

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

SUSAN JOHNSON, ROBERT JOHNSON, and)
COZY KITTEN CATTERY, LLC, ,)

Plaintiffs,)

v.)

No. 08-CV-06103-DW

ELIZABETH ARDEN d/b/a)
COMPLAINTSBOARD.COM et al. ,)

Defendants.)

ORDER

Before the Court are Motions to Dismiss filed by Defendant Kathleen Heineman (Doc. 3), Defendant Melanie Lowry (Doc. 6), and Defendant InMotion Hosting, Inc. ("InMotion") (Doc. 30). For the reasons stated below, the Motions are granted.

On June 28, 2008, Plaintiffs' Susan and Robert Johnson and Cozy Kitten Cattery, LLC filed their Petition against multiple Defendants, including Kathleen Heineman, Melanie Lowry, and InMotion Hosting, Inc.¹ The case was properly removed to this Court on October 9, 2008. According to the Petition, Plaintiffs Robert and Susan Johnson reside in Unionville, Missouri,

¹Plaintiffs' petition was originally filed in the Circuit Court for Putnam County, Missouri. The other defendants listed in the petition are Elizabeth Arden d/b/a ComplaintsBoard.com, Michelle Reitenger, and ComplaintsBoard.com. Based on the record before the Court, these parties have either not been served and/or have not entered an appearance in this case.

where they operate a cat breeding business known as Cozy Kitten Cattery². Cozy Kitten Cattery, LLC is a Missouri limited liability company, and was formed in 2007. Its principal office and place of business are located in Missouri, and Plaintiffs Robert and Susan Johnson are its sole members. In or about December 2004, Plaintiffs Robert and Susan Johnson obtained a registered federal trademark and service mark for "Cozy Kitten Cattery." Robert and Susan Johnson have operated their cat breeding business under that trademark, and licensed the use of that trademark and service mark to Cozy Kitten Cattery, LLC once it was formed. Plaintiffs advertise their cat breeding business on the internet, and have a website with the address www.CozyKittens.com.

Plaintiffs' four count petition sets forth claims for Injurious Falsehood (Count I), Defamation (Count II), and Intentional Infliction of Emotional Distress (Count III) against Defendants Heineman, Lowry, and InMotion. It further alleges Violation of the Lanham Act, 15 U.S.C. § 1051 et seq. (Count IV) against Defendant Kathleen Heineman. Counts One through Three are based on allegations that Defendants Heineman and Lowry posted false and defamatory statements about Plaintiffs on the website www.ComplaintsBoard.com, a website that Defendant InMotion hosts. In Count Four, plaintiffs allege that Defendant Kathleen Heineman advertises her cat-breeding business on the website www.BoutiqueKittens.com and that she uses the name "Cozy Kittens and Cuddly Cats" without Plaintiff's permission and in violation of 15 U.S.C. § 1114.

Defendants Heineman, Lowry³, and InMotion have moved to dismiss the action based on

²Plaintiffs' pleadings refer to the cattery as both "Cozy Kitten Cattery" and "Cozy Kittens Cattery".

³Defendant Melanie Lowry is a pro se litigant, therefore the Court construes her pleadings broadly. See, Smith v. Hundley, 190 F.3d 852, 855 n. 7 (8th Cir. 1999)(holding that pro se

lack of personal jurisdiction and insufficient service of process. Defendants Heineman and InMotion assert improper venue as an additional grounds for dismissal. The Court will address each of the three moving parties separately.

1) Defendant InMotion Hosting:

According to Plaintiffs' petition, Defendant InMotion Hosting, Inc. is a corporation organized and existing under the laws of California, where it maintains its principal office and place of business. InMotion hosts an interactive website known as ComplaintsBoard.com. Plaintiffs assert that by serving as the web host for the site where defamatory statements were posted, InMotion is liable under Counts One through Three of the petition. Neither Plaintiffs' petition nor their Memorandum of Law in Opposition to InMotion's Motion to Dismiss (Doc. 36) allege that InMotion itself provided defamatory content regarding Plaintiffs. Plaintiffs' theory of liability depends solely on InMotion's role as the host of a site where others can publish content.

The Communications Decency Act of 1996 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and expressly preempts any state law to the contrary. 47 U.S.C. §§ 230(c)(1), (e)(3). "The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)). Courts in this circuit have reached the same conclusion.

pleadings are afforded a liberal construction). The Court notes however that in her letter to the Court, Defendant Lowry specifically mentions lack of personal jurisdiction and insufficient service of process as her grounds for seeking dismissal.

