IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEREMY SCHOEMAKER,	)	**CASE NO. 8:09CV441**
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM**
	)	**AND ORDER**
DAVID SULLIVAN, individually and d/b/a BIG BLUE DOTS,	)	
	)	
Defendant.	)	

This matter is before the Court on Defendant David Sullivan's Motion to Dismiss Complaint for Lack of Personal Jurisdiction. (Filing No. 7.) For the reasons set forth below, the Motion will be denied.

FACTUAL BACKGROUND

Plaintiff Jeremy Schoemaker ("Schoemaker") is a web entrepreneur and the founder of ShoeMoney Media Group, Inc. ("ShoeMoney"). (Filing No. 1, Compl. ¶ 5; Filing No. 17-1 ("Schoemaker Decl.") ¶¶ 1, 3.) He is a resident of the State of Nebraska. (Filing No. 1, Compl. ¶ 1.) Defendant David Sullivan ("Sullivan") is a resident of the State of California who "conducts business under his personal name and under the name Big Blue Dots." (*Id.* ¶ 2.) Neither Sullivan nor Big Blue Dots has offices, mailing addresses, employees, agents, telephone numbers, or real property in Nebraska. (*See* Filing No. 9-1, Sullivan Decl. ¶¶ 3-5.)

Schoemaker and ShoeMoney operate two primary websites located on the internet at www.shoemoney.com and www.shoemoneymedia.com. (Schoemaker Decl. ¶ 5.) The sites average approximately 35,000 unique visitors each day, and "provide advice and tools to assist third parties in making money on the internet and running profitable internet

businesses." (*Id.* ¶¶ 6-7.) The site located at www.shoemoney.com is registered to Schoemaker at his Nebraska address, and both www.shoemoney.com and www.shoemoneymedia.com state Schoemaker's business is based in Lincoln, Nebraska. (*Id.* ¶¶ 5, 14.)

The record indicates that Schoemaker is "well-known in the internet marketing industry." (*Id*. ¶ 13; Filing No. 19-3 ("Ruckman Decl.") ¶¶ 3-4.) Schoemaker, ShoeMoney, and their primary websites "have been featured on or appeared in The Wall Street Journal, ABC News 20/20, The New York Times, The Washington Post, The Christian Science Monitor, The New York Post, Forbes.com," and a number of other news venues. (Schoemaker Decl. ¶ 8.) In addition, Schoemaker is "a frequent speaker at search engine marketing conferences," and he founded a conference that "provides lectures and seminars on how to run profitable internet businesses." (*Id*. ¶ 3.) He has launched "a subscription-based service [that] provides subscribers with access to a suite of 'tools' enabling them to optimize their work in the Pay-Per-Click . . . and Search Engine Optimization . . . fields," and he has launched a free training course and a "comprehensive video training system" that teach people how to make money using the internet. (*Id*. ¶¶ 10-12.)

In 2005, Schoemaker received a check in the amount of $132,994.97 from Google Inc. for work he performed "in one month using a particular internet advertising method." (*Id*. ¶ 17.) The check bears Schoemaker's address in Lincoln, Nebraska. (*Id.*) Schoemaker "prepared a photograph of [himself] holding the check in front of [his] face,"[1]

[1]In the photograph, Schoemaker is seen holding the check in front of his face in such a way that his forehead, glasses, eyes, ears, and a portion of his nose are visible above it, while the lower portion of his face is hidden behind it. (Compl. ¶ 11.)

and he displays this photograph prominently at www.shoemoney.com. (*Id.*) In January 2009, he registered the photograph for copyright protection. (*Id.*) When visitors to Schoemaker's website view the photograph, the website displays a notice indicating that the photograph is protected by copyright. (*Id.* ¶ 16.)

