

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

THE GENTLE WIND PROJECT, et al.,)

Plaintiffs)

v.)

JUDY GARVEY, et al.,)

Defendants)

Docket No. 04-103-P-C

**RECOMMENDED DECISION ON MOTIONS TO DISMISS FILED BY DEFENDANTS
RICK A. ROSS AND RICK A. ROSS INSTITUTE FOR THE STUDY OF DESTRUCTIVE
CULTS, CONTROVERSIAL GROUPS AND MOVEMENTS AND BY DEFENDANTS
JUDY GARVEY, JAMES BERGIN AND J.F. BERGIN COMPANY¹**

Defendants Rick A. Ross and Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements seek dismissal of the plaintiffs’ claims against them pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Motion to Dismiss Amended Complaint for Lack of Personal Jurisdiction by Defendants Rick A. Ross and Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements, etc. (“Ross Motion”) (Docket No. 61) at 1. Defendants Judy Garvey, James Bergin and J.F. Bergin Company move to dismiss Counts I and II of the amended

¹ Before filing an amended complaint, the plaintiffs voluntarily dismissed their claims against two defendants named in their initial complaint, Steven Allan Hassan and the Freedom of Mind Resource Center, Inc. Docket No. 22. Since that time, the plaintiffs have filed an amended complaint listing ten defendants. Amended Complaint (Docket No. 37) at 1. The plaintiffs’ motion for entry of default against one of those defendants, Ian Mander, has been granted. Docket No. 46. The plaintiffs later voluntarily dismissed defendants Steve Gamble, Equilibra, Ivan Fraser and The Truth Campaign. Docket No. 75. Accordingly, the five defendants bringing the motions at issue in this recommended decision are the only remaining non-defaulted defendants in the case.

complaint pursuant to Fed. R. Civ. P. 12(b)(6). Motion to Dismiss Counts I and II of Plaintiffs' Amended Complaint ("Garvey Motion") (Docket No. 64) at 1.

I. The Garvey Motion

A. Procedural Background

Garvey, Bergin and J.F. Bergin Company ("the Garvey defendants") filed a previous motion to dismiss claims asserted against them under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1343 *et seq.*, and the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), Motion of Defendant James Bergin, Judy Garvey and J.F. Bergin Company to Dismiss, etc. (Docket No. 23), the same claims that are asserted in Counts I and II of the amended complaint, Amended Complaint ¶¶ 134-49, which are the subject of these defendants' current motion. I issued a decision recommending that the earlier motion to dismiss be granted, Docket No. 36, and the court adopted that recommendation after considering the objections of the plaintiffs, Order Affirming the Recommended Decision of the Magistrate Judge, etc. ("Order") (Docket No. 82) at 1. Before the court had acted on the recommended decision and the objections to it, the plaintiffs filed the amended complaint, which added allegations to the two counts at issue. The Garvey defendants filed the current motion to dismiss, the plaintiffs filed an opposition to the motion and the Garvey defendants filed a reply, all before the court's order affirming the recommended decision was issued. In addition, the plaintiffs filed a motion for reconsideration of my recommended decision, Docket No. 38, which I denied, Docket No. 65. The court's order affirming the recommended decision referred to me for a recommended decision the Garvey defendants' current motion to dismiss. Order at 3.

B. Applicable Legal Standard

“[I]n ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff[s] would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

C. Discussion

The Garvey defendants contend that the plaintiffs’ amendment of the RICO allegations in Count I does not cure the defect found in the initial complaint. Garvey Motion at 5. Specifically, they argue that none of the wire communications identified by the amended complaint involves any effort to sell goods or services or to seek donations or money. *Id.* at 6. They also contend that the amended complaint fails to allege any benefit to them other than emotional satisfaction, which is insufficient to state a RICO claim. *Id.* at 6-7. Finally, they assert that the plaintiffs must allege both a receipt of a benefit by the defendants and harm to the plaintiffs in order to state a RICO claim. *Id.* at 8.