See, e.g., Gregerson v. Vilana Fin., Inc., 2008 U.S. Dist. Lexis 11727 at * 24 (D. Minn. Feb. 15, 2008); Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp.2d 1069, 1071 (D.S.D. 2001).

Because Defendant InMotion was merely a host and not an information content provider, Plaintiffs' claims against InMotion fail as a matter of law. See Zeran, 129 F. 3d at 330 (holding that Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role" and that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred."). As Plaintiffs' claims against InMotion are barred by statute, the Court need not address InMotion's arguments regarding personal jurisdiction, service of process, and venue.

2) Defendant Melanie Lowry:

Plaintiffs allege that, between December 2006 and August of 2008, Defendant Lowry posted false, injurious, and defamatory statements about the Plaintiffs on ComplaintsBoard.com, including that Plaintiffs kill cats, "rip off" cat breeders, steal kittens, that Plaintiffs' cats and kittens are infected, and that Plaintiffs are con artists. On November 12, 2008, Defendant Melanie Lowry filed her Motion to Dismiss (Doc. 6) based on lack of personal jurisdiction and insufficient service of process.

Personal Jurisdiction:

When a defendant challenges a federal court's jurisdiction, the plaintiff bears the burden of proving jurisdiction exists. Moog World Trade Corp. v. Bancomer, S.A., 90 F.3d 1382, 1384 (8th Cir. 1996). In order to defeat a motion to dismiss for lack of personal jurisdiction, the non-moving party need only make a prima facie showing of jurisdiction and may do so by

affidavits, exhibits or other evidence. Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 647 (8th Cir. 2003). A prima facie showing of personal jurisdiction is made by showing: (1) that the action arose out of an activity covered by the long-arm statute, and (2) that defendant had sufficient minimum contacts with forum state to satisfy the requirements of the Due Process Clause. Renaissance Learning, Inc. v. Metiri Group, LLC, 2008 U.S. Dist. Lexis 5766 at *9 (W.D. Mo.2008). The court must view the evidence in the light most favorable to the nonmoving party and determine all factual conflicts in its favor. Digitel Holdings v. Proteq Telcoms, 89 F.3d 519, 522 (8th Cir. 1996). Missouri's long-arm statute, R.S. Mo. § 506.500⁴, confers jurisdiction to the extent allowed by the Due Process Clause. State v. Pinnell, 454 S.W.2d 889, 892 (Mo. 1970). Therefore, due process minimum contacts analysis is the critical factor in determining whether the Court should assert personal jurisdiction. Clune v. Alimak AB, 233 F.3d 538, 541 (8th Cir. 2000).

Minimum contacts may be the basis for either "general" or "specific" jurisdiction. Davis v. Baylor University, 976 S.W.2d 5, 7 (Mo. Ct. App. 1998). With respect to general jurisdiction, "a court may hear a lawsuit against a defendant who has 'continuous and systematic' contacts with the forum state, even if the injuries at issue in the lawsuit did not arise out of the

⁴The statute states, in pertinent part:

1. Any person...whether or not a citizen or resident of this state... submits...to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:
 - (1) The transaction of any business within this state;
 - (2) The making of any contract within this state;
 - (3) The commission of a tortious act within this state;...

defendant's activities directed at the forum." Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1073 (8th Cir. 2004)(quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415- 16 (1984)). Specific jurisdiction over the defendant is exercised when a state asserts personal jurisdiction over a nonresident defendant in a suit that "arises out of or relates to" the defendant's contacts with the forum. Lakin v. Prudential Securities, Inc., 348 F.3d 704, 707 (8th Cir. 2003)(internal citations omitted).

Both categories of minimum contacts require some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, and thus invokes the benefits and protections of its laws. "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King Corp.v. Rudzewicz, 471 U.S. 462, 476 (1985)(citing Int'l Shoe Co. v. Wash., 326 U.S. 310, 320 (1945)). The exercise of personal jurisdiction violates the due process clause unless the actions of the "defendant himself... create[d] a 'substantial connection' with the forum State." Dakota Indus. v. Dakota Sportswear, 946 F.2d 1384, 1389 (8th Cir. 1991)(quoting Burger King, 471 U.S. at 475).

