UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CECIL McBEE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-198-P-C***
	)	
DELICA CO., LTD.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant, Delica Co., LTD., a Japanese corporation, moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. I recommend that the court deny the motion.

I. Applicable Legal Standard

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has "purposefully established minimum contacts in the forum State." *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices. *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff's pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true.

II. Factual Background

The following facts, with conflicts resolved in favor of the plaintiff's properly supported proffers of evidence, are material to consideration of the pending motion.

The plaintiff, a jazz musician, is a resident of Yarmouth, Maine. Affidavit of Cecil McBee ("Plaintiff's Aff.") (Docket No. 13) ¶¶ 1, 4. He performed in Japan in the early 1980s, 1983-84 and 2001. *Id*. ¶¶ 9, 14. He has a national and international reputation as an outstanding jazz bass player. *Id*. Exh. F; Affidavit of Donald S. Doane (Docket No. 16) ¶¶ 10-12; Affidavit of Carl Bradford (Docket No. 17) ¶¶ 5, 7. The defendant is a Japanese corporation with a principal place of business in Tokyo, Japan. Declaration of Tokiko Ata ("Ata Decl.") (Docket No. 6) ¶ 3. The defendant is in the business of selling women's fashions. *Id*. One of the defendant's product lines, marketed primarily to teen-aged girls, is sold under the name "Cecil McBee." *Id*. ¶ 4. The defendant operates retail shops throughout Japan called "Cecil McBee" which sell its "Cecil McBee" line of clothing and accessories. *Id*. ¶ 5. It has no stores in the United States. *Id*. ¶ 12. It has no office, manufacturing facility, address, telephone number or employees in the United States. *Id*. ¶¶ 12-13. Tags on the defendant's "Cecil McBee" merchandise state: "Produced by CECIL McBEE." Plaintiff's Aff. ¶ 25. The plaintiff has not given his permission for the use of his name to anyone, other than in connection with his recordings and performances. *Id*. ¶ 20.

The defendant operates a website on the internet at the address http://www.cecilmcbee.net. Ata Decl. ¶ 11. The website is written, designed and hosted in Japan and most of its content is presented in the Japanese language. *Id*. The website includes English words such as "CECIL McBEE Web Magazine." Affidavit of Deborah J. Jean (Docket No. 20) ¶ 6. The website includes photographs of Cecil McBee merchandise accompanied by numerical figures and a yen symbol or the

word "yen." *Id*. ¶ 8. Between February 2002 and March 2003 three Maine residents visited the website and thereafter placed orders for Cecil McBee merchandise with stores in Japan, which sent the merchandise to those individuals in Maine. Affidavit of Ayaka Sogabe (Docket No. 19) ¶¶ 5-28; Affidavit of Ayako McGrath (Docket No. 18) ¶¶ 5-6, 8-32; Affidavit of Yaeko Akaboshi Collier (Docket No. 12) ¶¶ 10, 12-40. A person with extensive experience in advertising and public relations considers the website to be an active website "because the site promotes, enhances, and visually entices a viewer to select products as from a catalog and makes available methods by which the potential purchasers of these products are able to make contact directly with Cecil McBee stores." Affidavit of George Hughes (Docket No. 15) ¶¶ 2-16, 18-20. The website also has interactive features, including a bulletin board and a feature that allows a viewer to obtain an application for a Cecil McBee Master Card. *Id*. ¶ 16.

III. Discussion

The defendant contends that this court may not exercise personal jurisdiction over it because it lacks sufficient contacts with the United States, it has not engaged in substantial or continuous and systematic activities unconnected to the subject matter of the complaint in the state of Maine, its website "is truly a passive website," and it has no contacts with the state of Maine. Defendant's Motion to Dismiss ("Motion") (Docket No. 3) at 4-11. The reach of the Maine long-arm jurisdictional statute, which is applicable to this case, is coextensive with the outer bounds of constitutional due process where, as here, Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Plaintiff's Opposition") (Docket No. 11) at 12 n.3, the assertion of jurisdiction is premised on so-called "specific jurisdiction," *see, e.g.,* 14 M.R.S.A. § 704-A(1) & (2)(I); *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717. 720 (1st Cir. 1991) (noting that Maine's long-arm statute provides only for the exercise of "specific jurisdiction" over defendants, "that is, jurisdiction which is asserted when

the lawsuit arises directly out of [the defendant's] forum-based activities.") (citation and internal quotation marks omitted); *Suttie v. Sloan Sales, Inc.*, 711 A.2d 1285, 1286 (Me. 1998) ("[W]hen applying the [Maine long-arm] statute a court need only consider whether due process requirements have been satisfied."). The assertion of personal jurisdiction over a non-resident defendant comports with constitutional due process if (i) the defendant has established "purposeful minimum contacts" with the forum and (ii) the assertion of jurisdiction is "reasonable" — *i.e.*, consistent with notions of "fair play and substantial justice." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992). With respect to specific jurisdiction, the First Circuit has developed the following test:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Id. at 1089. The "Gestalt factors" comprise

