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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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SOFTWARE DEVELOPMENT AND)
INVESTMENT OF NEVADA, d/b/a TRAFFIC-))
POWER.COM, a Nevada corporation,)
)
Plaintiff(s),)
)
vs.)
)
AARON WALL, an individual, d/b/a)
SEOBOOK.COM; and DOES I through X; and)
ROE CORPORATION I through X, inclusive,)
)
Defendant(s).)
_____)

Case No.: 2:05-cv-01109-RLH-LRL

ORDER

(Motion to Dismiss for Lack of Personal
Jurisdiction and Motion for Summary
Judgment—# 6)

18 Before the Court is Defendant AARON WALL, d/b/a SEOBOOK.COM’s **Motion**
19 **for Summary Judgment . . . or, in the Alternative, Motion to Dismiss for Lack of Personal**
20 **Jurisdiction** (#6), filed October 06, 2005. The Court has also considered Plaintiff’s Opposition
21 (#11), filed December 29, 2005, and Defendant’s Reply (#12), filed January 12, 2006.

BACKGROUND

23 This action arises from Plaintiff’s allegations that Defendant and third parties have posted
24 various defamatory communications on Defendant’s website and have also violated the Uniform
25 Trade Secrets Act, NRS 600A.010 *et seq.*, by posting Plaintiff’s trade secrets. Plaintiff is a
26 Nevada corporation in the business of Internet advertising and Internet placement optimization.

1 Pl.'s Compl. at ¶ 1. Defendant lives in the Commonwealth of Pennsylvania and owns and operates
2 a "blog" on the Internet website "SeoBook.com." Def.'s Mot. to Dismiss, Ex. A, Aff. of Wall, ¶¶
3 2-3. Defendant limits the subject matter of his blog to search engine optimization. Def.'s Mot. to
4 Dismiss, ¶¶ 12-13.

5 Specifically, Plaintiff claims that Defendant and other parties posted the following eight
6 disparaging comments directed at Plaintiff: 1) Plaintiff is among a group of people Defendant Wall
7 deems "fraudsters and hucksters;" 2) Plaintiff's site has been "banned by the search engines;" 3)
8 Plaintiff uses "idiotic high pressure salesmen" to sell its "shit services;" 4) Plaintiff's services
9 "suck;" 5) People who buy Plaintiff's services get "screwed;" 6) Defendant would need "to shower
10 at least 6 times a day" if he worked for a "company as dirty as" Plaintiff; 7) Plaintiff's site has
11 been banned by Google; and 8) Defendant directs visitors to his blog to other websites containing
12 disparaging comments. Pl.'s Opp'n at 3:28, 4:1-6. Further, Plaintiff alleges that Defendant or third
13 parties posted proprietary information relating to Plaintiff's solicitation procedures on its website.
14 Pl.'s Compl. at ¶ 14.

15 In response to Plaintiff's complaint, Defendant has moved this Court to dismiss for (1)
16 failure to state a claim upon which relief may be granted, or in the alternative, (2) lack of personal
17 jurisdiction. Having reviewed Defendant's motions, Plaintiff's Opposition thereto, and
18 Defendant's Reply to Plaintiff's Opposition, this Court denies Defendant's motion for summary
19 judgment and grants the motion to dismiss for lack of personal jurisdiction. The Court also grants
20 Plaintiff's motion to amend the complaint in order to provide the Court with sufficient facts upon
21 which to base personal jurisdiction.

22 DISCUSSION

23 1. Motion to Dismiss for lack of personal jurisdiction.

24 Defendants have moved this Court to dismiss Plaintiff's complaint for lack of personal
25 jurisdiction. In analyzing such a motion, the Court notes that the Plaintiff bears the burden of
26 establishing that the Defendant is subject to personal jurisdiction in Nevada. *Freeman v. Second*

1 *Judicial Dist. Ct.*, 1 P.3d 963, 965 (Nev. 2000). To verify that the exercise of personal jurisdiction
2 is proper, Plaintiff must demonstrate that Defendant established “minimum contacts” in Nevada.
3 *See Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945); *Baker v. Eighth Judicial Dist. Ct.*, 999 P.2d
4 1020, 1023 (Nev. 2000). “Specific personal jurisdiction over a defendant may be established only
5 where the cause of action arises from the defendant’s contacts with the forum.” *Trump v. Eighth*
6 *Judicial Dist. Ct.*, 857 P.2d 740, 748 (Nev. 1993). The Ninth Circuit uses a three-part test to
7 determine if the exercise of specific personal jurisdiction over a defendant is proper:

- 8 (A) The defendant must have done some act by which he purposefully avails himself of
- 9 the privilege of conducting activities in the forum, thereby invoking the benefits
- 10 and protection of its laws;
- 11 (B) The claim must arise from the defendant’s forum-related activities;
- 12 (C) The exercise of jurisdiction must be reasonable.

13 *See Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 560 (9th Cir. 1995). The Ninth Circuit has
14 further held that the “purposeful availment” requirement is satisfied “if the defendant has taken
15 deliberate action within the forum state or if he has created continuing obligations to forum
16 residents.” *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997).

17 When personal jurisdiction is challenged by motion as an initial response, plaintiff need
18 only make a prima facie showing of jurisdiction to avoid dismissal. *Myers v. Bennett Law Offices*,
19 238 F.3d 1068, 1071 (9th Cir. 2001). Conflicting factual claims at this stage in the litigation are
20 resolved in favor of the Plaintiff. *See Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019
21 (9th Cir. 2002). However, the plaintiff cannot “simply rest on the bare allegations of its
22 complaint.” *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). In
23 examining Plaintiff’s complaint, the Court finds that Plaintiff has not made a prima facie showing
24 of jurisdiction over the Defendant.

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1 **A. Purposeful Availment In Internet Cases**

2 With respect to Cyberspace, the Ninth Circuit has made a distinction between “passive”
3 and “interactive” websites when determining if valid specific personal jurisdiction exists.
4 *Cybersell, Inc.*, 130 F.3d at 414, 418, 419. As the *Cybersell* Court explained, “passive” websites
5 provide information and advertising and nothing more, whereas “interactive” websites allow users
6 to exchange information with the host computer. *Id.* at 418. The court noted that, as a general
7 rule, “passive” websites cannot confer specific personal jurisdiction over a defendant while
8 “interactive” websites may be a basis for jurisdiction depending upon “the level of interactivity
9 and commercial nature of the exchange that occurs on the website. *Id.*

10 **1) Interactive and Commercial Nature of Website**

11 Plaintiff alleges that Defendant operates an interactive website because on it, he offers a
12 book for sale to Nevada residents. However, Plaintiff offers no facts to support its claim that
13 Defendant has actually sold books to Nevada residents. Plaintiff relies on *Stomp v. NeatO, LLC*,
14 61 F. Supp.2d 1074 (C.D. Cal. 1999), a case where the court found that it had personal jurisdiction
15 over the nonresident defendant. In that case, the court determined the defendant’s website to be
16 “highly commercial” because “a substantial portion of the site is dedicated to allowing the
17 consumer to purchase NeatO’s products online.” *Id.* at 1078. Defendant also relies on the *Zippo*
18 case which the 9th Circuit quoted in its *Cybersell* decision, holding that “interactive” websites
19 may be a basis for jurisdiction depending upon “the level of interactivity and commercial nature of
20 the exchange that occurs on the web site. *Cybersell, Inc.*, 130 F.3d at 418, (*quoting Zippo Mfg.*
21 *Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997)).

22 However, this case is distinguishable from the *Stomp* case because, here, Defendant
23 maintains a “blog” where he and third parties can post comments and remarks which constitute the
24 majority of the site’s format, dedicating only a small portion of the site to the sale of his book.
25 Additionally, because Plaintiff has failed to provide the Court with factual support regarding the
26 alleged book sales to Nevada residents, this Court is unable to determine the “level of

1 interactivity” and “commercial nature of the exchange” between Defendant’s website and Nevada
2 residents. Personal jurisdiction should not be based on the mere possibility that Defendant will
3 sell books to Nevada residents; rather, Plaintiff must show that Defendant has “purposefully
4 availed itself” of the benefits of the State of Nevada and its laws.