The plaintiffs respond that paragraphs 64 and 139 of their amended complaint address the deficiencies found by the recommended decision to exist in their original complaint. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss Counts I and II of Plaintiffs’ Amended Complaint (“Garvey Opposition”) (Docket No. 77) at 2. They rely largely upon their opposition to the first motion to dismiss and their objections to the first recommended decision, *id.* at 4, both of which have now been rejected by the court. Paragraph 64 of the amended complaint, which appears to be entirely new, provides:

Garvey and Bergin engaged in the foregoing acts with the intent to benefit themselves and cause injury to Plaintiffs. Garvey and Bergin intended to benefit themselves by drawing attention to the role that cult conferences and therapy —

commercial activities in which Bergin and Garvey engage — played in helping them “recover” from the influence of a “cult,” thereby emphasizing the importance of such services and promoting and influencing decisions to purchase Garvey’s and Bergin’s services. Garvey and Bergin intended to deprive Gentle Wind of money or property by making the foregoing fraudulent misrepresentations about Gentle Wind and thereby inducing third parties, including but not limited to actual and/or prospective donors to Gentle Wind and actual and/or prospective users of Gentle Wind products, to rely upon such misrepresentations and act and/or refrain from acting by, e.g., requesting refunds of donations; declining to make additional donations; ceasing the use of Gentle Wind products; declining to obtain new Gentle Wind products; and ceasing the positive description to others of Gentle Wind products and Gentle Wind generally.

Amended Complaint ¶ 64. Paragraph 139 of the amended complaint adds the following sentence to what was paragraph 137 of the original complaint:

In committing such violations, the Count I Defendants acted with the intent to deprive Gentle Wind of money or property; to harm Gentle Wind by fraudulently inducing Gentle Wind supporters to stay away from Gentle Wind; and to benefit themselves by promoting the need for their own products and services and encouraging third parties to purchase such products and services.

Id. ¶ 139; *compare* Complaint and Jury Demand, etc. (Docket No. 1) ¶ 137.

I note first that neither of the two paragraphs includes anything beyond the most conclusory allegations that J.F. Bergin Company engaged in any of the challenged activity. The corporate defendant is not mentioned in paragraph 64 at all. J.F. Bergin Company is entitled to dismissal of Count I for this reason alone.

The new material included in the two paragraphs does explicitly allege that Bergin and Garvey intended to benefit themselves by engaging in the challenged conduct. However, as I noted in my first recommended decision, a court considering a motion to dismiss need not credit bald assertions, citing *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Recommended Decision on Motion of Defendants Garvey, Bergin and J.F. Bergin Company to Dismiss (“First Recommended Decision”) (Docket No. 36) at

6. These new allegations do not cure the problem I identified in that decision — that “[n]one of the specific wire communications by Bergin or Garvey alleged to be fraudulent . . . may reasonably be read to seek any economic benefit to either of them.” *Id.* Merely asserting that Garvey and Bergin intended to benefit themselves when engaging in the identified communications is insufficient if the communications themselves cannot reasonably be read to serve such an intent.

A closer question is presented by the new allegation in paragraph 64 that Garvey and Bergin intended to deprive Gentle Wind — none of the other plaintiffs is mentioned — of money or property. In *United States v. Rosen*, 130 F.3d 5 (1st Cir. 1997), the First Circuit interpreted the relevant section of RICO to cover deceptive schemes that “must, at a minimum, contemplate either some ‘articulable harm’ befalling the fraud victim or ‘some gainful use’ of the object of the fraudulent scheme by the perpetrator.” *Id.* at 9. The Garvey defendants contend that the First Circuit’s use of “either” and “or” in this sentence is *dictum* and that the statute should be read to require both the intent to harm the victim and the intent to benefit, rather than just one or the other. Garvey Motion at 8. This court is constrained to read the opinions of the First Circuit as they are set forth. I cannot dismiss the use of the “either-or” formulation by the First Circuit as gratuitous, even though the possibility of interpreting the statute to require both elements was not at issue in *Rosen*. Therefore I must consider whether the plaintiffs have alleged a sufficient claim of intent to deprive Gentle Wind of money or property through the identified wire communications. Given the generous standard to be applied to allegations in a complaint when a motion to dismiss is made under Rule 12(b)(6), I can only conclude that the paragraphs of the original complaint identified in my initial recommended decision, First Recommended Decision at 6, now found at paragraphs 32, 34, 36-37, 49-

