

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMUNICATIONS DEPOT, INC,)
LEACH, STEVE D/B/A CELLULINK)
COMM,)
WIRELESS COMMUNICATIONS, INC,)
CLEARLY WIRELESS, INC,)
HUFFORD, MIKE D/B/A HOOSIER)
CELLULAR,)

Plaintiffs,)
vs.)

VERIZON COMMUNICATIONS, INC *)
DISMISSED 02/19/02,)
VERIZON INTERNET SERVICES, INC,)
VERIZON INTERNET SERVICES NORTH)
INC * DISMISSED 02/19/02,)
YELLOWPAGES.COM, INC,)
WHITEPAGES.COM, INC,)
INFO-SPACE, INC,)
ACXIOM CORPORATION - DISMISSED)
3/27/02,)
LYCOS, INC,)
AT HOME CORPORATION D/B/A)
EXCITE@HOME,)
CMGI, INC * DISMISSED 03/19/02,)
B2BBIZ.COM, INC,)
VERIZON NEW MEDIA SERVICES INC,)
TMP WORLDWIDE, INC D/B/A TMP)
WORLDWIDE,)
CELLCO PARTNERSHIP D/B/A)
VERIZON WIRELESS,)

Defendants.)

CAUSE NO. IP01-1587-C-H/K

Allen Wellman & McNew
Five Couthouse Plaza
P O Box 455
Greenfield, IN 46140

James Dimos
Locke Reynolds LLP
201 N Illinois Street Suite 1000
PO Box 44961
Indianapolis, IN 46244

J Lee McNeely
McNeely Stephenson Thopy & Harrold
30 E Washington Street, Suite 400
P O Box 457
Shelbyville, IN 46176

James G Richmond
Ungaretti & Harris
3500 Three First National Plaza
Chicago, IL 60602-4283

Guy W Stilson
Low Ball & Lynch
601 California Street
San Francisco, CA 94108-2898

Mary Titsworth Chandler
Wooden McLaughlin & Sterner
201 N Illinois Street
Indianapolis, IN 46204

Kevin M Toner
Baker & Daniels
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

Sally F Zweig
Katz & Korin Pc
10 West Market Street Suite 1120

Indianapolis, IN 46204-2964

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMUNICATIONS DEPOT, INC.,)
STEVE LEACH d/b/a CELLULINK)
COMM., WIRELESS COMMUNICATIONS,)
INC., CLEARLY WIRELESS, INC., and)
MIKE HUFFORD d/b/a HOOSIER)
CELLULAR,)

Plaintiffs,)

v.)

CAUSE NO. IP 01-1587-C H/K

VERIZON COMMUNICATIONS INC.,)
VERIZON INTERNET SERVICES, INC.,)
VERIZON INTERNET SERVICES NORTH,)
INC., YELLOWPAGES.COM, INC.,)
WHITEPAGES.COM, INC., INFOSPACE,)
INC., ACXIOM CORPORATION, LYCOS,)
INC., AT HOME CORPORATION d/b/a)
EXCITE@HOME, CMGI, INC., and)
B2BBIZ.COM, INC.,)

Defendants.)

ENTRY ON DEFENDANT YELLOWPAGES.COM'S MOTION TO DISMISS

This action presents claims for unfair competition under federal law and conversion of corporate property under state law. The plaintiffs are cellular telephone service retailers in Indiana. They allege that the Verizon defendants appropriated business intended for plaintiffs by listing incorrect telephone

numbers for plaintiffs' businesses on several internet business directories. Plaintiffs have also sued the so-called "directory defendants," including defendant Yellowpages.com, Inc. ("YPC"), which operated one of the internet business directories that plaintiffs contend listed incorrect telephone numbers. This action is now before the court on YPC's motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). For the reasons stated below, the court grants YPC's motion to dismiss.

Neither side has asked for an evidentiary hearing on the facts relevant to personal jurisdiction. Accordingly, in ruling on YPC's motion to dismiss for lack of personal jurisdiction, the court must accept plaintiffs' allegations as true unless controverted by YPC's affidavits, and must resolve any conflicts in the parties' affidavits in plaintiffs' favor. See *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1275 (7th Cir. 1997), citing *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987). Factual statements in this entry are based on this standard. Cf. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001) (when jurisdiction depends on contested facts, court may hold a hearing and resolve factual disputes before allowing case to proceed); 2 Moore's Federal Practice § 12.31[5] at 12-45 (3d ed. 2000).

Background

YPC is incorporated in Delaware and has its principal place of business in Nevada. YPC is not licensed or registered to conduct business in Indiana. YPC does not maintain any facilities or have any employees, partners, agents, or resellers in Indiana. Accordingly, YPC has never paid use, sales, or real estate taxes in Indiana.