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. at 1088. The court will construe the allegations in the record in the light most favorable to the non-moving party, the plaintiff in this case. *Forum Fin. Group v. President & Fellows of Harvard Coll.*, 173 F.Supp.2d 72, 87 (D. Me. 2001). Once the plaintiff makes a *prima facie* showing of relatedness and minimum contacts/purposeful availment, the burden shifts to the defendant to convince the court that the Gestalt factors militate against the exercise of jurisdiction. *Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 891 (D. Me. 1992); *see also Foster-Miller, Inc. v. Babcock & Wilcox*

Canada, 46 F.3d 138, 145 (1st Cir. 1995) (plaintiff "must carry the devoir of persuasion on the elements of relatedness and minimum contacts") (citations omitted).

In this case the plaintiff relies on the defendant's website and its sales to three Maine consumers through its stores in Japan to establish the existence of "purposeful minimum contacts." Plaintiff's Opposition at 6-10. In dealing with questions of cyberspace and personal jurisdiction, courts have conceptualized a three-stage model of levels of internet activity:

> At one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet . . . . In this situation, personal jurisdiction is proper. At the other end of the spectrum, there are situations where a defendant merely establishes a passive website that does nothing more than advertise on the Internet. With passive websites, personal jurisdiction is not appropriate. In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information with a host computer. In this middle ground, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website.

Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999) (citations and internal quotation marks omitted). This test is usually applied when the plaintiff is alleging the existence of general rather than specific personal jurisdiction, however. *Id*. The defendant's website falls in the middle of this spectrum, entailing offers to sell the Cecil McBee products, enabling the exchange of information although not accepting orders directly, and enabling the viewer to purchase products from any one of many stores listed on the site. Despite the opinion offered by the Hughes affidavit that the defendant's website is "active," the website does not appear to meet the legal definition of that term, nor does it appear to be sufficiently interactive to meet the "middle ground" requirements set forth in *Mink*. *Id.* at 336-37. However, because Hughes' opinion is uncontradicted by the defendant, and because the plaintiff has stated its intent to oppose the motion to dismiss on the ground that the facts establish specific personal jurisdiction over the defendant, the closeness of this question suggests that the

existence and features of the website may be considered in connection with an evaluation of the existence of specific rather than general personal jurisdiction. *See Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 44 (D. Mass. 1997) (maintaining a website which can continuously be accessed by residents of forum state and thus regularly soliciting business in that state sufficient under state specific personal jurisdiction statute).

The "relatedness" prong of the specific jurisdiction analysis requires that the plaintiff's alleged injury arise out of or be related to the defendant's contacts with the forum state. "The transmission of information into [the forum state] . . . is unquestionably a contact for purposes of our analysis." *Sawtelle v. Farrell*, 70 F.3d 1381, 1389-90 (1st Cir. 1995). The complaint in this action is based on allegations of trademark dilution and unfair competition involving the commercial use of the plaintiff's name without his consent. Complaint (Docket No. 1) ¶ 1. The evidence establishes that individuals in Maine have accessed the defendant's website and the catalogue displayed there, both of which use the plaintiff's name, and that employees of the plaintiff's stores have solicited business in Maine and have conducted business with Maine residents, sending into Maine merchandise prominently marked with the plaintiff's name. The plaintiff's alleged injury does not arise only out of these contacts and the website's transmission of information into Maine — the evidence shows that the information is distributed around the world and the merchandise is primarily sold in Japan — but it does arise out of the Maine contacts and is related to them. *See Casco Standards v. Verichem Labs., Inc.*, 725 F. Supp. 66, 69 (D. Me. 1989) ("That there may be some statements in Plaintiff's pleadings that . . . arise from activities undertaken by Defendant outside of Maine does not have any impact on Plaintiff's [actions] that establish a valid claim for relief and arise out of Defendant's contacts with the State of Maine.") There is sufficient evidence of "relatedness" for purposes of the exercise of specific personal jurisdiction over the defendant in this court. *See Electronic Media Int'l v. Pioneer*

Communications of Am., Inc., 586 A.2d 1256, 1260 (Me. 1991) ("Although the extent of [the defendant's] contacts with Maine is admittedly small, less extensive activity is required where the cause of action arises out of or in connection with the defendant's forum-related activity.") (citation and internal quotation marks omitted); *Forum Fin.*, 173 F.Supp.2d at 89 ("Even a single intended act may be sufficient to oblige a foreign corporation to submit to jurisdiction in the forum state.") (citation and internal quotation marks omitted).