In Aftanase v. Economy Baler Company, 343, F. 2d 187 (8th Cir. 1965), the Eighth Circuit set forth five factors courts must consider when determining whether there are sufficient minimum contacts to confer jurisdiction. These factors include: (1) the nature and quality of the contacts with the forum state, (2) the quantity of the contacts, (3) the relationship of the cause of action to the contacts, (4) the interest of Missouri in providing a forum for its residents, and (5) the convenience or inconvenience to the parties. Aftanase, 343 F.2d at 197. The first three

factors are primary factors, and the remaining two are secondary factors. Id. The third factor distinguishes whether the jurisdiction is specific or general. Digi-Tel Holdings v. Proteq Telcoms., 89 F.3d 519, 523 n.4. The Court looks at all of the factors in the aggregate and examines the totality of the circumstances in making its determination. Northrup King. Co. v. Compania Productora Semillas Algodoneras, S.A., 51 F.3d 1383, 1388 (8th Cir.1995).

I. Nature and Quality of Contacts

Under this factor, the principle issue is whether the non-resident Defendants "have fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereignty." Gould v. P.T. Krakatau Steel, 957 F.2d 573, 576 (8th Cir. 1993)(internal citations omitted). When a defendant has "purposefully directed" his or her activities at the forum state, the fair warning requirement is satisfied. Id. (citing Burger King corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). "The contacts with the forum state must be more than 'random', 'fortuitious', or 'attenuated'." Id.

Defendant Lowry contends she has no contacts with the State of Missouri. In support of her Motion to Dismiss (Doc. 6), she filed a sworn affidavit stating that she has never been to Missouri, does not own any property in Missouri, does not have any bank accounts or telephone listings in Missouri, has never paid taxes in Missouri nor insured a risk in Missouri, and has never knowingly, regularly or continuously transacted business in the State of Missouri. Her affidavit also states that she has never done business with the Plaintiffs, does not know them, and has only spoken to Sue Johnson one time on the telephone– a call that Sue Johnson initiated. Plaintiffs' Suggestions in Opposition (Doc. 11) and corresponding affidavit do not refute any of Defendant Lowry's sworn statements regarding her lack of contacts with Missouri. Rather,

Plaintiffs argue that, by posting false and defamatory statements about the Plaintiffs on the website www.ComplaintsBoard.com, Lowry has subjected herself to jurisdiction by Missouri courts.

Although Plaintiffs' pleadings do not reference Calder v. Jones, 465 U.S. 783 (1984), their theory of jurisdiction appears to rely on the Calder "effects" test. The "effects" test provides that a "defendant's tortious acts can serve as a source of personal jurisdiction only where the plaintiff makes a prima facie showing that the defendant's acts (1) were intentional, (2) were 'uniquely' or expressly aimed at the forum state, and (3) cause harm, the brunt of which was suffered- and which the defendant knew was likely to be suffered- [in the forum state]." Lindregn v. GDT, LLC, 312 F. Supp.2d 1125, 1132 (S.D. Iowa 2004)(internal citations omitted). The Eighth Circuit has recognized the Calder "effects" test as an additional factor to consider when evaluating a defendant's relevant contacts with the forum state in cases involving intentional torts. Dakota Indus., Inc., v. Dakota Sportswear, Inc., 946 F.2d 1384, 1390-91 (8th Cir. 1991) (stating that "[i]n relying on Calder, we do not abandon the five-part test. . . . We simply note that Calder requires the consideration of additional factors when an intentional tort is alleged"). The Eighth Circuit construes the Calder effects test narrowly, and has held that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction. Hicklin Engineering, Inc. v. Aidco, Inc., 959 F.2d 738, 739 (8th Cir. 1992).

Plaintiffs' petition alleges that "through the Internet, the false statements about the Plaintiffs were published throughout the state of Missouri, and throughout the world..." in that the ComplaintsBoard.com website "solicits and receives business from Missouri residents as part of the operation of the website and publishes the advertisements of its clients, for a fee, within