YPC operates a website at <http://www.yellowpages.com>. At this address, YPC operates an internet business directory of telephone numbers and contact information. Internet users throughout the world, including the entire United States, can use YPC's business directory free of charge. YPC purchases most of the information for its directory through third-party vendors. Disclaimers on YPC's website inform visitors that YPC does not warrant the accuracy of its directory information and that it obtains its directory information from outside sources.

YPC sells enhanced listings for its business directory through its website. These enhanced listings give businesses the opportunity to provide additional information about themselves in the form of an "electronic business card." YPC has sold thousands of enhanced listings in the United States. In 2000, YPC sold enhanced listings to 16 Indiana businesses. In 2001, YPC sold enhanced listings

to 50 Indiana businesses. However, none of the Indiana businesses that purchased an enhanced listing is related to Verizon or any other telephone or cellular phone store. Interrog. Resp. Nos. 23, 24.

YPC also operates services on its website that enable visitors to obtain coupons and price quotations for specific products and services from businesses in a particular area. On January 17, 2002, a coupon search through YPC's website generated 190 coupons for businesses in Indianapolis, Indiana.

YPC's business directory also contains various advertising and promotional information, including "banner advertisements" that allow visitors to leave the YPC website and to access a website affiliated with the advertisement. YPC has not sold any banner advertisements to any companies or persons in Indiana.

Before this lawsuit was filed, YPC's website posted listings for plaintiffs' businesses. Plaintiffs allege that their listings on YPC's website provided a toll free telephone number for cellular phone service provider Verizon Wireless and appeared on a site that contained a Verizon logo. Plaintiffs are not associated with Verizon, but sell goods and services in direct competition with Verizon through non-party AT&T.

Discussion

A federal district court exercising diversity jurisdiction has personal jurisdiction over a nonresident defendant “only if a court of the state in which it sits would have such jurisdiction.” *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1275 (7th Cir. 1997). The same standard applies to claims arising under federal statutes that do not authorize nationwide service of process. *Search Force, Inc. v. Dataforce Int’l, Inc.*, 112 F. Supp. 2d 771, 774 (S.D. Ind. 2000). Indiana Trial Rule 4.4(A) serves as Indiana’s long-arm statute. In Indiana, personal jurisdiction depends on whether requirements of the state long-arm statute are met and whether federal due process is satisfied. *Anthem Ins. Cos. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1232 (Ind. 2000).¹

In federal court, the plaintiff bears the burden of showing personal jurisdiction when it is challenged by a Rule 12(b)(2) motion. *RAR, Inc.*, 107 F.3d at 1276. In this action, the court finds that plaintiffs cannot satisfy the

¹Prior to the Indiana Supreme Court’s decision in *Anthem*, deciding personal jurisdiction in Indiana required consideration only of federal due process standards. *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990), is one of many cases in which the Seventh Circuit applied Indiana Trial Rule 4.4(A) to extend personal jurisdiction to the limits of federal due process, and so collapsed the application of the state rule and federal due process into a single inquiry. In *Anthem*, however, the Indiana Supreme Court reinvigorated Indiana Trial Rule 4.4(A) by requiring courts to determine separately and initially whether its provisions have been satisfied. 730 N.E.2d at 1232.

requirements of Trial Rule 4.4(A) for their claims against YPC, and the court does not reach the federal due process issues.

As an “enumerated act” long-arm statute, the initial requirement of Indiana Trial Rule 4.4(A) is that the nonresident defendant’s contacts with Indiana must fall within at least one of its eight enumerated categories. See *Anthem*, 730 N.E.2d at 1232-33. The rule’s second requirement appears in its introduction, which states: “Any person or organization that is a nonresident of this state . . . submits to the jurisdiction of the courts of this state as to any action *arising from* the following acts.” (Emphasis added.) Thus, the plaintiffs’ claim must arise from the same Indiana contacts that fall into one of the rule’s enumerated categories. See *Sohacki v. Amateur Hockey Ass’n of Illinois*, 739 N.E.2d 185, 189 (Ind. App. 2000) (holding that trial court lacked jurisdiction under Indiana Trial Rule 4.4(A) because none of the allegedly wrongful acts “arose from any action performed by [defendant] in Indiana”).

From the language in Rule 4.4(A) – “submits to the jurisdiction of the courts of this state as to any action arising from the following acts” – one might conclude that Indiana would no longer recognize the concept of general jurisdiction. General jurisdiction authorizes the exercise of jurisdiction over a defendant with substantial and continuous contacts with a state even in actions

not arising from those contacts. The Indiana decisions show, however, that the equivalent of general jurisdiction is still permissible under Rule 4.4(A) when the contacts are “substantial, continuous, extensive, and systematic,” see *Anthem*, 730 N.E.2d at 1235. In *Anthem*, the Supreme Court of Indiana expressly held that one defendant’s business contacts with Indiana were sufficient to establish general jurisdiction. *Id.* at 1240; see also *American Economy Ins. Co. v. Felts*, 759 N.E.2d 649, 658 (Ind. App. 2001) (concluding that Supreme Court of Indiana would allow general jurisdiction based on doing business in Indiana where contacts satisfy due process standard for general jurisdiction).