The next element of the test involves the question whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Under Maine law, solicitation of business and shipment of goods to Maine meet this test. *A.F. Briggs Co. v. Starrett Corp.*, 329 A.2d 177, 184 (Me. 1974). "Promotional correspondence intended to solicit business represents voluntary availment of a forum, regardless of whether Plaintiff initiated the contact." *Lucerne Farms v. Baling Techs., Inc.*, 226 F.Supp.2d 255, 260 (D. Me. 2002). That is what happened in this case. In a trademark infringement case, the Massachusetts district court held that, while the extent to which trademark infringement outside the forum state may provide the basis for jurisdiction is a question that has been explicitly left open by the Supreme Court, when a website that itself used the trademark in dispute would plainly attract residents of the forum state and the owner of the website knows that the plaintiff is located in that state, the purposeful availment prong of the test is met. *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 470 (D. Mass. 1997). The same factual elements are present in the instant case, and I find the Massachusetts district court's analysis persuasive.

The defendant makes only a brief attempt to meet its burden to provide compelling evidence with respect to the Gestalt factors, *Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1208 (D.

Me. 1990), asserting that "the burden on Delica and all of the witnesses will be enormous if this case is allowed to proceed in Maine," "Maine has no interest in adjudicating this dispute," "[a]ny harm the plaintiff allegedly suffered was suffered only in Japan," the most effective resolution of the dispute would be in Japan, and the plaintiff has already demonstrated that the burden of litigation in Japan would not be too great for him because he has pursued an action against the defendant there. Motion at 10-11. Again, the Gestalt factors are (i) the defendant's burden in appearing in the forum, (ii) the forum state's interest in adjudicating the dispute, (iii) the plaintiff's interest in obtaining convenient and effective relief, (iv) the judicial system's interest in obtaining the most effective resolution of the dispute, and (v) the common interest of sovereigns in promoting substantive social policies. *163 Pleasant St.*, 960 F.2d at 1088.

Two of the defendant's assertions are clearly incorrect on first glance. Maine has a definite interest in adjudicating a dispute involving a Maine resident who allegedly has suffered harm in Maine at the hands of the defendant. *Lucerne Farms*, 226 F.2d at 261. The plaintiff has alleged that he suffered harm, including deprivation of the right to use his own name and to gain commercial benefit thereby, by the creation of a false inference of his endorsement of the defendant's products, wrongful appropriation of his reputation and dilution of his reputation and persona, Complaint ¶¶ 1, 19, 21, 26, 29-30, 36, 38, 40-42, 45, and none of this harm is alleged to have been suffered solely in Japan, nor could it have been. The plaintiff's interest in obtaining convenient and effective relief is obviously served by Maine as the forum. The judicial system's interest favors neither party on the evidence presented, and the fifth factor carries little or no weight in this case, as there is no evidence comparing the policies of Japan and the United States with respect to the issues raised by the complaint.

The remaining factor,[1] the burden on the defendant of appearing in this forum, is characterized as "enormous" by the defendant, Motion at 10, but it offers no evidence of its ability to bear the expense involved nor of the plaintiff's relative ability to bear the cost of continued litigation in Japan. In the absence of mitigating factors, the First Circuit has emphasized that this is a "primary concern" among the five Gestalt factors, particularly where the inconvenience to the defendant may not be coincidental. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994). However, the defendant does not contend that the plaintiff's choice of forum in this case is motivated

[1] The defendant concedes that "jurisdiction simply cannot be grounded on one [Gestalt] factor alone." Motion at 11.

by a desire to vex, harass or oppress the defendant. *Id*. at 211. There is no suggestion in the record currently before the court that this is in any way a vexatious action. In addition, the apparent disparity in the economic situations of the parties[2] is a mitigating factor. In this court, "because litigation in an out-of-state forum is usually a costly and inconvenient undertaking, 'this factor is only meaningful where a party can demonstrate some kind of special or unusual burden.'" *Scott v. Jones*, 984 F. Supp. 37, 45 (D. Me. 1997) (citing *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994)). The defendant has made no attempt to demonstrate any special or unusual burden in this case. Under the circumstances, the expense and inconvenience to be suffered by the defendant in connection with its appearance in this forum does not outweigh the two Gestalt factors that provide support to the exercise of jurisdiction and the fact that the exercise of this court's jurisdiction meets the relatedness and purposeful availment prongs of the applicable legal test.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14h day of April, 2003.

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[2] The complaint alleges that the defendant "has built a business which grosses over One Hundred Million Dollars annually." Complaint ¶ 1.

David M. Cohen
United States Magistrate Judge

Plaintiff

CECIL MCBEE

represented by **ALFRED C. FRAWLEY, III**
PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLC
PO BOX 9546
PORTLAND, ME 04101-9546
791-3000

NAOMI SAKAMOTO
PRETI, FLAHERTY, BELIVEAU & PACHIOS
ONE CITY CENTER
PORTLAND, ME 04112

ROBERT O. NEWTON
PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLC
PO BOX 9546
PORTLAND, ME 04101-9546
791-3000

V.

Defendant

DELICA CO LTD

represented by **TODD S. HOLBROOK**
BERNSTEIN, SHUR, SAWYER, & NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200