In November 2009, Schoemaker discovered that the aforementioned photograph "was being used to promote the sale of products/services on the web site www.world-jobs-report.com." (*Id*. ¶ 18; *see also id.* ¶ 19.) Visitors to www.world-jobs-report.com were shown a web page bearing the title "San Diego Herald News," but in fact "there is no such actual news organization." (*Id*. ¶ 31; *see also* Filing No. 1-2, Compl. Ex. B.) Below the title appeared a "'news article' about a person who made money on the internet using certain methods." (Filing No. 17-1, Ex. 1, Schoemaker Decl. ¶ 31; *see also* Filing No. 1-2, Compl. Ex. B.) The article was accompanied by additional written material designed to appear to be favorable "user-generated comments" about the methods described in the article. (Filing No. 17-1, Ex. 1, Schoemaker Decl. ¶ 31; *see also* Filing No. 1-2, Compl. Ex. B.) The article also "purport[ed] to offer legitimate information about how to make money on the internet." (*Id*.) Schoemaker submits, however, that the "news article" was "false," that the user-generated comments were "fabricated," and that the methods offered to purchasers were "part of a scam . . . to obtain consumers' credit card numbers and process substantial charges to those credit cards on a monthly basis." (*Id.*; *see also* Filing Nos. 18-2, 18-3, 18-4, 19-1, and 19-2, Ex. 1G.) Schoemaker's claim that the site used a false news story to promote a credit card scam is uncontradicted.

On November 6, 2009, Schoemaker's counsel sent an e-mail to Ralph Ruckman, CEO of Convert2Media,[2] requesting "information regarding the identity of the person who was using Jeremy Schoemaker's copyrighted photograph at the web site www.world-jobs[-]report.com." (Filing No. 19-4 ("Cooper Decl.") ¶ 3.) In an e-mail dated November 9, 2009, Ruckman responded that he would identify the "publisher" only in response to a subpoena or a "request from Jeremy [Schoemaker] personally." (Cooper Decl. Ex. 3A, Filing No. 19-4 at 4.) Ruckman added, however, that "[t]he publisher ha[d] been terminated from Convert2media for using unacceptable and unauthorized trademarked images." (*Id.*) On November 13, 2009, in response to subpoenas, Ruckman identified Sullivan as the person responsible for using Schoemaker's photograph at www.world-jobs-report.com. (Cooper Decl. ¶ 6.)

Sullivan is an online marketer who earns money by publishing banner advertisements on the internet, and he admits that in October 2009, he used Schoemaker's photograph in a banner advertisement to support a "work-from-home" advertising campaign. (Filing No. 9-1 ("Sullivan Decl.") ¶¶ 6-7, 9.) Sullivan states, however, that the advertisement at issue was created by a third party, (*id.* ¶ 7), and that Sullivan did not personally copy Schoemaker's photograph from any website. (Filing No. 21-1 ("Supp. Sullivan Decl.") ¶ 2.)

Ruckman called Sullivan after he learned of Schoemaker's copyright infringement allegations. (Filing No. 19-3 ("Ruckman Decl.") ¶ 7.) During their "initial" conversation, "Sullivan stated that he knew who Jeremy Schoemaker was, but that he did not believe the

[2]Ruckman describes Convert2Media as a "full-service internet marketing agency." (Filing No. 19-3, Ex. 2, Ruckman Decl. ¶ 3.)

copyright infringement allegations were serious because there had been only a small number of 'clicks' on the infringing advertisements." (*Id.*) Ruckman states that after he learned "that David Sullivan had intentionally used Jeremy Schoemaker's copyrighted photograph without authorization" and "that David Sullivan did not take the copyright infringement allegations seriously," he "terminated Convert2Media's relationship with David Sullivan." (*Id.* ¶ 8.)

In an e-mail dated November 23, 2009, Sullivan disclosed to Schoemaker's counsel the number of "impressions," "clicks," and "sales" that the advertisement in question generated on www.world-jobs-report.com and on a second site located at http://sandiego-herald.com/business/index/php. (*See generally* Filing No. 18-2, Ex. 1C.) Sullivan's disclosure indicates that "ads containing [Schoemaker's] copyrighted photograph were displayed approximately 4,000,000 times to internet users" and led directly to 14 sales. (Schoemaker Decl. ¶¶ 23-24; *see also* Filing No. 18-2, Ex. 1C.) Sullivan intentionally directed the advertisement to be displayed to internet users in the entire United States, including the State of Nebraska. (Schoemaker Decl. ¶¶ 28-30; Sullivan Supp. Decl. ¶ 3; Filing No. 21-6, ("Helm Decl.") ¶¶ 2-3.) Schoemaker viewed the advertisement himself on www.world-jobs-report.com from his office in Lincoln, Nebraska. (Schoemaker Decl. ¶¶ 19, 30.)