Plaintiffs contend that jurisdiction over YPC for their claims against YPC is proper under the following three provisions of Trial Rule 4.4(A):

Acts Serving as a Basis for Jurisdiction. Any person or organization that is a nonresident of this state . . . submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent:

(1) doing any business in this state;

* * *

(3) causing personal injury or property damages in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;

- (4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state.

Doing Any Business in Indiana: YPC's sale of enhanced listings for its internet business directory to Indiana residents amounts to "doing any business" in Indiana, but it does not support jurisdiction in this case, in which the claims are not based on that business activity.

A defendant does not need to engage physically in substantial business activity in Indiana to fall within the scope of the Trial Rule 4.4(A)(1) for "doing any business." In *Anthem*, the Indiana Supreme Court found that a defendant's telephone calls and letters to Indiana amounted to "doing any business" under Trial Rule 4.4(A)(1) because they were in furtherance of the defendant's business in Indiana. 730 N.E.2d at 1241. The plaintiff insurer in *Anthem* filed suit against numerous health care providers for insurance fraud. The trial court dismissed the action against several providers for lack of personal jurisdiction. The plaintiff insurer appealed the dismissal of two providers, one of which was National Medical Enterprises ("NME"). When finally before the Indiana Supreme Court, the insurer argued that personal jurisdiction over NME was proper based on telephone calls and letters that it directed to recipients in Indiana.

Writing for the court, Justice Sullivan held that Indiana had jurisdiction over NME under Indiana Trial Rule 4.4(A)(1) because its telephone calls and letters to Indiana were “in furtherance of its business in Indiana.” *Anthem*, 730 N.E.2d at 1241. Further, NME’s telephone calls and letters satisfied the second requirement of Trial Rule 4.4(A) because they were the “very means by which Anthem claims that NME Hospitals perpetrated its fraud.” *Id.*

In contrast to NME’s contacts in *Anthem*, YPC’s sale of enhanced listings does not satisfy the second requirement of Trial Rule 4.4(A). To satisfy this requirement, the plaintiffs’ claims would need to arise from YPC’s sale of enhanced listings to Indiana residents. Plaintiffs’ claims are based on YPC’s posting of allegedly inaccurate information regarding plaintiffs’ businesses in its business directory. See Second Amended Cplt. ¶¶ 44-45. However, YPC allegedly posted the inaccurate information in an ordinary listing, not any enhanced listings. Plaintiffs never purchased an enhanced listing from YPC. Thus, YPC’s sale of enhanced listings to Indiana businesses and residents is unrelated to plaintiffs’ claims and cannot support jurisdiction here.

Plaintiffs cite *Search Force, Inc. v. Dataforce International, Inc.*, 112 F. Supp. 2d 771, 776 (S.D. Ind. 2000), to contend that posting on the internet a single advertisement of an employment position located in Indiana, standing alone, is

sufficient to establish personal jurisdiction under Trial Rule 4.4(A)(1). Arguing that YPC has engaged in activities that go far beyond posting a single advertisement on the internet, plaintiffs argue that this court must have personal jurisdiction over YPC. Plaintiffs misconstrue *Search Force*, in which Judge Tinder only assumed “for the sake of argument” that defendant’s contacts with Indiana satisfied Trial Rule 4.4(A)(1). Judge Tinder then determined that the court lacked personal jurisdiction because defendant’s contacts did not satisfy the requirements of federal due process. *Id.* at 778-79. *Search Force* does not show that YPC’s contacts are sufficient to establish that YPC was doing business in Indiana for purposes of Rule 4.4(A)(1).

Plaintiffs also argue that YPC’s coupon and quotation services amount to “doing any business” in Indiana. However, merely posting information on a website is passive activity insufficient to support personal jurisdiction where the reader or viewer is located. See *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) (finding that the operation of an internet yellow pages directory did not constitute purposeful availment of the readers’ or viewers’ forum); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (finding that posting a telephone number to order an allegedly infringing product on a website did not amount to committing a tortious

act in New York under New York's long-arm statute), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

Plaintiffs argue that this case is different because YPC's coupon and quotation services provide commercial information specific to a requested geographic area. This distinction does not warrant categorizing YPC's coupon and quotation services as "doing any business" in Indiana. There is still no financial exchange between YPC and the person using these services. Rather, YPC facilitates a potential exchange between the person accessing its website and some third party. In *Anthem*, the defendant's telephone calls and letters were in furtherance of the defendant's own business in Indiana, not some third party's business in Indiana. Accordingly, YPC's coupon and quotation services are not "doing any business" in Indiana under Trial Rule 4.4(A)(1). Moreover, even if they fell within Trial Rule 4.4(A)(1), they could not satisfy the long-arm statute here because they are unrelated to plaintiffs' claims against YPC.