the state of Missouri, by placing those advertisements on the interactive website." In their suggestions in Opposition to Defendant Lowry's Motion to Dismiss, Plaintiffs argue that the statements she made "were directed specifically to Plaintiffs in the operation of the their cat breeding business in Unionville, Missouri." Plaintiffs have provided no evidence of any kind that ComplaintsBoard.com specifically aims its content at the State of Missouri. The Court further notes that the website itself is devoid of any such indication. Plaintiffs have provided the Court a copy of one alleged posting by Defendant Lowry. That alleged posting does not mention Missouri, and there is no other evidence indicating that the focal point of this particular posting, or other postings made by Defendant Lowry, was Missouri. The lack of intentional aim at Missouri weighs against the exercise of personal jurisdiction. Revell v. Lidov, 317 F.3d 467, 473 (5th Cir. 2002)(citing Calder, 465 U.S. at 788)(holding that, in regards to an alleged defamatory internet posting, the posting's lack of references to the proposed forum state and the lack of evidence that the posting was "directed at [forum state] readers as distinguished from readers in other states" are factors that weigh against the exercise of personal jurisdiction under Calder.); Toro Co. v. Advanced Sensor Tech., Inc., 2008 U.S. Dist. Lexis 49458 at *10-11 (D. Minn. June 25, 2008)(holding that, where a party fails to demonstrate that a party's web-based conduct was expressly aimed at the forum state, personal jurisdiction is lacking); Amerus Group v. Ameris Bancorp, 2006 U.S. Dist. Lexis 32722 at *21 (S.D. Iowa May 22, 2006)(holding that the "effects" of a tortious act, standing alone, are insufficient to subject a defendant to personal jurisdiction in a forum where no other contacts exist.). To the extent Defendant Lowry's alleged postings constitute "contacts" with the state of Missouri at all, the Court finds such contacts to be attenuated in nature. The nature and quality of Defendant Lowry's contacts with Missouri does

not support the exercise of personal jurisdiction.

II. Quantity of Contacts

Specific jurisdiction can arise from a single contact with the forum state. Fulton v. Chicago, R.I. & P.R. Co., 481 F.2d 326, 335 (8th Cir. 1973). Therefore, the Court is not concerned with the number of contacts made for purposes of whether specific jurisdiction exists. Defendant Lowry's "contacts" with the State of Missouri are limited to these alleged internet postings. As her contacts with the State of Missouri are not systematic and continuous in nature, Defendant Lowry is not subject to personal jurisdiction under a general jurisdiction analysis.

III. Relation of Contacts to the Cause of Action

Defendant Lowry contends that she has no Missouri contacts. Plaintiffs argue that Lowry established contacts with the State of Missouri when she posted defamatory statements to the website www.ComplaintsBoard.com. The Court finds that the claims for injurious falsehood and defamation against Defendant Lowry arise out of statements she made in California. Likewise, the alleged conduct that forms the basis of Plaintiffs' claim for intentional infliction of emotional distress stems from the statements and postings made in California. The only connection these causes of action have to Missouri is the fact that Plaintiffs reside in Missouri and their business is located in Missouri. As previously noted under the Calder analysis, Plaintiffs have failed to put forth prima facie evidence that the alleged defamatory statements were uniquely or expressly aimed at the State of Missouri. Therefore, the Court finds that this factor does not weigh in favor of exercising personal jurisdiction.

IV. Interest of the Forum State

The State of Missouri has an interest in providing a forum for its residents. Aylward v.

Fleet Bank, 122 F.3d 616, 618 (8th Cir. 1997). The Court finds that this factor weighs in favor of exercising personal jurisdiction.

V. Convenience of the Parties

"A plaintiff normally is entitled to select the forum in which it will litigate." Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1389 (8th Cir. 1995). The Court notes however that the alleged postings were made in California and posted on a website that is managed, operated, and hosted in California. Much of the discovery in this case will therefore take place in or have significant ties to the State of California, and many of the potential witnesses for trial likely reside in California. The Court therefore finds that the convenience of the parties factor weighs neither in favor of nor against the exercise of personal jurisdiction.

The Court finds that the actions of Defendant Lowry as alleged by Plaintiffs do not create a "substantial connection" with the State of Missouri. Therefore, the exercise of personal jurisdiction over her would violate the due process clause. See, Dakota Indus., 946 F.2d at 1389. As the Court lacks personal jurisdiction over Defendant Lowry, it need not address her claim of insufficient service of process.

3) Defendant Kathleen Heineman:

On October 16, 2008, Defendant Kathleen Heineman filed her Motion to Dismiss (Doc. 3) based on lack of personal jurisdiction, improper venue, and insufficient service of process.⁵

⁵Plaintiffs' response to Defendant Heineman's Motion was due by October 31, 2008. Plaintiffs failed to file a timely response to Defendant's Heineman's Motion to Dismiss. On November 13, 2008, Plaintiffs filed a Motion for Additional Time to Respond to Defendant Heineman's Motion to Dismiss (Doc. 5), which Defendant Heineman opposed. Plaintiffs filed Reply suggestions in support of their motion for extension of time (Doc. 8), and included with