50, 52, 53-54, 56, and 58 of the amended complaint,² do allow the drawing of a reasonable inference that at least some of the communications specified were intended to deprive Gentle Wind of money. As to Garvey and Bergin, therefore, dismissal of Count I is not warranted.

With respect to Count II, the Lanham Act claim, the Garvey defendants contend that the amended complaint still fails to allege two of the four required elements of such a claim. Garvey Motion at 2-4. The plaintiffs respond that paragraphs 64 and 147 of the amended complaint address the deficiencies found in the first recommended decision with respect to this claim. Garvey Opposition at 5-6. Again, the plaintiffs rely primarily on their arguments in opposition to the initial motion to dismiss and in their objections to the first recommended decision. *Id.* at 6. The plaintiffs' specific arguments, *id.* at 6-7, add nothing to those already made by them and rejected by the court. Paragraph 64 of the amended complaint is set forth above. Paragraph 147 of the amended complaint adds the following language to what was paragraph 145 of the original complaint: "'and to influence customers' decisions by denigrating Gentle Wind, promoting the superiority of or need for the Count II Defendants' own products and services, and encouraging customers to purchase these services instead of, or in addition to, Gentle Wind products.'" Amended Complaint ¶ 147; *compare* Complaint ¶ 145. This conclusory language does not alter my conclusion that

[n]o intent to influence potential customers to purchase the speaker's goods or services is explicit on the face of any of the statements alleged in the complaint [which the plaintiffs do not contend have been changed in the amended complaint in any way] to have been made by Bergin or Harvey. They simply cannot reasonably be construed to have "promoted defendants' own product." The plaintiffs apparently contend . . . that a reasonable inference to that effect may be drawn from the facts that Garvey is a hypno-therapist and that Bergin "is engaged in commerce with respect to 'cults and new religious movements.'" No such inference could reasonably be drawn from the allegations about Garvey's

² Two other paragraphs of the original complaint cited in my first recommended decision, paragraphs 99-100, First Recommended Decision at 6, do not include allegations against any of the Garvey defendants.

profession. With respect to Bergin, such an inference is far too attenuated and speculative to meet the *Podiatrist [Ass'n, Inc. v. La Cruz Azul de Puerto Rico, Inc.]*, 332 F.3d 6, 19 (1st Cir. 2003)] test.

First Recommended Decision at 9 (citations and footnote omitted). This failure is sufficient to entitle the Garvey defendants to dismissal of Count II.

II. The Ross Motion

A. Applicable Legal Standard

The second motion to dismiss invokes Fed. R. Civ. P. 12(b)(2). Ross Motion. at 1. A motion to dismiss for lack of personal jurisdiction, governed by this rule, 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. *Id.*

B. Factual Background

The amended complaint includes the following factual allegations relevant to the question of this court’s exercise of personal jurisdiction over the Ross defendants. Defendant Rick A. Ross is a resident of New Jersey. Amended Complaint ¶ 16. Defendant Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements (“the Institute”) is a New Jersey nonprofit corporation with a place of business in Jersey City, New Jersey. *Id.* ¶ 17. Ross is the executive director of the Institute and its

sole controlling officer and/or director. *Id.* The Institute operates and maintains the web site www.rickross.com. *Id.* ¶ 111.