5 Furthermore, the *Zippo* Court held that a “sliding scale” existed between a “passive”
6 website and an “interactive” website in that the “constitutionality of exercising jurisdiction was
7 directly proportionate to the nature and quality of commercial activity that an entity conducts over
8 the Internet.” *Zippo Mfg. Co.*, 952 F.Supp. at 1119, 1124. Under the “sliding scale” approach, the
9 mere fact that Defendant offers to sell his book over the Internet does not answer the question of
10 whether this Court properly has personal jurisdiction over him. Rather, an inquiry into the nature
11 and quality of the alleged book sales must be initiated. However, without Plaintiff proffering a
12 scintilla of evidence as to whether Defendant actually sold his books to Nevada residents, this
13 Court cannot conduct a proper analysis of the quality and nature of the alleged commercial
14 activity, nor can it determine whether Defendant purposefully availed himself of the privileges of
15 conducting activities in this forum. Even if Plaintiff provided evidence that Defendant had
16 actually sold books from his website to Nevada residents, the Ninth Circuit has held that even
17 minimal purchases by forum residents through a website are insufficient to establish personal
18 jurisdiction. *Callaway Golf Corp. v. Royal Canadian Golf Assoc.*, 125 F.Supp.2d 1194, 1203
19 (C.D. Cal. 2000).

20 The question of whether a court has personal jurisdiction over a nonresident who hosts a
21 website that allows its patrons to read and post messages is a relatively new issue still evolving in
22 the various jurisdictions. However, the issue was addressed in the *Medinah Mining* case, where
23 the court decided that a website that allowed the public to view and post information regarding
24 publically traded companies was “passive,” and thus insufficient to confer personal jurisdiction
25 over the defendant. *Medinah Mining, Inc., v. Amunategui*, 237 F.Supp.2d 1132, 1135 (D.Nev.
26 2002). The plaintiff in that case sued a website owner for defamation because a third party posted

1 derogatory comments about the plaintiff on the website. *Id.* at 1133. Similar to the website in the
2 *Medina* case, Defendant operates an interactive “blog” that allows third parties to read and post
3 information regarding “search engine optimization.” However, one distinguishing feature between
4 these two cases is that the website in the *Medina* case was strictly designed as an online forum and
5 offered no services or products for sale, whereas here, Defendant not only hosts a blog, but also
6 offers a book for sale on his website. Whether the *Medina* court took this distinction into account
7 when it made its decision this Court cannot say. Irrespective of that court’s reasoning, as has
8 already been explained in previous paragraphs, this Court has no way of measuring how much
9 weight to assign the commercial nature of the book sales to Nevada since Plaintiff failed to
10 provide the Court with adequate support.

11 Though this Court is unaware of any other cases within the 9th Circuit that have addressed
12 the issue of whether “blog” sites and other Internet message boards are sufficiently interactive for
13 the purpose of finding personal jurisdiction over a nonresident, this Court finds the rationale in the
14 *Revell* case from the Northern District of Texas particularly persuasive. *Revell v. Lidov*, 2001 WL
15 285253 (N.D. Tex. 2001). In that case, the plaintiff brought suit for defamation against a
16 university for posting inflammatory comments about him on a website bulletin board. *Id.* at *1. In
17 addition to the bulletin board, the website offered for sale to the public certain services and
18 products. *Id.* at *2. The court held that although the website may seem interactive because it
19 allowed members of the public to read and post comments, “it is not truly interactive in that the
20 site does not send anything back—there is no direct contact between the website, the people who
21 send the information, or the people who read it. Once information is posted, the site is completely
22 passive, individuals can go to the site, read the information, and if they choose to, post additional
23 information.” *Id.* at *5. Similarly, Defendant’s blog site while interactive in the sense that it
24 allows individuals to read and post comments on a forum, does not rise to the level of interactivity
25 to tip the “sliding scale” in favor of personal jurisdiction.

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2) The Effects Test

The Court may also maintain personal jurisdiction over an out-of-state defendant for tortious conduct under the “effects test,” first articulated in *Calder v. Jones*, 465 U.S. 783 (1984). Specific personal jurisdiction may be premised upon “(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.” *Core-Vent v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993). Express aiming exists where “the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082 (2000).