On December 8, 2009, Schoemaker filed in this Court a four-count Complaint alleging that Sullivan's use of the copyrighted photograph "has . . . caused damage to Schoemaker's name and brand in the marketplace by purporting to affiliate Schoemaker with the Defendant's products/services that are sold in misleading/deceptive ways." (Compl. ¶ 19.) The Complaint's four causes of action are labeled "Copyright Infringement,"

"Invasion of Privacy–Neb. Rev. Stat. § 20-202," "Consumer Protection Act–Neb. Rev. Stat. § 59-1601 *et seq.*," and "Uniform Deceptive Trade Practices Act–Neb. Rev. Stat. § 87-301 *et seq.*" (*See generally id.*)

Sullivan filed the instant motion on February 5, 2010, arguing that the Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2) because this Court lacks personal jurisdiction over Sullivan. (Filing No. 7.)

STANDARD OF REVIEW

To survive a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, "the plaintiff must state sufficient facts in the complaint to support a reasonable inference that defendants may be subjected to jurisdiction in the forum state." *Steinbuch v. Cutler*, 518 F.3d 580, 585 (8th Cir. 2008) (citing *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004)). Moreover, after jurisdiction has been controverted by the opposing party, "the plaintiff bears the burden of proving facts supporting personal jurisdiction." *Miller v. Nippon Carbon Co., Ltd.*, 528 F.3d 1087, 1090 (8th Cir. 2008) (citing *Dever,* 380 F.3d at 1072). The plaintiff "need[] only make a prima facie showing of jurisdiction" to satisfy this burden. *Id.* (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.,* 946 F.2d 1384, 1387 (8th Cir. 1991)). "The plaintiff's 'prima facie showing' must be tested, not by the pleadings alone, but by the affidavits and exhibits presented with the motions and opposition thereto." *Id.* (quoting *Dever*, 380 F.3d at 1072). When considering these affidavits and exhibits, the Court must view the facts in the light most favorable to the plaintiff and resolve all factual conflicts in his favor. *E.g.*, *Epps v. Stewart Information Services Corp.*, 327 F.3d 642, 647 (8th Cir. 2003); *Dakota Indus., Inc.,* 946 F.2d at 1387.

DISCUSSION

"A federal court may exercise jurisdiction 'over a foreign defendant only to the extent permitted by the forum state's long-arm statue and by the Due Process Clause of the Constitution.'" *Miller v. Nippon Carbon Co., Ltd.*, 528 F.3d 1087, 1090 (8th Cir. 2008) (quoting *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 915 (8th Cir. 1994)). Because Nebraska's long-arm statute[3] confers personal jurisdiction to the "to the fullest extent permitted by the United States Constitution," the Court need only address whether the exercise of personal jurisdiction over the defendant would violate the Due Process Clause. *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690, 693 (8th Cir. 2003) (citing *Barone v. Rich*

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[3]The statute states:

> A court may exercise personal jurisdiction over a person:
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> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
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> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Neb. Rev. Stat. § 25-536 (West, Westlaw through 1st special session 2009).