Causing Personal Injury or Property Damages in Indiana: Plaintiffs also contend there is personal jurisdiction over YPC under Trial Rule 4.4(A)(3) because the posting of inaccurate information on YPC's website injured plaintiffs' businesses in Indiana. However, to satisfy Trial Rule 4.4(A)(3), plaintiffs also must show that YPC "regularly does or solicits business or engages in any other

persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered” in Indiana. With respect to this requirement, plaintiffs assert that YPC was “conducting and soliciting business in Indiana” on a regular basis at the time of its allegedly wrongful conduct. Pl. Br. at 8.

Because the sale of enhanced listings to Indiana residents was YPC’s only business in Indiana, plaintiffs must show that YPC regularly engaged in the sale of enhanced listings or derived substantial revenue from their sale to satisfy Trial Rule 4.4(A)(3). The evidence indicates that YPC sold only 16 enhanced listings in 2000 and 50 enhanced listings in 2001 to Indiana residents. So few sales over a two-year period do not amount to regular business activity or a “persistent course of conduct” sufficient to satisfy Trial Rule 4.4(A)(3). YPC did not derive substantial revenue from its Indiana sales – less than \$10,000 annually from Indiana businesses. Shin Reply Dec. ¶ 13. Even if the court assumed that the sales of enhanced listings might amount to doing business in Indiana, these activities are not so substantial, continuous, and systematic as to support general jurisdiction over claims unrelated to those activities. The court does not have jurisdiction over YPC under Trial Rule 4.4(A)(3).²

²Trial Rule 4.4(A)(3) does not require that a plaintiff’s action arise out of the nonresident defendant’s regular business activity or “persistent course of
(continued...)

Having Contracted to Supply Services in Indiana: Plaintiffs contend that YPC's sale of enhanced business listings and operation of its coupon and quotation services amount to having contracted to supply services in Indiana under Trial Rule 4.4(A)(4). This argument closely tracks plaintiffs' argument for jurisdiction under subsection (A)(1) and it fails for the same reasons. YPC's sale of enhanced listings is the only contact that might amount to contracting to supply services in Indiana. Whether YPC agrees to supply services *in Indiana* by agreeing to post information on the internet is questionable, but in any event, as discussed above, YPC's sale of enhanced listings is unrelated to plaintiffs' claims in this case. Thus, the court does not have jurisdiction over YPC under Trial Rule 4.4(A)(4).

Because Trial Rule 4.4(A) does not authorize this court to exercise personal jurisdiction over defendant YPC, plaintiffs' claims against YPC are dismissed without prejudice. The court need not reach the federal due process aspect of

²(...continued)
conduct" in Indiana. Plaintiff's action must arise out of only the "occurrence, act, or omission" outside Indiana that caused damages in Indiana. Thus, Trial Rule 4.4(A)(3) permits a form of general jurisdiction in Indiana where the requirements of federal due process are also satisfied. In this case, Trial Rule 4.4(A)(3) does not support jurisdiction because YPC has not engaged in business activity in Indiana substantial enough to satisfy either Trial Rule 4.4(A)(3) or the requirements of federal due process for general jurisdiction.

the personal jurisdiction issue. No separate judgment shall be entered at this time.

So ordered.

Date: July 17, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Eric N. Allen
Allen Wellman & McNew
Five Courthouse Plaza
P.O. Box 455
Greenfield, IN 46140

Sally F. Zweig
Katz & Korin, PC
10 West Market Street, Suite 1120
Indianapolis, Indiana 46204

James Dimos
Locke Reynolds, LLP
201 North Illinois Street
Suite 1000
P.O. Box 44961
Indianapolis, IN 46244

J. Lee McNeely
McNeely Stephenson Thopy & Harrold
30 East Washington Street
Suite 400
P.O. Box 457
Shelbyville, IN 46176

James G. Richmond
Ungaretti & Harris
3500 Three First National Plaza
Chicago, IL 60602-4283

Guy W. Stilson
Low Ball & Lynch
601 California Street
San Francisco, CA 94108-2898

Mary Titsworth Chandler
Wooden McLaughlin & Sterner
201 North Illinois Street
Indianapolis, IN 46204

Kevin M. Toner
Baker & Daniels
300 North Meridian Street
Suite 2700

Indianapolis, IN 46204