In order for this Court to find personal jurisdiction over Defendant under the “effects test”, Plaintiff must show that Defendant expressly aimed the offensive communications at the State of Nevada, knowing that the communications would cause harm to Plaintiff in Nevada. In the complaint, Plaintiff makes no mention of whether Defendant deliberately aimed the offensive communication at Nevada, knowing Plaintiff would likely suffer harm in Nevada. Nor does the Court have any reason to believe that the Defendant knew where the Plaintiff resided, an essential element to finding personal jurisdiction under the “effects test.” Defendant’s website, which could be viewed by anyone in the world with access to an Internet connection, does not specifically target Nevada residents. Furthermore, if anyone in Nevada did happen to read the defamatory communication, such an event would be merely fortuitous and should not be the basis for finding personal jurisdiction without more significant contacts between Defendant and the State of Nevada. Therefore, without further insight into this matter, the Court finds that there is insufficient evidence to maintain personal jurisdiction over Defendant based on the “effects test”.

B. Arising Under Doctrine

In order for this Court to have specific personal jurisdiction over a nonresident, the plaintiff’s claim must arise out of the defendant’s particular activities in the forum state. *Bancroft & Masters, Inc.*, 223 F.3d 1082. This requirement is satisfied if Plaintiff would not have been

1 harmed “but for” Defendant’s conduct in Nevada. *Rio Props., Inc.*, 284 F.3d at 1017, 1021. The
2 only conduct which Plaintiff alleges Defendant conducted in Nevada is the sale of his book over
3 the internet to Nevada residents. However, Plaintiff makes no claim that this product is the source
4 of the alleged trade secrets violation or defamatory communications. Rather, Plaintiff maintains
5 that the offending material is published on Defendant’s website not published in the book
6 allegedly sold within Nevada. Plaintiff claims that because the book competes with Plaintiff’s
7 own products and services and is offered for sale on Defendant’s website, it is sufficiently related
8 to the offending material also found on Defendant’s website. To make the connection between the
9 book and the offensive material, the appropriate question is “but-for” the sale of Defendant’s book
10 in Nevada, would Plaintiff have been injured by the offensive material allegedly posted on
11 Defendant’s website. Under Plaintiff’s argument, the Court is unable to find a connection
12 between the book and the offensive material. Because Plaintiff’s claims of defamation and trade
13 secrets violation stem from offensive material contained on Defendant’s website and not in the
14 book, these claims do not “arise under” the commercial sale of Defendant’s book to Nevada
15 residents.

16 **C. Reasonableness**

17 Because Plaintiff has not shown a prima facie case for personal jurisdiction over the
18 Defendant with respect to the elements of “purposeful availment” and “arising under,” this Court
19 need not address the issue of reasonableness.

20 **2. Request to Amend Complaint**

21 Plaintiff requests that it be granted leave to amend its complaint in order to set forth facts
22 sufficient to persuade this Court that it has proper personal jurisdiction over Defendant. The Court
23 will grant this request. Fed. R. Civ. P. 15(a) (“leave shall be freely given when justice so
24 requires.”)

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1 **3. Motion for Summary Judgment**

2 Defendant's Motion for Summary Judgment will be denied as moot given the Court's
3 decision to grant Defendant's Motion to Dismiss based on Lack of Personal Jurisdiction.

4 **CONCLUSION**

5 Accordingly, and for good cause appearing.

6 IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment...or, in the
7 Alternative, Motion to Dismiss for Lack of Personal Jurisdiction (#6) is DENIED in part and
8 GRANTED in part as follows: denied as moot as to Summary Judgment and granted as to Lack of
9 Personal Jurisdiction.

10 IT IS ALSO ORDERED THAT Defendant's Motion to Strike Plaintiff's Opposition to
11 Defendant's Motions is DENIED.

12 IT IS ALSO ORDERED THAT Plaintiff is GRANTED leave to file a motion to amend the
13 complaint with an attached proposed amended complaint. Said motion to be filed no later than 30
14 days from the date of this order.

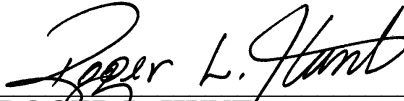
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16 Dated: Feb. 13, 2006.

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ROGER L. HUNT
United States District Judge

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