Personal Jurisdiction

Viewing the record in the light most favorable to the Plaintiffs, and based upon the record properly submitted to the Court, the Court makes the following findings of fact as to Defendant Kathleen Heineman:

Defendant Kathleen Heineman is a citizen and resident of the State of Colorado. She sells cats and kittens throughout the United States, and advertises her business on the website www.BoutiqueKittens.com.⁶ Defendant Heineman has never been a resident of the State of Missouri. She does not own, use, or possess any real property in the State of Missouri, nor does she have any bank accounts or telephone listings in Missouri. She has never paid income or property taxes in Missouri nor contracted to insure any person, property, or risk within Missouri.

those suggestions several affidavits, including the affidavit of Plaintiff Sue Johnson, labeled "Affidavit of Susan Johnson in Opposition to the Motion of Defendant Kathleen Heineman to Dismiss," (Doc. 8-3) in which Ms. Johnson avers facts relating to Defendant Heineman's contacts with the State of Missouri. On November 24, 2008, and without receiving leave from the Court, Plaintiffs filed Suggestions in Opposition to Defendant Heineman's Motion to Dismiss (Docs. 9 and 10). Documents 9 and 10 were subsequently stricken by the Court. The affidavit of Sue Johnson attached to Plaintiffs' Reply suggestions (Doc. 8-3) is not properly attached to the motion for extension of time, as it relates to the stricken pleading, Plaintiffs' Opposition to the Motion to Dismiss, rather than to the motion for extension of time. Because Plaintiffs failed to respond to Defendant Heineman's Motion to Dismiss in a timely manner, Plaintiffs technically have waived all argument in opposition to Defendant Heineman's Motion. However, out of caution, and because the Court must construe the jurisdictional facts in the light most favorable to the Plaintiffs, the Court has considered the affidavit of Sue Johnson attached to the Motion for Extension of Time (Doc. 8-3). The Court does not consider facts and argument included in Documents 9 and 10, nor the accompanying affidavits to Documents 9 and 10.

⁶Defendant Heineman strongly contests Plaintiffs' assertion that she owns or operates a business by the name of Boutique Kittens or the website located at www.BoutiqueKittens.com. However, the home page for www.BoutiqueKittens.com displays a State of Colorado Department of Agriculture License with the number 4806. That license was issued to Kathleen Heineman. For purposes of this Order, the Court construes the facts in the light most favorable to Plaintiff, and finds that Ms. Heineman is responsible for the content of the [BoutiqueKittens.com](http://www.BoutiqueKittens.com) website.

Ms. Heineman has never acted as a director, manager, trustee, or other officer of a corporation organized under the laws of or having a place of business within the State of Missouri.

The Plaintiffs and Defendant Heineman first made contact when Heineman purchased a cat from Plaintiffs in late 2001 or early 2002. Around April 2002, they began a business relationship that lasted until March of 2006. During this time, Heineman provided Plaintiffs administrative assistance with their website, www.CozyKittens.com, including proofreading. She also purchased advertising space for cats she sold from Colorado on Plaintiffs' website, [CozyKittens.com](http://www.CozyKittens.com). She paid Plaintiffs \$100 per cat advertised, and the website then listed Ms. Heineman's e-mail address as the contact e-mail for persons interested in those cats. Over the course of the relationship, Heineman advertised approximately 50 cats on Plaintiffs' website. She also helped Plaintiffs acquire cats or kittens on occasion. Between 2002 and 2006, Heineman purchased about sixteen (16) cats for Plaintiff Susan Johnson from breeders throughout the United States. These cats were generally shipped to Colorado, then eventually shipped to Susan Johnson in Missouri. Defendant Heineman did not profit from the purchase of these cats. On one occasion in 2004, Defendant Heineman helped Plaintiff acquire three cats from a breeder located in St. Louis, Missouri. During this same period of time, Plaintiff Susan Johnson shipped about ten cats to Kathleen Heineman. Johnson did not profit from the transfer of these cats to Ms. Heineman. In 2004 or 2005, Defendant Heineman sold one cat in Missouri.

Heineman was never an employee of Plaintiffs, and did not receive a salary from them. The vast majority of communication between Plaintiffs and Ms. Heineman occurred via telephone and e-mail. Plaintiff Sue Johnson estimates they exchanged more than 800 e-mails and had over 1,000 telephone conversations between early 2002 and March of 2006.