The web site allows readers in the state of Maine to read its content at all times. *Id.* ¶ 112. Third parties have viewed the web site in the state of Maine. *Id.* The web site offers a number of products and services for sale. *Id.* ¶ 114. It contains a page in which Ross and the Institute solicit donations and an e-mail address by which readers are invited to interact with Ross. *Id.* ¶ 115. The web site lists the web site of Gentle Wind as a web site critical of Ross. *Id.* ¶ 117. On the web site's "flaming websites" page, Ross and/or the Institute characterize Gentle Wind as a "rather odd group" and make the following statement:

This purported "cult" is run by John and Mary Miller, They hawk so-called "instruments," which includes everything from a wallet sized "healing card" ("requested donation \$450") to a "Healing Bar Ver 1.3" ("requested donation \$8,600"). But don't expect any objective peer-reviewed scientific evidence published about their puck in the pages of JAMA. Interestingly, since being called a "cult" the Millers have decided to offer free "cult deprogramming," though probably not to dissuade anyone from making more "requested donation[s]" to them.

Id. ¶ 118. The web site contains a link to web sites of defendants Garvey and Bergin, defaulted defendant Mander and settling defendant Equilibra. *Id.* ¶ 119. Since the filing of the initial complaint in this action, Ross has placed Gentle Wind on his web site's list of "controversial groups, some called 'cults.'" *Id.* ¶ 122.

The amended complaint asserts claims against the Ross defendants under RICO and the Lanham Act (Counts I and II) as well as common-law claims of defamation, tortious interference with advantageous relationships, intentional infliction of emotional distress, negligent infliction of emotional distress and false light invasion of privacy (Counts III-VII). The Ross defendants' motion seeks dismissal of all counts on the basis of an asserted lack of personal jurisdiction.

C. Discussion

In order to show that this court may exercise personal jurisdiction over the Ross defendants, the plaintiffs must make a *prima facie* showing of jurisdiction by “citing to specific evidence in the record that, if credited, is enough to support findings of all facts essential to personal jurisdiction.” *New Life Brokerage Servs., Inc. v. Cal-Surance Assocs., Inc.*, 222 F.Supp.2d 94, 97 (D. Me. 2002) (citation and internal quotation marks omitted). When no evidentiary hearing is held,

the plaintiff must make the showing as to every fact required to satisfy both the forum’s long-arm statute and the due process clause of the Constitution. In so doing, the plaintiff must make affirmative proof beyond the pleadings. When determining whether the plaintiff has made the requisite *prima facie* showing, the court considers the pleadings, affidavits, and exhibits filed by the parties. For the purposes of such a review, plaintiff’s properly supported proffers of evidence are accepted as true and disputed facts are viewed in a light favorable to the plaintiff[;] however[,] unsupported allegations in the pleadings need not be credited.

Id. (citations and internal quotation marks omitted).

Where, as here, the parties are residents of different states, the exercise of personal jurisdiction over a non-resident defendant is governed by the forum state’s long-arm jurisdiction statute. Maine’s long-arm jurisdiction statute applies by its terms “so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment.” 14 M.R.S.A. § 704-A(1). Therefore, on a motion to dismiss for lack of personal jurisdiction, the court’s inquiry focuses on whether the assertion of jurisdiction violates due process.

Danton v. Innovative Gaming Corp. of Am., 246 F.Supp.2d 64, 68 (D. Me. 2003) (citations omitted).

The plaintiffs do not appear to contend that this court has general personal jurisdiction over the Ross defendants; such jurisdiction arises when a defendant has continuous and systematic general business contacts with the forum state. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 619 (1st Cir. 2001). In this case, the plaintiffs rely on contacts that cannot reasonably be described as continuous and systematic. Plaintiffs’ Opposition to Motion to Dismiss of Defendants Rick A. Ross, etc. (“Ross

Opposition”) (Docket No. 73) at 6-16, *see also id.* at 5 n.5. The issue must accordingly be analyzed on the basis of specific personal jurisdiction, which has three elements.

First, an inquiring court must ask whether the claim that undergirds the litigation directly relates to or arises out of the defendant’s contacts with the forum. Second, the court must ask whether those contacts constitute purposeful availment of the benefits and protections afforded by the forum’s laws. Third, if the proponent’s case clears the first two hurdles, the court then must analyze the overall reasonableness of an exercise of jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.

Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999). The Ross defendants do not address any of these elements individually but rather rely on case law that deals with attempts to establish personal jurisdiction based on internet activity. Ross Motion at 7-10.

Among the many paragraphs of the amended complaint cited by the plaintiffs in their response, Ross Opposition at 1-5, the only ones that may reasonably be construed to allege facts relevant to the question of personal jurisdiction are the following:

Paragraph 2: plaintiff The Gentle Wind Project is a Maine nonprofit corporation with a place of business in Kittery, Maine;

Paragraph 111: Ross controls the Institute, which in turn operates a web site;

Paragraph 112: the web site may be and has been viewed by readers in the state of Maine;

Paragraph 114: the web site offers products and services for sale;

Paragraph 115: the web site contains a page in which the Ross defendants solicit donations and an e-mail address by which readers are invited to interact with Ross; and

Paragraph 119: the web site contains a link by which the viewer may be taken to other specific web sites, one of which is operated by Maine residents and two others of which allow the viewer to read a

report or reports which “specifically reference[] the State of Maine” and “indicate[] that much if not all of the conduct [described] occurred in Maine,” paragraphs 35, 38, 78, 80, 83, 101.

The plaintiffs also rely on the Declaration of Mary Miller (“Miller Decl.”) (Docket No. 74), but the only paragraph of that affidavit cited in their memorandum of law, Ross Opposition at 2-5, that mentions Maine is a reference to twelve letters sent to Gentle Wind from “GWP volunteers” who are residents of Maine who “have seen Rick Ross’ web site.” Miller Decl. ¶ 22.

The plaintiffs contend that the content of the reports and the statements on the Ross web site quoted above are defamatory and have caused them damage in Maine, including damage to their reputations — although all of the individual plaintiffs reside outside Maine — and a decrease in donations. Ross Opposition at 6. These alleged actions by Ross provide the basis for all of the claims asserted against him in the amended complaint. The plaintiffs contend that Ross “targeted Maine as the primary focus of interest in Gentle Wind” by “putting materials on [the] web site that identify Maine as the focal point of allegations of cult behavior, sexual misconduct,” etc., rendering “inescapable” “[t]he conclusion . . . that Ross intended to direct his conduct at Maine and its residents — and in doing so, he purposefully availed himself of the benefits and protections of Maine law.” Ross Opposition at 8. They do not mention the Institute in their argument.³ This assertion goes to the second element of the test for specific jurisdiction, but the conclusion posited by the plaintiffs is hardly “inescapable.” The mere fact that Gentle Wind conducted many of its activities in Maine, making it impossible to criticize those activities without at least inferentially referring to Maine, does not mean that any such criticism necessarily was “directed at” Maine as that term is used in the

³ The failure to mention any basis for this court’s exercise of personal jurisdiction over the Institute as distinct from Ross — or any argument that the two should be considered as a single entity for purposes of the personal jurisdiction inquiry — means that the plaintiffs have waived any opposition to the Institute’s motion. That portion of the motion accordingly should be granted.

case law discussing personal jurisdiction. The plaintiffs also assert that “Maine is qualitatively different than [sic] other places where the Ross Web Site may be viewed” because “posting materials that clearly label a group and/or its members as a Maine-based cult that has engaged in nefarious conduct in Maine” may only be characterized as “targeting Maine.” *Id.* at 7. However, this argument would allow any plaintiff to hale a web site publisher into court in the state in which the plaintiff operated merely because the web site included material that criticized the plaintiff, an expansion of the concept of personal jurisdiction so great as to render the “purposeful availment” prong of the legal test a nullity.⁴

