 465 U.S. at 789, 104 S.Ct. 1482. The writers' "actions were expressly aimed at California," the Court said, "[a]nd they knew that the brunt of [the potentially devastating] injury would be felt by [the actress] in the State in which she lives and works and in which the National Enquirer has its largest circulation," 600,000 copies. *Calder*, 465 U.S. at 789-90, 104 S.Ct. 1482.

[8][9] Warden Young argues that *Calder* requires a finding of jurisdiction in this case

simply because the newspapers posted articles on their Internet websites that discussed the warden and his Virginia prison, and he would feel the effects of any libel in Virginia, where he lives and works. *Calder* does not sweep that broadly, as we have recognized. For example, in *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625-26 (4th Cir.1997), we emphasized how important it is in light of *Calder* to look at whether the defendant has expressly aimed or directed its conduct toward the forum state. We said that "[a]lthough the place that the plaintiff feels the alleged injury is plainly relevant to the [jurisdictional] inquiry, it must ultimately be accompanied by the defendant's own [sufficient minimum] contacts with the state if jurisdiction ... is to be upheld." *Id.* at 626. We thus had no trouble in concluding in *ALS Scan* that application of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to **\*263** the forum state. *ALS Scan*, 293 F.3d at 714. In *ALS Scan* we went on to adapt the traditional standard (set out in part II.A., *supra*) for establishing specific jurisdiction so that it makes sense in the Internet context. We "conclude[d] that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." *ALS Scan*, 293 F.3d at 714.

[10] When the Internet activity is, as here, the posting of news articles on a website, the *ALS Scan* test works more smoothly when parts one and two of the test are considered together. We thus ask whether the newspapers manifested an intent to direct their website content--which included certain articles discussing conditions in a Virginia prison--to a Virginia audience. As we recognized in *ALS Scan*, "a person's act of placing information on the Internet" is not sufficient by itself to "subject[ ] that person to personal jurisdiction in each State in which the information is accessed." *Id.* at 712. Otherwise, a "person placing information on the Internet would be subject to personal jurisdiction in every State," and the traditional due process principles governing a State's jurisdiction over persons outside of its borders would be subverted. *Id.* See also *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C.Cir.2000). Thus, the fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to "indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state," Virginia. *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1321 (9th Cir.1998) (quotation omitted). The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.

We therefore turn to the pages from the newspapers' websites that Warden Young placed in the record, and we examine their general thrust and content. The overall content of both websites is decidedly local, and neither newspaper's website contains advertisements aimed at a Virginia audience. For example, the website that distributes the Courant, ctnow.com, provides access to local (Connecticut) weather and traffic information and links to websites for the University of Connecticut and Connecticut state government. The Advocate's website features stories focusing on New Haven, such as

one entitled "The Best of New Haven." In sum, it appears that these newspapers maintain their websites to serve local readers in Connecticut, to expand the reach of their papers within their local markets, and to provide their local markets with a place for classified ads. The websites are not designed to attract or serve a Virginia audience.

We also examine the specific articles Young complains about to determine whether they were posted on the Internet with the intent to target a Virginia audience. The articles included discussions about the allegedly harsh conditions at the Wallens Ridge prison, where Young was warden. One article mentioned Young by name and quoted a Connecticut state senator who reported that Young had Confederate Civil War memorabilia in his office. The focus of the articles, however, was the Connecticut prisoner transfer policy and its impact on the transferred prisoners and their families back home in Connecticut. The articles reported on and encouraged a public debate in Connecticut about whether \*264 the transfer policy was sound or practical for that state and its citizens. Connecticut, not Virginia, was the focal point of the articles. *Cf. Griffis v. Luban*, 646 N.W.2d 527, 536 (Minn.2002) ("The mere fact that [the defendant, who posted allegedly defamatory statements about the plaintiff on the Internet] knew that [the plaintiff] resided and worked in Alabama is not sufficient to extend personal jurisdiction over [the defendant] in Alabama, because that knowledge does not demonstrate targeting of Alabama as the focal point of the ... statements.").

The facts in this case establish that the newspapers' websites, as well as the articles in question, were aimed at a Connecticut audience. The newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers. Accordingly, the newspapers could not have "reasonably anticipate[d] being haled into court [in Virginia] to answer for the truth of the statements made in their article[s]." *Calder*, 465 U.S. at 790, 104 S.Ct. 1482 (quotation omitted). In sum, the newspapers do not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them. [FN\*]

FN\* Because the newspapers did not intentionally direct Internet activity to Virginia, and jurisdiction fails on that ground, we have no need to explore the last part of the *ALS Scan* inquiry, that is, whether the challenged conduct created a cause of action in Virginia. See *ALS Scan*, 293 F.3d at 714.

We reverse the order of the district court denying the motions to dismiss for lack of personal jurisdiction made by the New Haven Advocate, Gail Thompson (its editor), and Camille Jackson (its reporter) and by the Hartford Courant, Brian Toolan (its editor), and Amy Pagnozzi (its reporter).