Bros. Interstate Display Fireworks Co., 25 F.3d 610, 612 (8th Cir. 1994)); *see also Wagner v. Unicord Corp.*, 526 N.W.2d 74, 77-78 (Neb. 1995).[4]

Due process requires that a non-resident defendant have sufficient "minimum contacts" with the forum state "such that the maintenance of the suit [in that state] does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *See also Miller v. Nippon Carbon Co., Ltd.*, 528 F.3d 1087, 1090 (8th Cir. 2008). "The Supreme Court has set forth two theories for evaluating minimum contacts, general jurisdiction and specific jurisdiction." *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073 (8th Cir. 2004). "Under the theory of 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 defendant's activities directed at the forum." *Id.* (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984)). "In contrast, specific jurisdiction is viable only if the injury giving rise to the lawsuit occurred within or had some connection to the forum state." *Id.* (citing *Hall*, 466 U.S. at 414). Under either of these two theories, the defendant must have committed "some act by which the defendant purposely avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of

[4]The Complaint alleges that this Court has subject matter jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1332, and 1338. (Filing No. 1, Compl. ¶ 3.) The due process analysis that must be performed to resolve personal jurisdiction challenges may be based on the Fifth Amendment's Due Process Clause or the Fourteenth Amendment's Due Process Clause, depending upon the basis for subject matter jurisdiction. *See Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1384 n.2 (8th Cir. 1991). The variability of the applicable amendment will not alter the Court's analysis in this case. *See id.*

its laws." *Dever*, 380 F.3d at 1073 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985). "This purposeful availment must be sufficient to provide the defendant with fair warning that his activities might result in his being haled into court in that jurisdiction." *Johnson v. Woodcock*, 444 F.3d 953, 955 (8th Cir. 2006). "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.*, 471 U.S. at 476 (quoting *International Shoe Co.*, 326 U.S. at 320). *See also Dever*, 380 F.3d at 1073.

In light of the foregoing principles, the Eighth Circuit "instruct[s] courts to consider the following factors when resolving a personal jurisdiction inquiry: (1) the nature and quality of a defendant's contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties." *Dever*, 380 F.3d at 1073-74 (internal quotation marks, brackets, and citation omitted). *See also Sybaritic, Inc. v. Interport Intern., Inc.*, 957 F.2d 522, 524 (8th Cir. 1992) (explaining that this five-factor framework "incorporates the notions of both 'minimum contacts' and 'fair play and substantial justice'"). The first three factors are given more weight than the remaining factors, although factor three may be inapplicable if jurisdiction is predicated on the theory of general jurisdiction. *Dever*, 380 F.3d at 1074.

I. Minimum Contacts with Nebraska

Sullivan submits that he did not have minimum contacts with the State of Nebraska sufficient to support this Court's exercise of personal jurisdiction over him. Specifically, Sullivan argues that "general personal jurisdiction" is lacking because Sullivan "does not have continuous and systematic general business contacts with Nebraska," and that "specific personal jurisdiction" is lacking under both "the sliding-scale test set forth in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)," and the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984). (*See* Filing No. 8, Def.'s Br. at 6-13.) In response, Schoemaker argues only that this Court has personal jurisdiction under *Calder*'s "effects test." (*See* Filing No. 16, Pl.'s Response Br. at 10-16.) Because the burden of establishing jurisdiction lies with Schoemaker, and because Schoemaker does not contend that jurisdiction exists under the general theory or under *Zippo*, the central issue before the Court is whether Schoemaker has made a prima facie showing that specific jurisdiction is viable under the effects test.

The effects test allows "personal jurisdiction over non-resident defendants whose acts are performed for the very purpose of having their consequences felt in the forum state." *Dakota Indus., Inc. v. Dakota Sportswear, Inc.,* 946 F.2d 1384, 1390-91 (8th Cir. 1991) (internal quotations omitted); *see also Calder v. Jones*, 465 U.S. 783, 789-90 (1984); *Coen v. Coen*, 509 F.3d 900, 906 (8th Cir. 2007) (quoting *Finley v. River North Records, Inc.*, 148 F.3d 913, 916 (8th Cir. 1998)). If a defendant's intentional acts are aimed at a particular forum with knowledge that the brunt of the injury caused by those acts would be suffered in that forum, then the defendant must reasonably anticipate being haled into

court in that forum. *See Denenberg v. Ruder*, No. 8:05CV215, 2006 WL 379614, at *3-4 (D. Neb. Feb 15, 2006) (discussing *Denenberg v. Berman*, No. 4:02CV7 (D. Neb. Dec. 20, 2002)).