Consideration of the question of the exercise of specific personal jurisdiction in defamation cases begins, but does not end, with *Calder v. Jones*, 465 U.S. 783 (1984). In that case, the plaintiff, a resident of California, brought suit against a Florida corporation, which published a nationally distributed newspaper, and individual residents of Florida. *Id.* at 785. The Supreme Court held that the exercise of personal jurisdiction in California over the defendants was proper “based on the ‘effects’ of their Florida conduct in California,” when the story at issue concerned “the California activities of a California resident[,] . . . impugn[ing] the professionalism of an entertainer whose television career was centered in California” in an article “drawn from California sources,” and the “brunt of the harm” caused by the article “was suffered in California.” *Id.* at 788-89. The Court also found it significant that the circulation of the newspaper in California was more than twice that of any other state. *Id.* at 785.

In *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), a Virginia resident brought an action for libel in federal court in Virginia against two Connecticut newspapers, two of their editors and the

⁴ It is for this reason that I find the reasoning of *Planet Beach Franchising Corp. v. C3ubit, Inc.*, 2002 WL 1870007 (E.D.La. Aug. 12, 2002), at *3 -*4, and *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1332-34 (E.D.Mo. 1996), cited by the plaintiffs, to be unpersuasive.

two reporters who wrote articles which the newspapers posted on their web sites. *Id.* at 258-59. The plaintiff contended that the court could exercise specific personal jurisdiction over the defendants because

- (1) the newspapers, knowing that [the plaintiff] was a Virginia resident, intentionally discussed and defamed him in their articles, (2) the newspapers posted the articles on their websites, which were accessible in Virginia, and (3) the primary effects of the defamatory statements on [the plaintiff's] reputation were felt in Virginia.

Id. at 261-62. This argument does not differ in any substantive way from that asserted here by the plaintiffs.

The Fourth Circuit held that “*Calder* does not sweep that broadly,” and that “application of *Calder* in the Internet context requires proof that the out-of-state defendant’s Internet activity is expressly targeted at or directed to the forum state.” *Id.* at 262-63. “The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.” *Id.* at 263. Nothing offered by the plaintiffs in this case allows the drawing of a reasonable inference that Ross designed the web site at issue “to attract or serve a [Maine] audience.” *Id.* *Accord, Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002) (postings to a bulletin board on a web site were directed at the whole world, not specifically at the plaintiff’s state of residence); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F.Supp.2d 1154, 1165-66 (W.D.Wisc. 2004); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997), at *10 (web site that could be viewed all over the world not targeted at residents of New York). *See also Bailey v. Turbine Design, Inc.*, 86 F.Supp.2d 790, 795 (W.D. Tenn. 2000).

The plaintiffs contend that, even if Ross did not intentionally direct his conduct toward Maine, “the interactivity of his web sites [sic] creates an alternative basis for finding ‘purposeful availment’ for purposes of personal jurisdiction.” Ross Opposition at 14. While the First Circuit has yet to do so, other courts have conceptualized a three-stage model of levels of internet activity to be applied when such a basis for the exercise of specific personal jurisdiction is asserted.

At the 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). The plaintiffs point out that

Ross's Internet web site allows for the purchase and sale of products . . . and provides for direct on-line purchase by entering credit-card and other information[,] . . . solicits donations from viewers, . . . lists an electronic-mail address by which readers are invited to interact with Ross, invites readers to fill out and submit on-line forms, and features an "open forum."

Ross Opposition at 14; Amended Complaint ¶¶ 114-16. These facts, they contend, make the web site "far more than 'passive,'" and "provide[] an alternative basis to find 'purposeful availment.'" *Id.* at 15-16.