*REVERSED.*

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**METCALF V. LAWSON**, 802 A.2d 1221 (NH 2002)

DALIANIS, J.

The defendant, Shirley Lawson, appeals an order of the Milford District Court (*Ryan, J.*) denying her motion to dismiss for lack of personal jurisdiction. We reverse.

This case arises out of a breach of contract action involving an Internet transaction. The defendant, a New Jersey resident, advertised a "John Deere 30 mini excavator" on an Internet auction site known as "eBay." The defendant has never been physically present in New Hampshire.

Prior to bidding on the excavator, the plaintiff, Robert Metcalf, a New Hampshire resident, contacted the defendant through electronic mail (e-mail) to inquire about the product's quality. After receiving an e-mail message from the defendant assuring him that the product was in good condition, he bid on the excavator and won the auction.

Following the auction, the parties exchanged further e-mail messages and at some point the plaintiff informed the defendant that he was a New Hampshire resident. The plaintiff then traveled to New Jersey and purchased the excavator. After the transaction was concluded, the plaintiff experienced problems with the excavator and tried to contact the defendant, hoping to receive a partial refund. The defendant did not respond.

The plaintiff filed a small claims complaint. The defendant moved for dismissal, arguing that she was not subject to personal jurisdiction in New Hampshire. The court denied the motion, stating, in part:

**\*37** By advertising her John Deere excavator on "E-bay" for sale, the defendant knew or should hav[e] know[n] that the offer would be extended to possible buyers in all 50 states. The Court finds that by doing business on the Internet, the defendant has the requisite minimum contact with the State of New Hampshire.

This appeal followed.

"The plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant." *Phelps v. Kingston*, 130 N.H. 166, 170, 536 A.2d 740 (1987). The plaintiff must offer affirmative proof to substantiate facts that relate to personal jurisdiction. See *Brother Records v. HarperCollins Publishers*, 141 N.H. 322, 324, 682 A.2d 714 (1996), *cert. denied*, 520 U.S. 1103, 117 S.Ct. 1106, 137 L.Ed.2d 309 (1997). The plaintiff, however, need make only a *prima facie* showing of jurisdictional facts to defeat a defendant's motion to dismiss.

In determining whether a defendant is subject to personal jurisdiction, we generally engage in a two-part inquiry. *Staffing Network, Inc. v. Pietropaolo*, 145 N.H. 456, 457, 764 A.2d 905 (2000). "First, the State's long-arm statute must authorize such jurisdiction. Second, the requirements of the [F]ederal Due Process Clause must be satisfied." *Id.* (citation omitted). Because we construe the State's long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause, see *Alacron v. Swanson*, 145 N.H. 625, 628, 765 A.2d 1043 (2000), our primary analysis relates to due process. See *Dagesse v. Plant Hotel N.V.*, 113 F.Supp.2d 211, 215 (D.N.H.2000).

[5][6] Pursuant to the Federal Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant if the defendant has certain minimum contacts with the forum, "such that the maintenance of the suit does not offend

traditional notions of fair play and substantial\*\*1225 justice." *Alacron*, 145 N.H. at 628, 765 A.2d 1043. "Where, as here, specific rather than continuous contacts with the forum are the basis for personal jurisdiction, whether these contacts are sufficient to confer jurisdiction over a foreign defendant depends upon the relationship between the defendant, the forum, and the litigation." *Id.*

In determining if the exercise of specific personal jurisdiction comports with due process, we examine whether: (1) the contacts relate to the cause of action; (2) the defendant has purposefully availed herself of the protections of New Hampshire law; and (3) it would be fair and reasonable to require the defendant to defend the suit in New Hampshire. *Skillsoft Corp. v. Harcourt General*, 146 N.H. 305, 308, 770 A.2d 1115 (2001). All three factors must be satisfied in order for the exercise of jurisdiction to be \*38 constitutionally proper, *Dagesse*, 113 F.Supp.2d at 216, and each factor must be evaluated on a case-by-case basis. *Phelps*, 130 N.H. at 171, 536 A.2d 740. Because there appears to be no dispute in this case as to the first factor, we begin by considering if the defendant purposefully availed herself of the protections of New Hampshire's laws.

"The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum State." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108-09, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (quotations and brackets omitted). Minimum contacts

must have a basis in some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.... Jurisdiction is proper where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum State.

*Id.* at 109, 107 S.Ct. 1026 (quotations and ellipsis omitted). "The focus of this inquiry, therefore, is not merely whether ... the defendant[s] contacts might have caused injury in New Hampshire, but whether these contacts should have given [the] defendant notice that ... she should reasonably have anticipated being haled into court in this State." *Alacron*, 145 N.H. at 628, 765 A.2d 1043. The purposeful availment requirement ensures that a defendant will not be subjected to a forum State's jurisdiction based upon random, fortuitous or attenuated contacts. *Dagesse*, 113 F.Supp.2d at 215.