Additionally, Defendant Heineman traveled to Missouri two times in 2002. In June of 2002, Defendant Heineman met Robert and Susan Johnson at the Kansas City, Missouri airport, and brought Plaintiffs a cat they had previously paid for. In November of 2002, Heineman traveled to Plaintiffs' business location in Unionville, Missouri, and delivered six cats that Plaintiffs had purchased.

Plaintiffs' petition alleges that between December 2006 and August of 2008, Defendant Heineman posted false, injurious, and defamatory statements about the Plaintiffs on ComplaintsBoard.com, including that Plaintiffs kill cats, "rip off" cat breeders, steal kittens, that Plaintiffs' cats and kittens are infected, and that Plaintiffs are con artists. Plaintiffs further allege that from approximately August 2006 until August 2008,⁷ Defendant Kathleen Heineman used the words "Cozy Kittens 'N Cuddly Cats" in advertising cats for sale on BoutiqueKittens.com, thereby infringing Plaintiffs' trademark.

General Jurisdiction:

Defendant Heineman's contacts with Missouri fall short of the "continuous and systematic general business contacts" required to find general jurisdiction. See, Helicopteros, 466 U.S. at 416. The e-mail and telephone correspondence between Defendant Heineman and the Plaintiffs is insufficient to support general jurisdiction. See, Porter v. Berall, 293 F.3d 1073, 1076 (8th Cir. 2002)(holding that "contact by phone or mail is insufficient to justify exercise of personal jurisdiction under the due process clause."); J.N.F.S. Eng'g Co. v. Gibson Tech. Servs., 2007 U.S. Dist. Lexis 681 at *14 (D. Neb. Jan3, 2007)(applying the holding in Porter to e-mail

⁷According to Plaintiffs, all references to "Cozy Kittens" were removed from the BoutiqueKittens.com website sometime between August 4, 2008 and November 12, 2008. The original petition in this case was filed on August 4, 2008.

contacts). The other contacts between Defendant Heineman and the State of Missouri that fall within the relevant time frame, including her alleged internet postings, the internet advertising arrangement Heineman had with Plaintiffs, the parties' joint efforts to procure cats and kittens are limited in nature and quantity, and as such, even when considered in conjunction with telephone and e-mail contacts, do not rise to high level of contacts required to confer general jurisdiction.⁸

Specific Jurisdiction:

_____ A plaintiff bringing multiple claims arising from different contacts of the defendant must establish specific jurisdiction for each claim. Seiferth v. Helicopteros Atuneros, Inc. 472 F.3d 266, 274-75 (5th Cir. 2006). Plaintiff's claims against Defendant Heineman arise out of two distinct sets of alleged actions; the posting of defamatory statements posted to www.ComplaintsBoard.com, and violation of Plaintiffs' trademark by virtue of postings on www.BoutiqueKittens.com. The first set of actions gives rise to Plaintiffs' claims for injurious falsehood, defamation, and intentional infliction of emotional distress, and the second gives rise to their claim for violation of the Lanham Act, 15 U.S.C. § 1051 et seq. ____

1) Injurious Falsehood, Defamation, and Intentional Infliction of Emotional Distress Claims ("the defamation claims"):

_____ The Court must determine whether Defendant Heineman's alleged postings to the

⁸The Court notes that Plaintiffs' Lanham Act claims alleges no facts relevant to a general jurisdiction inquiry. Plaintiff has failed to allege that the BoutiqueKittens.com website was viewed by a single Missouri resident, therefore the Court need not evaluate the nature of the BoutiqueKittens.com website in determining general jurisdiction. See, Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1091-92 (E.D. Mo. 2001)(holding that "the fact that a site is classified as "interactive is irrelevant to the analysis of general jurisdiction if no one from the forum state has ever used the site.).

www.ComplaintsBoard.com website create a "substantial connection" with Missouri such that the exercise of personal jurisdiction over her would not violate due process. Dakota, 946 F.2d at 1389. Although Plaintiffs' pleadings make no reference to Calder v. Jones, 465 U.S. 783 (1984), as with Defendant Lowry, their theory of jurisdiction as to the defamation claims against Defendant Heineman appears to rely on the Calder effects test. Personal jurisdiction is appropriate under Calder only when a plaintiff makes a prima facie showing that the defendant's acts "(1) were intentional, (2) were 'uniquely' or expressly aimed at the forum state, and (3) cause harm, the brunt of which was suffered- and which the defendant knew was likely to be suffered- [in the forum state]." Lindregn, 312 F. Supp.2d at 1132.