Schoemaker argues that this Court's exercise of personal jurisdiction over Sullivan is proper under the effects test because Sullivan "purposely directed his harm at the Plaintiff with knowledge that the Plaintiff would be harmed in Nebraska." (Filing No. 16, Pl.'s Br. at 10.) The Court agrees.

Viewed in the light favorable to Plaintiff, the record shows that Sullivan was familiar with Schoemaker and at least one of Schoemaker's websites. First, as noted above, Sullivan admitted that he knew who Schoemaker was when he first spoke with Ruckman about Schoemaker's allegations. (Ruckman Decl. ¶ 7.) Also, in response to questions from Schoemaker's counsel, Sullivan wrote in an e-mail dated December 1, 2009, that he had "visited Shoemoney's site" a few times "in [his] life." (Cooper Decl., Filing No. 19-4, Ex. 3E.) There is also evidence that Sullivan and Schoemaker both attended internet marketing industry events and conferences, and Ruckman recalled specifically that Sullivan "recently" attended a conference where Schoemaker served as a speaker. (Filing No. 19-3, Ex. 2, Ruckman Decl. ¶¶ 4-5.) In addition, the record includes e-mails written by Sullivan to Schoemaker on December 1 and 2, 2009, in which Sullivan addressed Schoemaker using the nickname "Shoe." (Filing No. 18-2, Exs. 1D & 1E.)[5] In the

[5]Schoemaker states that "Shoe" is "the name that friends and industry observers frequently refer to [him] by." (Filing No. 17-1, Ex. 1, Schoemaker Decl. ¶ 25; *see also id.* ¶ 4).

December 2 e-mail, Sullivan wrote, "Although we've never met, we're probably friends with the same people (Ruck, etc.)." (Filing No. 18-2, Ex. 1E.)

The record also shows that Sullivan knew, or should have known, that Schoemaker was a Nebraska resident. The website that Sullivan admits to visiting is registered to Schoemaker at a Nebraska address, and every page of the site includes a notice stating, "Based in Lincoln, Nebraska." (Schoemaker Decl. ¶¶ 5, 14; Filing 17-1, Exs. 1A-1B.)[6]

Finally, the record shows that Sullivan purposely directed his actions at Schoemaker, and thereby caused Schoemaker to suffer harm in Nebraska. It is uncontroverted that Schoemaker is well-known in the internet marketing industry, and it is uncontroverted that Sullivan used Schoemaker's image to promote an internet marketing scam. (*See, e.g.*, Schoemaker Decl. ¶¶ 3, 8, 10-13, 31; Filing Nos. 18-2, 18-3, 18-4, 19-1, and 19-2, Ex. 1G; Ruckman Decl. ¶¶ 3-4; Sullivan Decl. ¶ 7.) It is also uncontroverted that Sullivan's advertisement was published throughout the United States, including the State of Nebraska. (Schoemaker Decl. ¶¶ 28-30; Sullivan Supp. Decl. ¶ 3; Filing No. 21-6, Helm Decl. ¶¶ 2-3.) Ruckman states that he confronted Sullivan about Schoemaker's allegations, and Sullivan replied that he knew who Schoemaker was, but he did not take Schoemaker's allegations seriously because the banner advertisements did not receive many "clicks." (Ruckman Decl. Ex. 2, Filing No. 19-3, ¶ 7.) Ruckman also states that he "terminated Convert2Media's relationship with David Sullivan" after concluding that

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[6]Schoemaker also emphasizes that the photograph used by Sullivan includes Schoemaker's Nebraska address on its face. (Filing No. 16, Pl.'s Br. at 13 (citing Filing No. 17-1, Ex. 1, Schoemaker Decl. ¶¶ 15).) The Nebraska address is not legible on the photograph as it appears in Sullivan's banner advertisement, however–though the Court notes that a "Shoemoney.com" watermark is partially legible on the banner ad. (*See* Filing No. 17-1, Ex. 1, Schoemaker Decl. ¶ 18.)