It can be difficult to apply long-standing jurisdictional principles in cases involving Internet contacts. See *Edberg v. Neogen Corp.*, 17 F.Supp.2d 104, 113 (D.Conn.1998). Nevertheless, while

[t]he internet ... undoubtedly challenges the territorial-based concepts that courts have traditionally applied to problems of personal jurisdiction [,] ... it is equally true that traditional constitutional requirements of foreseeability, minimum contacts, purposeful availment, and fundamental fairness must continue to be satisfied before any activity--including internet activity--can support an exercise of personal jurisdiction.

*Dagesse*, 113 F.Supp.2d at 220-21 (citations and quotations omitted). In analyzing the significance of Internet contacts, therefore, most courts hold that the constitutionality of a State's exercise of jurisdiction is proportionate to the nature and quality of the commercial activity the defendant conducts over the Internet. See, e.g., *Sports Authority \*39 Michigan, Inc. v. Justballs, Inc.*, 97 F.Supp.2d 806, 812-13 (E.D.Mich.2000); *Zippo Mfg. Co. v. Zippo \*\*1226 Dot Com, Inc.*, 952 F.Supp. 1119,

1124 (W.D.Pa.1997). A common analytical framework applied in these cases incorporates a sliding scale approach, which provides that:

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. At 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.

*Zippo Mfg. Co.*, 952 F.Supp. at 1124 (citations omitted).

The *Zippo* test is not particularly helpful in this case, however, because the majority of cases using it are based upon a defendant's conduct over its own website. Unlike those cases, the transaction in this case was conducted through an Internet auction site. In analyzing this issue, we find *Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746 (E.D.Mich.2000), instructive.

In *Winfield Collection, Ltd.*, the court held that two sales made to Michigan residents through eBay, standing alone, were insufficient to find that the defendant purposefully availed herself of the privileges and protections of the State of Michigan. *Id.* at 749. The court took judicial notice that the function of an auction is to permit the highest bidder to purchase the property offered for sale, and that the choice of the bidder is beyond the seller's control. *Id.* Thus, it reasoned that the defendant's sales in the forum were the result of random and attenuated contacts, insufficient for finding that the defendant purposefully availed herself of the privilege of doing business in Michigan. *Id.*

In this case, the defendant did not purposefully avail herself of the privilege of doing business in New Hampshire by selling her excavator through eBay. Like the defendant in *Winfield Collection, Ltd.*, she had no control over who would ultimately be the winning bidder on the excavator, nor could she exclude bidders from particular jurisdictions. While it is arguable that the defendant may have foreseen the possibility that a New Hampshire resident might bid on the excavator, foreseeability alone is insufficient to support the exercise of personal jurisdiction under the Federal Due Process Clause. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). "It is the conduct of the defendant [ ], rather than the medium utilized by [her], to which the parameters of specific jurisdiction apply." *Millennium Enterprises v. Millennium Music, LP*, 33 F.Supp.2d 907, 921 (D.Or.1999).

Nor do the e-mail communications between the parties create sufficient minimum contacts. First, the e-mail sent by the plaintiff prior to winning the auction cannot be a ground to support jurisdiction because that contact was the result of his **\*\*1227** unilateral activity. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Second, there is insufficient evidence to establish whether any subsequent e-mails were initiated by the defendant and when she was made aware that

the plaintiff was a New Hampshire resident.

Nothing indicates, therefore, that the defendant intentionally directed her activities at New Hampshire or was aware she was contracting with a New Hampshire resident until after the transaction was completed. See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-66 (6th Cir.1996) (defendant knowingly contracted with Ohio company, directed activities at forum and engaged in ongoing commercial relationship through use of Internet). Consequently, even if we apply the *Zippo* test as encouraged by the plaintiff, we conclude that the defendant's contacts through the Internet are insufficient to warrant the exercise of jurisdiction.

Finally, what appears to be the isolated nature of this transaction and the absence of any evidence that the defendant was a commercial seller militate against a finding of jurisdiction. We reject the plaintiff's contention that jurisdiction exists because the defendant did not plead that she is a non-commercial seller or that she engaged in only one transaction on eBay. The plaintiff had the burden of offering some affirmative proof to substantiate facts that relate to personal jurisdiction. *Brother Records*, 141 N.H. at 324, 682 A.2d 714. To the extent the plaintiff attempts to introduce evidence on appeal to support his claim for jurisdiction, he is barred from doing so because it was not presented first to the district court. *State v. Natalcolon*, 140 N.H. 689, 691-92, 671 A.2d 556 (1996).

\*41 Accordingly, we conclude that the defendant did not engage in sufficient activity in this State to make it fair and reasonable for purposes of due process to require her to defend this claim here.

*Reversed.*

**NOTE:**

1. What is an online business to do? The US Supreme Court has held that contractual choice of forum is enforceable so long as it is not unreasonable or unjust and other courts have commented that this creates in effect a presumption that such contractual terms are enforceable. With some, but not many, exceptions, appellate courts enforce choice of forum clauses in the U.S. Europe disagrees as to consumers. Which rule is better?