Plaintiffs have failed to make a prima facie showing that the alleged Heineman postings were 'uniquely' or expressly aimed at Missouri. Plaintiffs have provided the Court with no evidence that the ComplaintsBoard.com website specifically targets Missouri, nor that content of Defendant Heineman's alleged postings specifically targeted Missouri.⁹ Application of the Calder effects test therefore does not support the exercise of personal jurisdiction.

Consideration of the Aftanase factors also weighs against the exercise of jurisdiction. To the extent Defendant Heineman's alleged postings constitute "contacts" with the state of Missouri at all, the Court finds such contacts to be attenuated in nature. Furthermore, her previous contacts with Missouri are not relevant to the Court's analysis of specific jurisdiction, as they are not directly related to the claim at issue. The quantity of contacts alleged, as relevant to the defamation claims, weighs neither in favor of nor against the exercise of jurisdiction. See

⁹Although Plaintiffs provided the Court with a copy of one alleged posting made by Defendant Lowry, they have not provided the Court with any evidence whatsoever of alleged postings made by Defendant Heineman.

Boyko v. Robinson, 2007 U.S. Dist. LEXIS 61070 at *25 (D.N.D. Aug. 17, 2007)(noting that, when specific jurisdiction is alleged, the quantity of contacts is not determinative). As to the relationship of Defendant Heineman's contacts to the cause of action, Plaintiffs have failed to put forth prima facie evidence that the alleged defamatory statements were uniquely or expressly aimed at the State of Missouri, therefore this factor weighs against jurisdiction. In considering the last two factors of the test, the Court finds that while Missouri has an interest in providing a forum for its citizens, that factor does not outweigh the first three factors, which favor a dismissal. Furthermore, the convenience of the parties as between Plaintiffs and Defendant Heineman is fairly balanced. Defendant Heineman's contacts do not create a "substantial connection" with the State of Missouri. Therefore, the exercise of personal jurisdiction over her as to the defamation claims would violate the due process clause.

2) Lanham Act Claim:

_____ Count Four of Plaintiffs' petition alleges that Defendant Heineman violated the Lanham Act, 15 U.S.C. § 1501 et seq., by using the words "Cozy Kittens and Cuddly Cats" to advertise her cat breeding business on the BoutiqueKittens.com webpage. Infringing upon a trademark may be grounds for personal jurisdiction under 'the commission of a tortious act' provision of Missouri's long-arm statute. Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters-Manhattan, Inc., 96 F. Supp. 2d 919, 921 (E.D. Mo. 2000)(citing Maritz v. Cybergold, Inc., 947 F. Supp. 1328, 1331 (E.D. Mo. 1996). Jurisdiction may only be exercised, however, if there is prima facie evidence the defendant "has purposefully directed its activities at the state residents, and the claim of this suit either arises out of or relates to those activities." Lakin v. Prudential Secs., 348 F.3d 704, 707 (8th Cir. 2003). Although Plaintiff's petition alleges that

Defendant Heineman sells cats and kittens "throughout the United States, including in the state of Missouri," Plaintiffs do not allege nor provide any evidence that anyone in Missouri has accessed the BoutiqueKittens.com website. Without such evidence, the Court finds that personal jurisdiction is lacking. Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 647 (8th Cir. 2003)(holding that "the party seeking to establish the court's in personam jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction.")

The Court reaches the same conclusion under the Zippo "sliding scale" analysis. The opinion in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), has become a "seminal authority" on the propriety of exercising personal jurisdiction based upon the operation of an Internet web site. Toys "R" Us, Inc. V. Step Two, S.A., 318 F.3d 446, 452 (3rd Cir. 2003). In Lakin v. Prudential Securities, Inc., 348 F.3d 704 (8th Cir. 2003), our Court of Appeals deemed the Zippo model appropriate for use in cases of specific jurisdiction. The Zippo Court described the sliding scale model as follows:

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. Id. at 710-711 (quoting Zippo, 952 F. Supp. at 1124.)

Although the BoutiqueKittens.com website is somewhat interactive, in that it allows users to exchange information with the host computer and fill out applications for cat adoption online,

there is no evidence that Defendant Heineman has engaged in any transaction or exchange of information with a Missouri resident via the BoutiqueKittens.com website. Cases applying the Zippo analysis, including Zippo itself, have found that personal jurisdiction exists where a plaintiff makes a prima facie showing that a defendant does business or conducts commerce over the internet *with residents of the forum state*. In Zippo, the Court based its finding of personal jurisdiction not only on the nature of Defendant's website, but also on evidence that individuals in the forum state (in that case Pennsylvania) had accessed the website in doing business with the Defendant. Id. at 1125-26. The Zippo Court explained:

We are not being asked to determine whether Dot Com's Web site alone constitutes the purposeful availment of doing business in Pennsylvania. This is a "doing business over the Internet" case in the line of Compuserve, supra.. We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does. Dot Com has contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania. The intended object of these transactions has been the downloading of the electronic messages that form the basis of this suit in Pennsylvania. Id. (referencing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).