However, "the court must find 'something more' than an advertisement or solicitation for sale of goods to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F.Supp.2d 332, 336 (D.N.J. 2000).⁵ An instructive case in this regard is *Best Van Lines, Inc. v. Walker*, 2004 WL 964009 (S.D.N.Y. May 5, 2004), a defamation action based on diversity jurisdiction in which the court

⁵ I find persuasive the reasoning of those courts that have rejected the opposite conclusion reached in *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996), on which the plaintiffs rely, Ross Opposition at 15. *See, e.g., Digital Control Inc. v. Boretronics Inc.*, 161 F.Supp.2d 1183, 1186 (W.D.Wash. 2001) ("the legal analysis in *Inset* is far from compelling"); *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F.Supp.2d 907, 914-15 (D. Or. 1999) (*Inset* represents a "rather inauspicious beginning," following which "the trend has shifted away from finding jurisdiction based solely on the existence of Web site advertising").

declined to exercise specific personal jurisdiction over a defendant whose web site was alleged to have published false information about the plaintiff. The court found it significant that access to the web site was free and open to anyone in the country; that its content in general was not focused on the forum state; that while the defendant posted commentary in response to a site visitor's question, there was no evidence that the defendant specifically solicited comments or questions from viewers in the forum state or advertised in the forum state; that there was no allegation that the defendant "in any way sought out [forum-state] viewers or focused his comments on [forum-state] businesses; and that while the website requested donations, there was no evidence that any donations had been made by residents of the forum state. *Id.* at *5-*6. The court also held that, even if the defendant had "enjoyed significant donations" from residents of the forum state, the alleged defamation was not substantially related to the donations and thus the donations could not serve as the basis for jurisdiction. *Id.* at *6. *See also Conseco, Inc. v. Hickerson*, 698 N.E.2d 816, 820 (Ind. App. 1998) (when dealing with asserted jurisdiction based on interactivity of web site, facts that defendant did not direct any advertising, send e-mails or letters or make any phone calls to forum state must be considered).

The plaintiffs have not met their burden to demonstrate compliance with the second element of the test for specific personal jurisdiction through either of the two alternatives presented. Ordinarily, this would make it unnecessary to consider the third element, the so-called "gestalt factors," and Ross would be entitled to dismissal. However, in this case the plaintiffs have asserted a third basis for jurisdiction based on the Maine Law Court's decision in *Bickford v. Onslow Mem. Hosp. Found., Inc.*, 855 A.2d 1150 (Me. 2004). Ross Opposition at 9-10. The Ross defendants do not respond to this argument.

In *Bickford*, the plaintiff brought claims of defamation, intentional infliction of emotional distress and tortious interference with an economic advantage in state court against a nonresident corporation. 855 A.2d

at 1153. He alleged that the defendant, a North Carolina hospital, had notified credit-reporting agencies that he had been “placed in collection” for failing to pay for services provided to others for which he had no legal obligation to pay, following which he was denied a mortgage because of the apparent outstanding debt.

Id. Construing Maine’s long-arm jurisdiction statute, the Law Court held that the hospital should be held to have reasonably anticipated litigation over the report in Maine, where the plaintiff resided, because the hospital “fail[ed] to take steps to eliminate the use of the allegedly libelous statement” after “it engaged in an exchange with Bickford about the status of the credit report.” *Id.* at 1156. “[A]fter Bickford contested the report, the hospital can be understood to have ‘intentionally directed’ its conduct toward a Maine resident.”

Id. The Law Court stated that this conclusion made it unnecessary to decide “whether simply filing a report with a national credit agency that might share its information with lenders in Maine could establish a connection between the hospital and Maine that would justify Maine’s exercise of control.” *Id.* The plaintiffs in the present case allege that on or about April 29, 2004 — about three weeks before filing the initial complaint in this action — they “wrote to Ross demanding that he cease and desist from posting on his website any further defamatory content concerning Plaintiffs, and that Ross immediately remove all offensive and actionable material from his website,” and that Ross refused to comply with this demand. Amended Complaint ¶ 122. The plaintiffs contend that *Bickford* controls the jurisdictional question presented here, because Ross’s alleged failure to cease and desist “confirmed his intent to direct his conduct at Maine.” Ross Opposition at 10.