"Sullivan had intentionally used Jeremy Schoemaker's copyrighted photograph without authorization." (*Id.* ¶ 8.)

Based on the foregoing facts, the Court finds that Schoemaker has made a prima facie showing that Sullivan, acting intentionally and for his own personal gain, associated Schoemaker's copyrighted image with a nation-wide internet marketing scam, knowing that "the brunt of that injury" would be suffered by Schoemaker in Nebraska. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). Under the circumstances, Sullivan "must reasonably anticipate being haled into court" in Nebraska to answer for his actions. *Id.* (internal quotation marks omitted). *See also Denenberg v. Ruder*, No. 8:05CV215, 2006 WL 379614, at *3 (D. Neb. Feb 15, 2006) ("Such intentional conduct [(i.e., appropriating copyrighted photos from a website and using them to promote one's own business)] can give rise to specific personal jurisdiction over a defendant in the forum where a plaintiff's website was established, particularly if the website bore indicia that it was created in the forum, by a resident of the forum, for the promotion of business in the forum."); *Denenberg v. Djordjevic*, No. 8:07CV150, 2007 WL 4525011, at *5 (D. Neb. Dec. 18, 2007) ("[T]he intentional tortious activity included on the defendant's website, namely intentionally infringing on Denenberg's copyright, . . . forms the basis for jurisdiction.").

In reaching this finding, the Court considered the first three of the five factors set forth in *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073-74 (8th Cir. 2004).[7] The nature and quality of Sullivan's contacts with Nebraska clearly support the exercise of personal jurisdiction over Sullivan in this forum because Sullivan's intentional conduct in

[7]The Court's discussion of the remaining factors is deferred to Part II below.

California was directly focused upon Schoemaker in Nebraska. Specifically, Sullivan targeted Schoemaker by using Schoemaker's photograph for his own gain, and his decision to associate Schoemaker's image with a credit-card scam was certain to cause injury to Schoemaker in Nebraska. Although Sullivan's contacts with Nebraska are limited in quantity, there is a clear connection between Sullivan's Nebraska-directed conduct and Schoemaker's claims. In short, the Court finds that Sullivan's contacts with Nebraska are not random, fortuitous, or attenuated, and that Sullivan has purposefully established the necessary minimum contacts to support the exercise of personal jurisdiction in Nebraska.

Sullivan argues that the "effects test does not apply in this case for several reasons." (Filing No. 8, Def.'s Br. at 12.) First, Sullivan states that "when [he] began using the banner advertisement on October 15, 2009, he did not know Plaintiff and did not know the identity of the person depicted in the picture." (*Id.* (citing Sullivan Decl. ¶ 8).) As noted above, however, Schoemaker has submitted evidence showing that Sullivan knew who Schoemaker was when he used the advertisement. Also, although there is no evidence that Sullivan knew that Schoemaker was the person depicted in the photograph, Schoemaker has submitted evidence showing that Sullivan knew that the photograph belonged to Schoemaker. For the purposes of this Memorandum, the conflict between Schoemaker's evidence and Sullivan's declaration must be resolved in Schoemaker's favor. *E.g.*, *Epps v. Stewart Information Services Corp.*, 327 F.3d 642, 647 (8th Cir. 2003). Sullivan knew that his actions would harm Schoemaker.

Second, Sullivan argues that he "did not know that Plaintiff lived in Nebraska when he began using the banner advertisement," and therefore he "could not have intentionally directed harm at Plaintiff in Nebraska or known that the brunt of that harm would be felt in

Nebraska." (Filing No. 8, Def.'s Br. at 12-13 (citing Sullivan Decl. ¶ 8).) Though Sullivan's declaration supports this argument, this Court is not free to disregard Schoemaker's evidence to the contrary. *E.g.*, *Epps*, 327 F.3d at 647. As noted above, when the record is viewed in a light favorable to Schoemaker, it establishes that Sullivan knew–or at the least should have known–that Schoemaker was a Nebraska resident.