Unlike the Zippo plaintiffs, who provided ample prima facie evidence that the website in question had made forum state contacts, Plaintiffs in this case have provided no evidence that any Missouri residents have even accessed the BoutiqueKittens.com website, let alone that they have made purchases through the site. The Zippo court based its exercise of jurisdiction on evidence of actual web contacts with the forum state have been made— not the mere possibility of such contacts. See, Id. Other Courts applying the Zippo test in Lanham Act cases have further emphasized that some prima facie evidence linking the website to the forum state is important to the exercise of jurisdiction. See, e.g., Renaissance Learning, Inc. v. Metiri Group, LLC, 2008

U.S. Dist. Lexis 5766 (W.D. Mo. Jan. 25, 2008)(finding personal jurisdiction under Zippo where plaintiff presented prima facie evidence that the cause of action arose directly from defendant's substantial internet contacts with a Missouri state agency, including the collection of thousands of dollars in web site subscription fees.); Just Enters. v. (888) Justice, Inc., 2007 U.S. Dist. Lexis 9040 (W.D. Mo. Feb. 8, 2007)(applying Zippo to find personal jurisdiction in Missouri over a defendant from New York based on evidence that defendant attempted to associate a Missouri-based party with their web-based business, and entered into a contract with a Missouri-based licensee to use its web site); Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters-Manhattan, Inc., 96 F. Supp.2d 919, 922 (E.D. Mo. 2000)(finding no personal jurisdiction in Missouri over a New York-based defendant because of the lack of evidence that anyone from Missouri accessed the web site in question.). As Plaintiffs have failed to provide evidence that any Missouri party has accessed or otherwise interacted with the BoutiqueKittens.com website, application of the Zippo model weighs against the exercise of personal jurisdiction.

Under Calder analysis, the result is the same: Plaintiffs have failed to present prima facie evidence that the alleged use of their trademark on the BoutiqueKittens.com website was "'uniquely' or expressly aimed" at Missouri, thus application of the Calder effects test does not support personal jurisdiction. Lindregn, 312 F. Supp.2d at 1132.

Defendant Heineman essentially has no contacts with the forum State relevant to the Lanham Act claim, therefore the first three Aftanase factors, (nature and quality of the contacts, quantity of the contacts, and relationship of the cause of action to the contacts), also weigh against the exercise of personal jurisdiction. In considering the last two factors of the test, the

Court finds that while Missouri has an interest in providing a forum for its citizens, that factor does not outweigh the first three factors, which favor a dismissal. Furthermore, the convenience of the parties between Plaintiffs and Defendant Heineman is fairly balanced. Defendant Heineman's contacts do not create a "substantial connection" with the State of Missouri. Therefore, the exercise of personal jurisdiction over her as to the Lanham Act claim would violate the due process clause. As the Court lacks personal jurisdiction over Defendant Heineman, it need not address her claims for improper venue and insufficient service of process.

For the reasons discussed above, the Court ORDERS that:

- 1) The Claims against Defendant InMotion Hosting, Inc. are DISMISSED WITH PREJUDICE.
- 2) For good cause shown, and pursuant to Federal Rule of Civil Procedure 60(b), the Court hereby SETS ASIDE the Default Judgment entered against Defendant Melanie Lowry in the Circuit Court for Putnam County, Missouri.
- 3) Defendant Melanie Lowry's Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 6) is GRANTED. The claims against Defendant Lowry are hereby DISMISSED without prejudice.
- 4) Defendant Kathleen Heineman's Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 3) is GRANTED. The claims against Defendant Heineman are hereby DISMISSED without prejudice.
- 5) Plaintiffs' Motion for Additional Time to File the Affidavit of Antonio Deshawn Outten in Response to the Motion of InMotion Hosting, Inc. to Dismiss (Doc. 35) is

DENIED AS MOOT.

SO ORDERED.

Date: June 8, 2009

/s/ Dean Whipple
Dean Whipple
United States District Judge