With due respect, I am unable to agree that the failure to respond to a cease-and-desist letter transforms conduct by a defendant which occurred prior to delivery of the letter, conduct that cannot reasonably be characterized as intentionally directed at the state of Maine so as to constitute “purposeful availment” of the benefits and protections of Maine law, into conduct that does meet that standard. It is the

allegedly defamatory conduct that predated the existence of the letter that is at issue in this proceeding, and the issue for purposes of the exercise of specific personal jurisdiction is the intentionality of that conduct at the time when it occurred. This court is not bound by the Law Court's decision in *Bickford*; after all, a plaintiff must demonstrate *both* that Maine's long-arm statute grants jurisdiction *and* that exercise of jurisdiction under the statute is consistent with the due process clause of the United States Constitution. *Heller v. Allied Textile Cos.*, 276 F.Supp.2d 175, 182 (D. Me. 2003). It is the essential role of a federal court to interpret the federal Constitution. To allow a plaintiff to create specific personal jurisdiction over a nonresident defendant where none would otherwise exist merely by sending a cease-and-desist letter to that defendant to which no response is made would not comport with basic principles of federal due process.

To the extent that the *Bickford* decision would allow a Maine plaintiff to establish the second prong of the legal test for the exercise of specific personal jurisdiction, exercise of jurisdiction under these circumstances would still not be consistent with notions of fair play and substantial justice. *See United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992); *Snell v. Bob Fisher Enters., Inc.*, 115 F.Supp.2d 17, 22 (D. Me. 2000). A prospective defendant receiving such a letter, under the plaintiffs' theory, would be put to a choice between being haled into court in a distant forum or taking an action which might well be used as evidence of an admission of tortious conduct should legal action be initiated by the plaintiff in the state in which the prospective defendant resides. The parameters of federal due process cannot be stretched to provide such a tactical advantage to individuals who believe that they have been defamed. The result contemplated by the plaintiffs' argument under *Bickford* would not provide fair play or substantial justice to Ross.

D. Request for Further Discovery

The plaintiffs request, in the event that the court finds that they have not established that the exercise of specific personal jurisdiction over Ross by this court is justified, that they be allowed to conduct discovery with respect to jurisdiction “given the strong evidence of minimum contacts and Plaintiffs’ inability fully to know what other contacts might exist.” Ross Opposition at 18. Not surprisingly, the Ross defendants oppose this request. Reply in Support of Motion to Dismiss Amended Complaint, etc. (Docket No. 80) at 9.

In order to be entitled to jurisdictional discovery, a plaintiff must make out a colorable case for the existence of personal jurisdiction. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d at 625. The plaintiff must be diligent in preserving his rights in order to be so entitled, which includes “the obligation to present facts to the court which show why jurisdiction would be found if discovery were permitted.” *Id.* at 626. Here, the plaintiffs have not set forth any “description of the types of contacts it hopes to discover” or any “description of the additional pertinent avenues of inquiry” that they hope to pursue. *Id.* (citation and internal quotation marks omitted). “Failure to allege specific contacts, relevant to establishing personal jurisdiction, in a jurisdictional discovery request can be fatal to that request.” *Id.* at 626-27. In addition, contrary to the plaintiffs’ assertion, they have not presented “strong evidence of minimum contacts,” for the reasons set forth above in the discussion of the motion to dismiss. The only evidence currently before the court on this point suggests that any attempt by the plaintiffs to discover a factual basis for personal jurisdiction would be unsuccessful. Affidavit of Rick A. Ross (Docket No. 42) ¶¶ 13-20. The plaintiffs’ cursory presentation of their request fails to meet the minimum requirements set forth in *Swiss*. It should accordingly be denied.

III. Conclusion

For the foregoing reasons, I recommend that (i) the motion of defendants Garvey, Bergin and J.F. Bergin Company to dismiss Counts I and II be **GRANTED** as to Count II for all three of the moving defendants and as to Count I for defendant J.F. Bergin Company and otherwise **DENIED**; (ii) the motion to dismiss of defendants Rick A. Ross and Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements be **GRANTED**; and (iii) the request of the plaintiffs for further jurisdictional discovery with respect to defendants Ross and Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements 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 10th day of January, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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