Next, Sullivan argues that he should not be subject to personal jurisdiction in Nebraska because he "assumed that the photograph was either licensed or in the public domain." (Filing No. 8, Def.'s Br. at 13.) But Schoemaker has submitted evidence showing that Sullivan "intentionally used Jeremy Schoemaker's copyrighted photograph without authorization" and did not take Schoemaker's copyright infringement claim seriously because the advertisement did not draw many "clicks." (Ruckman Decl. Filing No. 19-3, Ex. 2, ¶¶ 7-8.) In short, there is evidence that Sullivan's acts were intentional (as opposed to merely negligent), and the conflict in the evidence must be resolved in Schoemaker's favor.

In his reply brief, Sullivan argues that although he admitted to visiting Schoemaker's website "five times," none of these visits occurred before he received notice of Schoemaker's copyright infringement claims on November 6, 2009. (Filing No. 20, Def.'s Reply Br. at 5.) He submits that, "[w]ithout showing that Defendant visited Plaintiff's website or actually copied the picture from the website, Plaintiff has not presented sufficient evidence to show that Defendant knew that Plaintiff lived in Nebraska when the alleged infringement occurred." (*Id.* at 6.) In response, Schoemaker argues that Sullivan's "attempt[] to explain away his admissions by arguing that he meant to say he had visited Plaintiff's web site five times *in the preceding three weeks*, rather than 'five times in his

[entire] life,'" raises a question of credibility that must be resolved in Schoemaker's favor "for purposes of this Motion to Dismiss." (Filing No. 24, Pl.'s Sur-reply Br. at 3 (emphasis in original).) The Court agrees with Plaintiff. Sullivan admitted in a December 1, 2009, e-mail that he had "visited Shoemoney's site less than 5 times *in [his] life*." (Filing No. 19-4, Ex. 3E (emphasis added).) This admission supports a reasonable inference that Sullivan visited one of Schoemaker's websites before Sullivan received word of Schoemaker's allegations,[8] and Schoemaker is entitled to the benefit of this inference at this stage of the proceedings. Sullivan's interpretation of his own admission may or may not be reasonable, but that question remains to be resolved at a later time.

Sullivan also asserts that "Plaintiff's argument under *Calder* fails because there is no evidence that Defendant intentionally targeted the banner advertisement specifically at Nebraska or any part of Nebraska," and "[w]ithout such evidence, Plaintiff cannot show that Defendant performed intentional acts 'for the very purpose of having their consequences felt in the forum state.'" (Filing No. 20, Def.'s Reply Br. at 6.) This argument is without merit. First, the record shows that Sullivan purposefully targeted the banner advertisement "at the United States at a whole," (Helm Decl. ¶ 3), including internet users in Nebraska, (Schoemaker Decl. ¶¶ 19, 30), and the advertisement was shown to the targeted internet group approximately 4 million times, (Schoemaker Decl. ¶¶ 23-24; *see also* Filing No. 18-2, Ex. 1C). The fact that the advertisement was published in Nebraska is clearly relevant, but evidence that it was also published in other states does not undermine the exercise of

[8]Other evidence summarized above–including evidence that Sullivan knew Schoemaker before he was informed of the allegations–lends additional support to this inference.

personal jurisdiction in this forum. *See Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991) ("The fact that *some of* the 'passing off' [of trademark infringing goods] occurred in [the forum state], along with the fact that [the plaintiff's] principal place of business is in [the forum state], demonstrates that [the defendant's] actions were uniquely aimed at the forum state and that the 'brunt' of the injury would be felt there, as required by *Calder*." (emphasis added)).

Calder is instructive on this point. In *Calder*, the plaintiff claimed that she had been libeled by the *National Enquirer*, a Florida-based newspaper with a national circulation. 465 U.S. at 784. Because California was "the focal point both of the story and the harm suffered," however, the Court found that jurisdiction over the defendants was "proper in California based on the 'effects' of their Florida conduct in California." *Id.* at 789. Likewise, Schoemaker has made a prima facie showing that Sullivan took intentional actions that he "knew would have a potentially devastating impact" upon Schoemaker, and he "knew that the brunt of that injury would be felt by [Schoemaker] in the State in which []he lives and works" and in which the advertisement was displayed. *Id.* at 789-90. Here, as in *Calder*, personal jurisdiction is proper in the forum where the defendant knowingly caused injury.[9] The fact that the advertisement was also displayed outside Nebraska does not aid Sullivan's position; on the contrary, it serves to amplify the injury that Schoemaker felt in Nebraska.

[9]Clearly, this does not mean that "Defendant would be subject to personal jurisdiction in every state in the United States," as Sullivan claims. (Filing No. 28, Def.'s Sur-sur-reply Br. at 2-3 (emphasis omitted).)

Finally, Sullivan argues that the instant case is distinguishable from the *Denenberg* cases relied upon by Schoemaker in his response to the instant Motion. (Filing No. 20, Def.'s Reply Br. at 6-8 (citing *Denenberg v. Ruder*, No. 8:05CV215, 2006 WL 379614 (D. Neb. Feb 15, 2006); *Denenberg v. Djordjevic*, No. 8:07CV150, 2007 WL 4525011 (D. Neb. Dec. 18, 2007)).) Sullivan states,

> Here, unlike *Ruder* and *Djordjevic*, there is no evidence of extensive copying. Plaintiff is alleging that Defendant copied one photograph in thumbnail form. Indeed, unlike in *Ruder* and *Djordjevic*, Plaintiff is not even attempting to argue that Defendant himself did the copying. Further, unlike in *Ruder*, there is no evidence that Defendant continued to use Plaintiff's picture for any purpose after receiving notice of the alleged infringement from Mr. Ruckman.
>
> Unlike in *Djordjevic*, there is no evidence in this case that Defendant directed his website towards Nebraska residents.

(Filing No. 20, Def.'s Reply Br. at 7 (emphasis omitted).)

This case differs from *Ruder* and *Djordjevic* in several respects–though it should be noted that some of the distinctions highlighted by Sullivan must be qualified. For example, the defendant in *Djordjevic* denied having any role in designing, constructing, or personally maintaining the websites that displayed the plaintiff's copyrighted photographs, *see* 2007 WL 4525011, at *2, which is analogous to Sullivan's denial that he created the banner advertisement at issue here. Also, although it is true that the defendant in *Djordjevic* may have "directed his website toward Nebraska residents" more specifically than did Sullivan, Sullivan's suggestion that his banner advertisement was not directed towards Nebraska residents is not consistent with the record. In any event, for all of the reasons outlined above, the Court is not persuaded that the differences between *Ruder*, *Djordjevic*, and the instant case support a finding that personal jurisdiction over Sullivan is lacking.

In summary, Schoemaker has made a prima facie showing that Sullivan purposefully established minimum contacts with Nebraska. Acting with knowledge that Schoemaker was a well-known figure in the internet marketing industry who resided in Nebraska, Sullivan purposefully used Schoemaker's copyrighted photograph in a nationally-published advertisement promoting an internet marketing credit card scam. This advertisement that was displayed to approximately 4 million internet users, including users in Nebraska. Sullivan's intentional actions are "sufficient to provide the defendant with fair warning that his activities might result in his being haled into court" in Nebraska. *Johnson v. Woodcock*, 444 F.3d 953, 955 (8th Cir. 2006).

II. Fair Play and Substantial Justice

As noted above, "[o]nce 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) (quoting *International Shoe Co.*, 326 U.S. at 320). These factors may include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, 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." *Id.* at 476-77 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)) (internal quotation marks omitted). *See also Dever*, 380 F.3d at 1073-74 (directing courts to consider "the interest of the forum state in providing a forum for its residents" and the

"convenience of the parties"). It must be noted, however, that "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp.*, 471 U.S. at 477.

After giving due consideration to the foregoing factors and principles, the Court concludes that "minimum requirements inherent in the concept of 'fair play and substantial justice'" do not "defeat the reasonableness of jurisdiction" in this case. *Burger King Corp.*, 471 U.S. at 477-78.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction, (Filing No. 7), is denied.

DATED this 10th day of May, 2010.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge