

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

JERRY FALWELL,)
)
 Plaintiff,)
)
 v.) No. 6:02cv00040
)
 GARY WILLIAM COHN and GOD.INFO,)
)
 Defendants.)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

In this action, Jerry Falwell, a well-known political and religious figure who lives in Lynchburg, Virginia, has sued Illinois resident Gary Cohn over a completely non-commercial and passive website that criticizes Falwell's remarks about the responsibility of gays and others for the terrorist attacks of September 11, and otherwise parodies Falwell's views. Falwell has sued in this Court, raising trademark claims that seek to ban the use of the name "Falwell" on the web site, even though Falwell lost in arbitration on his central trademark claim. Falwell also alleges a variety of Virginia torts that sound either in trademark or in defamation, complaining that the web site calls Falwell a "false prophet."

As this memorandum explains, the suit has been brought in the wrong forum, because the maintenance of a passive, non-commercial web site that allegedly violates the rights of a Virginia resident is not a proper basis for suit in this Court. Moreover, the non-commercial nature of the web site requires dismissal of the trademark claims. The state libel claim should also be rejected because the statement that Falwell is a "false prophet" is an opinion that can not be proved true or false. The other Virginia tort claims should be dismissed because they depend on the libel or trademark claims which themselves are subject to dismissal.

STATEMENT

A. Facts.

Plaintiff Jerry Falwell is a well-known religious figure who invokes a supposedly literal reading of the Bible to justify a variety of extreme religious and political views. For example, in the immediate aftermath of the terrorist bombing of the World Trade Center and the Pentagon on September 11, 2002, Falwell stated that the sinful behavior of gay people, and America's toleration of gays, was responsible for the suffering that had been visited on this country. *E.g., Jerry-miad / Falwell blames liberals, gays, judges for terror*, <http://www.post-gazette.com/forum/20010917edfal17p3.asp>. Falwell has not hesitated to use the courts to discourage criticism, bringing unsuccessful suits on a variety of theories against those who have had the audacity to criticize or mock him. The allegations of his complaint make it apparent that Falwell is a public figure, and the findings in his previous lawsuits support that characterization. *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988); *Falwell v. Penthouse Int'l*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981).

For several years, Falwell has maintained a site on the Internet at the address www.falwell.com. According to publicly available records that show both contact information for the person registering each name and the date of first creation of the record, this domain name was registered in 1998. Cohn Affidavit ¶ E.

Gary Cohn is a resident of Illinois who objects to Falwell's religious and political views. He does not own any property in Virginia; he has no businesses in Virginia; and, since the creation of the website that is at issue in this case, he has never visited Virginia. The web site at issue in the case was created in Illinois, and rests on a server in Illinois. The only connections between this case and Virginia are that Falwell lives here and that in Virginia, just as in every other state and country,

an Internet viewer could access Cohn's web site by logging onto the Internet and using a browser to visit the site.

After Falwell made his statements about the cause of the September 11 bombings, Cohn posted a web site that criticized Falwell for these statements and poked fun at his advocacy of Biblical literalism by stating that God was angry because people were "cherry picking" the Bible (a favorite Falwell expression), portraying Falwell with a beard, and stating that he was wearing a beard because the Bible calls for men to refrain from cutting their hair. Other parts of the web site poked fun at Falwell's penchant for giving advice by selecting passages from the Bible and asking for advice about how to comply with them. Yet another page purported to discover a "bible code" that reveals that Falwell was a "false prophet" like Jim Jones and David Koresh. A graphic showed Falwell repeatedly sticking his foot into his mouth. A printout of Cohn's web site (in an earlier version as well the current one) is attached as Exhibit A.

The web site contains no advertisements, and does not provide any opportunity for viewers to purchase any products or to communicate with any sellers of products. It is completely noncommercial, existing for the purpose of expressing Cohn's disapproval of Falwell's views.

Cohn placed this web site on the Internet using the domain names "jerryfalwell.com" and "jerryfallwell.com." These names accurately portray the subject matter of the web site, inasmuch as the site is about Jerry Falwell. The second name, "jerryfallwell.com", also parodies Falwell by combining his name with the word "fall," thus expressing Cohn's wish that Falwell should "fall." Cohn Affidavit ¶ 4. The first of these names was registered in 1999. *Id.* and Exhibit E. Because, under the system for the registration of domain names, names are available for registration on a first-come, first served basis, *Panavision Int'l v. Toepfen*, 141 F.3d 1316, 1318-1319 (9th Cir. 1998),

Falwell himself could have registered these names when he selected his falwell.com domain name in 1998. He chose not to do so.

Cohn listed “god.info” as the contact name for the domain name jerryfallwell.com. The address listed for “god.info” is Cohn’s own business address in Highland Park, Illinois. The contact name “god.info” is of a piece with Cohn’s parody of Falwell, suggesting that it is God himself who is responsible for the web site’s criticisms of Falwell. God.info is not a separately incorporated entity, and has no existence apart from Cohn himself.

B. Proceedings to Date.

On October 26, 2001, John Midlen, acting as counsel for Falwell, sent Cohn a demand letter asserting that Cohn’s domain names violated Falwell’s rights under the federal and state trademark laws, and threatening to bring suit against Cohn unless he promptly surrendered those names to Falwell. Cohn Affidavit, Exhibit B. Cohn promptly responded to Midlen’s letter, denying any violation of the trademark laws but also twitting Falwell for his threat to go to Court in light of other public statements Falwell had made denouncing “radicals” for using lawyers and the courts to advance their agenda. *Id.* Cohn suggested that the parties use the Uniform Dispute Resolution Procedure (“UDRP”), an alternate dispute resolution procedure established by the Internet Corporation for Assigned Names and Numbers (“ICANN”) to decide who was entitled to the domain names.

Falwell accepted this suggestion and filed a complaint against Cohn with the World Intellectual Property Organization (“WIPO”), alleging that Cohn had registered the domain names in bad faith and without any legitimate claim to use the names. Cohn Affidavit, Exhibit C. WIPO is an international organization of trademark enforcement interests, and the selection of WIPO as

a forum for UDRP proceedings is known to favor trademark holders through WIPO's designation of the lists of neutral arbitrators who are eligible to decide each case. Mueller, *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy*, <http://dcc.syr.edu/roughjustice.pdf>; see also Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP* (August 2001), <http://aix1.uottawa.ca/~geist/geistudrp.pdf> (studies show that, by allowing complainants to select arbitration provider, UDRP biases outcomes in favor of complainants). Falwell acknowledged that he has never registered his name as a trademark, but was proceeding based on a theory of common law trademark. *Id.* 8. After a proceeding in which both Falwell and Cohn were each permitted to name one of the arbitrators, and to participate in the selection of the third arbitrator from a list provided by WIPO, the arbitration panel rejected Falwell's claims. *Falwell and The Liberty Alliance v. Gary Cohn, Prolife.net and God.info*, Case No. D2002-0184 (WIPO June 3 2002), attached as Exhibit D. All three arbitrators ruled that Falwell had not introduced sufficient evidence showing use of his name as a trademark to establish common law trademark rights, and, by a majority of 2-1, they ruled that Cohn's use of Falwell's name to describe a web site whose subject was Jerry Falwell was "a legitimate noncommercial or fair use of the domain name."

Unfazed by the ruling in that forum, Falwell filed a complaint in this Court on June 20, 2002. The complaint alleges several causes of action under the federal trademark laws – false designation of origin under section 43(a) of the Lanham Act (Count I), dilution under section 43(c) of the Lanham Act (Count VII), and cybersquatting under section 43(d) of the Lanham Act (Count VIII). The complaint also alleges libel (Count II) and a variety of other state law torts, most of which simply restate the libel or trademark claims.

On July 8, 2002, the complaint was mailed to defendants with a request for waiver of service of summons. Defendants did waive service, while preserving all of their objections to the complaint; defendants now move to dismiss the complaint in its entirety.

SUMMARY OF ARGUMENT

This case should be dismissed for lack of personal jurisdiction. Plaintiff apparently asserts jurisdiction over defendants on the theory that the web site constitutes the transaction of business or the commission of a tort in Virginia. However, well-established case law establishes that a web site, even if tortious, does not provide the basis for the exercise of personal jurisdiction unless the web site is both commercial and sufficiently interactive that the defendant is engaged in repeated commercial transactions in the forum state sufficient that he should anticipate being sued there.

The Court can dismiss the entire complaint based on personal jurisdiction; should it dismiss on that basis, there will be no need for this Court to reach the remaining issues, which can be considered in the event the complaint is refiled in an appropriate forum, such as the Northern District of Illinois. If the Court choose not to resolve the case solely on personal jurisdiction, however, each count of the complaint should be dismissed for failure to state a claim. The trademark claims should be dismissed because Cohn's web site is entirely non-commercial, and hence outside the purview of section 43 of the Lanham Act as well as of the state unfair competition claim. The libel claim should be dismissed because Cohn's characterization of Falwell as a "false prophet" is his constitutionally protected opinion about Falwell's religious and political views, not an assertion of verifiable fact. The remaining counts should be dismissed both because each of them depends on the viability of the trademark or libel claims, and, in the case of the conspiracy claims, because essential elements have not been pleaded. Finally, the claim against defendant "god.info" should

bedismissed under Rule 17 because it is simply a name that Cohn has used, not an entity with any existence separate and apart from Cohn.

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS.

To be subject to in personam jurisdiction, Cohn must have “certain minimum contacts with [Virginia] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted); *Ellicott Machine Corp. v. John Holland Party*, 995 F.2d 474, 477 (4th Cir. 1993). The minimum contacts test requires “in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant’s connection with the state must be such that “it should reasonably anticipate being haled into court” in the state in the event of a dispute. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980).

The minimum contacts analysis generally requires assessment of whether the court is exercising “general” or “specific” jurisdiction. Falwell can not sustain his burden of proving either general or specific jurisdiction because the only conduct at issue — Cohn’s creation in Illinois of a web site where he can express his opinions about Falwell — occurred outside Virginia and entailed no contact by Cohn with Virginia. Cohn Affidavit ¶ 4.¹

¹On a motion to dismiss for lack of personal jurisdiction, the Court is not limited to considering the face of the complaint; defendant’s evidence may also be considered. *Mylan Labs v. Akzo*, 2 F.3d 56, 62 (4th Cir. 1993). Plaintiff has the burden of proof on this motion. *Young v. FDIC*, 103 F.3d 1180, 1191 (4th Cir. 1997).

A. General Jurisdiction Is Lacking.

The exercise of general jurisdiction requires that a defendant's contacts with the forum be "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Even "continuous activity of some sorts within a state is not enough to support [general jurisdiction]." *International Shoe*, 326 U.S. at 318. "This is a fairly high standard in practice." *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990). *Accord, Nichols v. GD Searle Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993). For Virginia to assert general jurisdiction over a non-resident defendant, his contacts with Virginia must be of such a "continuous and systematic" nature that personal jurisdiction is proper even if the action is unrelated to the defendant's contacts with the state. *Id.* Where a defendant is not licensed to do business in the forum state, does not maintain offices or employees there, and owns no property in the forum, the facts do not support general jurisdiction.

The complaint does not allege any basis for general jurisdiction, and the record does not support it. Gary Cohn does not live in Virginia. Cohn Affidavit ¶ 2. He owns no property in Virginia, has no employees or offices in Virginia, and has no contacts with Virginia. *Id.* ¶ 3. Cohn is a self-employed resident of Illinois who does not compete with Falwell, and in any event his web site is unrelated to his employment. *Id.* ¶¶ 3, 5. The web site is something he maintains in his spare time, and he gains no monetary benefit from its operation. *Id.* ¶¶ 5, 6. Cohn has not been in Virginia since the web site was created or the domain names for the web site were registered. *Id.* ¶ 3. Put simply, Cohn does not have "systematic and continuous" contacts with the State of Virginia so as to support the exercise of general jurisdiction.

B. Specific Jurisdiction Is Lacking.

Specific jurisdiction is proper when a defendant has sufficient contacts with the forum that are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8; *Diamond Healthcare v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000). To maintain specific personal jurisdiction, Falwell must show that: (1) Cohn has purposely availed himself of the privilege of conducting business or causing consequences in Virginia; (2) the cause of action arises from his activities in Virginia; and (3) his conduct has a substantial enough connection with Virginia to make the exercise of jurisdiction reasonable. The defendant's contacts with the forum state must have been sufficiently purposeful that the defendant should have had fair warning that he would be subject to suit there. *Federal Ins. Co. v. Lake Shore*, 886 F.2d 654, 657-658 (4th Cir. 1989).

The only allegations in Falwell's complaint to support personal jurisdiction are boilerplate assertions that Cohn's web site "constitute[s] the transaction of business within" Virginia, or "the commission of [tortious] acts within" Virginia, or "causing of [tortious] injury in Virginia by acts outside Virginia" by defendants who allegedly regularly do or solicit business in Virginia or engage in a persistent course of conduct in Virginia. Complaint ¶ 5. The complaint also alleges that Cohn registered the offending domain names using a registrar located in Virginia. These allegations do not provide a sufficient basis for the assertion of personal jurisdiction.

To the contrary, courts faced with claims of personal jurisdiction based on wrongdoing on a defendant's web site **consistently** rule that contact limited to viewing a non-resident defendant's non-commercial web site (or a commercial but merely passive web site) in the forum, is simply

insufficient to warrant the assertion of personal jurisdiction.² Following the lead of the court in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997), the courts – including the Fourth Circuit in *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002) – have decided that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet,” *id.* at 1124, *quoted in ALS Scan*, 293 F.3d at 713. Consequently, the courts have adopted a “sliding scale” between passive and interactive web sites:

² See, e.g., *Cybersell v. Cybersell*, 130 F.3d 414, 419 (9th Cir. 1997) (Florida corporation’s use of Arizona corporation’s mark on web site did not support exercise of personal jurisdiction); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25, 29 (2d Cir. 1997) (establishment of web site accessible to New York residents was insufficient to confer specific jurisdiction arising from use of trademark in web site); *Oasis Corp. v. Judd*, 132 F. Supp.2d 612, 623 (S.D. Ohio 2001) (fact that plaintiff was based in Ohio did not support personal jurisdiction of trademark and libel claims against operator of non-commercial gripe site from Ohio, even though site was sufficiently interactive to permit viewers to generate automatic letters in support of defendant to the media and to the plaintiff); *Search Force v. Dataforce Int’l*, 112 F. Supp.2d 771, 778 (S.D. Ind. 2000) (“recent district court cases . . . reinforce the notion that a defendant must avail itself of the forum state in a manner that is somewhat more purposeful than an allegedly infringing domain name or use of an allegedly infringing mark on an interactive web site”); *Coastal Video Comms. Corp. v. Staywell Corp.*, No. 2:99:cv198, 1999 U.S. Dist. LEXIS 11827, at *26 (E.D. Va. Aug. 2, 1999) (interactive web site alone did not confer personal jurisdiction); *Nicosia v. De Rooy*, No. C98-3029, 1999 U.S. Dist. LEXIS 17451, at *8-9 (N.D. Cal. July 7, 1999) (mere creation of a web site accessible by forum residents does not amount to purposeful availment); *Patriot Sys., v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1324 (D. Utah 1998) (no jurisdiction over company based merely on passive web site that provided information to those interested in it); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 113-115 (D. Conn. 1998) (no jurisdiction for web site which provided no way to order items advertised thereon); *Santana Prods. v. Bobrick Washroom Equip.*, 14 F. Supp. 2d 710, 714 (M.D. Pa. 1998) (jurisdiction insufficient based on web site through which no business was transacted); *Blackburn v. Walker Oriental Rug Galleries*, 999 F. Supp. 636, 639 (E.D. Pa. 1998) (contacts insufficient to support jurisdiction when web site in question provided the ability to receive e-mail messages from viewers but was otherwise passive); *Mallinckrodt Med. v. Sonus Pharms.*, 989 F. Supp. 265, 272-273 (D.D.C. 1998) (no jurisdiction based merely on posting of allegedly defamatory statements on America On Line). *Cf. Carver v. H.R. Plus*, 992 F. Supp. 1293, 1295 (D. Utah 1998) (no personal jurisdiction based simply on computer access to forum state).

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Zippo, 952 F. Supp. at 1124, quoted in *ALS Scan*, 293 F.3d at 713-714. In *ALS Scan*, the Fourth Circuit specifically “adopt[ed] the model developed in *Zippo*.” 293 F.3d at 713.³

Courts have repeatedly employed the *Zippo* analysis to determine the availability of personal jurisdiction in trademark cases like this one. Thus, for example, in *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.2d 25 (2d Cir. 1997), a St. Louis jazz club published a website using its name, the Blue Note, which was the same as the world-famous club in New York City. The New York club sued for trademark violations, but the district court refused to exercise jurisdiction, because, as here, defendant had no presence of any kind in the forum “other than the Web site that can be accessed worldwide.” 937 F. Supp. at 301. The court found that to permit jurisdiction in New York would have violated due process because the defendant did not actively seek to encourage residents of the forum to access the site and conducted no business in the forum. As the court stated, “[c]reating a [web] site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed

³*Young v. New Haven Advocate*, 184 F. Supp.2d 498 (W.D. Va. 2001), implicitly rejected *Zippo* in a defamation suit where jurisdiction was based on the commercial web site of a newspaper. However, the case was decided before *ALS Scan*, and is pending on appeal. No. 01-2340, *argued* June 3, 2002.

toward the forum state.” *Id.*, citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1992). The basis for asserting personal jurisdiction over Cohn is even weaker because his web site conducts no business of any kind whatsoever.

Similarly, in *Neogen Corp. v. Neo Gen Screening*, 282 F3d 883 (6th Cir. 2002), a Michigan company named Neogen sued a Pennsylvania company named Neo Gen over the use of the domain name “neogenscreening.com.” Although the plaintiff was a Michigan company and the defendant was accused of infringing its trademark, the Sixth Circuit held that the mere operation of a passive website using a trademark that allegedly belonged to the Michigan company was not sufficient to subject Neo Gen to jurisdiction in Michigan. “The level of contact with a state that occurs simply from the fact of a website’s availability is therefore an ‘attenuated’ contact that falls short of purposeful availment.” *Id.* at 890. Jurisdiction may be based on the website only if the way in which the defendant uses the website to interact in an intentional manner with commercial customers in Michigan is substantial enough. In *Neogen*, the defendant provided its Michigan customers with passwords that they could use to download test information that they were buying from the defendant, and the website provided a geographic breakdown of data that specifically listed Michigan. *Id.* at 890-891. The Court stated, however, that even the sufficiency of these interactive features to support jurisdiction was a close question, so close that the Court chose not to rest its holding on the website but rather on other contacts that the defendant had with Michigan. *Id.* at 891.

By contrast, in *Berthold Types Ltd. v. European Mikrograf Co.*, 102 F. Supp.2d 928 (N.D. Ill. 2000), two companies that market typefaces were in litigation over whether the defendant’s font software violated the plaintiff’s trademarks. “The exercise of jurisdiction is ultimately determined

by examining the level of interactivity and the commercial nature of the exchange of information.” *Id.* at 933. Although the defendant’s web site enabled potential customers to interact with the defendant, and enabled existing customers to access information about their commercial relationship with the defendant, jurisdiction was lacking because sales could not actually be conducted over the site.

Under this analysis, Cohn’s web site cannot provide the basis for personal jurisdiction. His site is not only passive, but entirely non-commercial. Cohn Affidavit ¶ 6. His message does not in any way target Virginia residents. *See IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) (affirming dismissal based on lack of personal jurisdiction because tortious conduct was not expressly aimed at the forum). Cohn is not selling anything, and his web site contains no advertisements for the sale of products and services. Cohn Affidavit ¶ 6; *see generally* Exhibit A. Accordingly, there is no basis for personal jurisdiction over Cohn in Virginia.

Because the complaint identifies Herndon, Virginia as the location of the registrar at which Cohn allegedly registered both domain names, ¶ 7, Falwell may argue that these actions provide a basis for the exercise of personal jurisdiction in this case. This allegation is inaccurate because Cohn was not the original owner of one of the names, Cohn Affidavit, ¶ 4, and Falwell acknowledges that the names were held by registrars outside Virginia by the time the complaint was filed. Complaint ¶ 7. But even if the domain names were still held by Virginia-based registrars, the presence of property in Virginia is not a sufficient basis for the exercise of personal jurisdiction over the property’s owner. *Shaffer v. Heitner*, 433 U.S. 186 (1977). Nor is the mere use of a registrar in Virginia a sufficient basis for personal jurisdiction. This much is clear from the Fourth Circuit decisions holding both that registering a domain name with a registrar located in Virginia provides

a basis for in rem jurisdiction under the new cybersquatting amendments to the Lanham Act, and that in rem jurisdiction cannot be exercised under the cybersquatting laws if the plaintiff can obtain personal jurisdiction over the person who registered the names. *Harrods Ltd. v. Sixty Internet Domain Names*, Nos. 00-2414 & 01-1928 (4th Cir. August 23, 2002), Slip Op. at 11-12, 2002 WL 1941428; *Porsche Cars v. Porsche.net*, No. 01-2028 (4th Cir. August 23, 2002), Slip Op. at 14, 2002 WL 1941442. If the registration of names in a particular forum were alone sufficient for personal jurisdiction there, the entire in rem subsection of the cybersquatting law would be rendered nugatory, and the Fourth Circuit cases upholding in rem jurisdiction in Virginia courts would be wrong.⁴

Stripped of the ability to rely on the location of the registrars, Falwell's assertion that jurisdiction over Cohn is proper in Virginia must be based on the fact that Falwell himself lives here. However, the courts have previously rejected the proposition that a defamatory statement made in the defendant's home state constitutes a tort committed in the plaintiff's home state, even if the defendant knew that the plaintiff was located there. *Nelson v. Bulso*, 149 F.3d 701 (7th Cir. 1998). Similarly, the inclusion of a trademark in a non-commercial Internet site is not enough, by itself, to subject a defendant to personal jurisdiction in the home state of the trademark holder. We have found no case authorizing personal jurisdiction solely on that basis, and squarely to the contrary are cases such as *Bensusan*, *Neogen*, and other such cases. *See also Mid City Bowling Lanes & Sports Palace v. Ivercrest*, 35 F. Supp. 2d 507, 511-512 (E.D. La. 1999), *aff'd mem.*, 208 F.3d 1006 (5th Cir. 2000) (even in a commercial context, inclusion of a trademark is insufficient to support personal

⁴ In any event, the proper venue for claims based on the registration of names would be in the Eastern District of Virginia, not this Court.

jurisdiction).

If any tort was committed (which defendants deny), it was committed in Illinois, where the website was created, and where the HTML code was loaded onto the server. Cohn Affidavit ¶ 5. See *Christian Science Bd. v. Robinson*, 259 F.3d 209, 218 and n.11 (4th Cir. 2001) (jurisdiction in North Carolina based on defendant having asked a North Carolina resident to create a web site for him); *Compuserve v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (jurisdiction could be exercised in Ohio over a defendant who had loaded his software onto the plaintiff's server in Ohio, but Court pointedly declined to extend its holding to any Internet user who happened to use the software on a computer in a different state). In sum, Virginia's interest in protecting Falwell from an Illinois resident's exercise of his First Amendment rights is slim, and does not trigger personal jurisdiction based upon the Virginia long-arm statute.

Indeed, a finding of jurisdiction here would have chilling implications for citizens' right to speak freely about corporations and public figures with whom they disagree. This case is not, after all, about a manufacturer or entrepreneur who placed a product in the stream of commerce in the hopes of making profits, an expectancy that can be balanced against the danger of being sued in some location where the product came to rest and caused injury. Every person who posts an opinion on the Internet knows that people sitting at computers not just in their own country, but in foreign lands around the globe, may gain access to their views by simply "clicking on their link" or finding them through a search engine. If citizens knew that they could be forced to defend themselves against litigation in every forum, they would surely be chilled in the exercise of their First Amendment rights. The Fourth Circuit specifically adverted to this danger in adopting the *Zippo*

test. 293 F.3d at 713.⁵

This danger is amply shown by the case before the Court. Gary Cohn is an individual living and working in Illinois who feels compelled to speak about Falwell. Cohn is not a competitor of Falwell, and derives no financial benefit from his non-commercial web site. *Id.* ¶ 23. Cohn created a forum where he can express his opinions about the plaintiff's political and religious views. And yet he has been haled into court several hundred miles away, where he knows nobody and where he has not even visited since registering the domain names. Cohn has done nothing to purposefully avail himself of the privilege of conducting activities within Virginia. His creation of a non-commercial web site from his home in Illinois certainly has not given him reason to "reasonably anticipate being haled into court" in Virginia. Consequently, Falwell's action should be dismissed for lack of personal jurisdiction.

II. THE TRADEMARK CLAIMS SHOULD BE DISMISSED BECAUSE COHN'S WEB SITE IS ENTIRELY NONCOMMERCIAL.

In moving to dismiss the trademark claims under Rule 12(b)(6), Cohn assumes for purposes of this motion that, as alleged, Falwell has used his name in a sufficiently commercial manner to designate the origins of commercial goods and services to qualify as a common law trademark, and also that the name has such pervasive national recognition as such a trademark that it meets the criteria for a "famous" mark and thus qualifies for protection against dilution. Nevertheless, all of

⁵ In recent cases, for example, France and Germany have sought to bar leading internet companies from allowing sites accessible in their countries from mentioning Nazi's or carrying Nazi paraphernalia, which are beyond the bounds of free speech protection in those countries. Other countries, such as China and Cuba, have undertaken efforts to purge the internet of any dissenting opinions. If jurisdiction is allowed anywhere that a web site is accessible, the chilling effects on free Internet speech will become even more serious.

the trademark claims should be dismissed because Cohn's web site is completely non-commercial. For this reason, his use of Falwell's name to denote the subject that is criticized on the web site does not violate any of the various provisions of the trademark laws on which the complaint rests – the false designation of origin claim under Lanham Act section 43(a), the dilution claims under Lanham Act section 43(c), or the cybersquatting claims under Lanham Act section 43(d). None of these claims applies to a wholly non-commercial web site like Cohn's. Although the complaint alleges that the web site is a "use in commerce", done "for commercial gain," and is a "commercial use in commerce" of Falwell's mark, Complaint ¶¶ 9(b), 11, 32, the Court can consider the web sites themselves under Rule 12(b)(6) without converting the motion into a summary judgment motion because the sites are "integral to and explicitly relied on in the complaint." *Phillips v. LCI Int'l*, 190 F.3d 609, 618 (4th Cir. 1999), *citing Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir. 1998); *Cortec Indus. v. Sum Holding*, 949 F.2d 42, 48 (2d Cir. 1991); *Williamson v. Virginia First Savings Bank*, 26 F. Supp.2d 798, 800 (E.D. Va. 1998). The Court may also take judicial notice of public records available on the World Wide Web, *Cairns v. Franklin Mint Co.*, 107 F. Supp.2d 1212, 1216 (C.D. Cal. 2000); *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F. Supp. 2d 1058, 1066 (N.D. Cal. 1999), because such records are admissible as self-authenticating documents. *See also Elliott Associates LP v. Banco de la Nacion*, 194 FRD 116, 121 (S.D.N.Y. 2000) (prime rates on Fed Reserve web site are self-authenticating and hence admissible); *Sannes v. Jeff Wyler Chevrolet*, 1999 U.S. Dist. LEXIS 21748 at *10 n.3 (S.D. Ohio. 3/31/99) (FTC press releases). The web sites reveal their entirely non-commercial character, and, as this section of the memorandum shows, none of the trademark causes of action alleged in the complaint can be pursued against a purely non-commercial use of a trademark.

Because he has never registered his name as a trademark, Falwell cannot take advantage of the cause of action for trademark infringement under section 32 of the Lanham Act, 15 U.S.C. § 1114, because that section gives rights only to the holder of a registered trademark. *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 768 (1992); *Basile S.p.A. v. Basile*, 899 F.2d 35, 37 n.1 (D.C. Cir. 1990) ("Basile's registration is a predicate to its protection under the Lanham Act."). Instead, Falwell brings his claims under various subsections of Lanham Act section 43 – a claim for false designation of origin under section 43(a), a claim for dilution under section 43(c), and a claim for cybersquatting under the recently added cybersquatting law, section 43(d). None of these provisions, however, apply to a purely non-commercial use such as Cohn's web site.

The exclusion of non-commercial uses is accomplished first and foremost by section 43(c)(4), which contains a proviso limiting the scope of all of section 43 of the Act: "The following shall not be actionable **under this section**: . . . (B) Noncommercial use of the mark. (C) All forms of news reporting and news commentary." (emphasis added). The three federal trademark claims alleged in this case – false designation, dilution and cybersquatting – are all part of the same section of the Lanham Act, § 43, and hence are all covered by this exclusion. Section (c)(4) was added to the Act when it was amended in 1989; the House Judiciary Committee explained the purpose was to avoid any impact on non-commercial speech:

[T]he proposed change in Section 43(a) should not be read in any way to limit political speech, **consumer** or editorial **comment**, parodies, satires, or other constitutionally protected material. . . . The section is narrowly drafted to encompass only clearly false and misleading commercial speech.

135 Cong. Rec. H1207, H1217 (daily ed., April 13, 1989) (emphasis added).

The purpose of the statute's noncommercial use exception was to protect "parody, satire, editorial and other forms of expression that are not part of a commercial transaction." *Dr. Seuss Enterprises*

v. Penguin Books USA, 924 F. Supp. 1559, 1574 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997), quoting Congressional Record statement of Senator Hatch.

Moreover, each of the subsections of section 43 on which Falwell relies contains a separate limitation that excludes noncommercial uses such as Cohn's. Section 43(a) extends the cause of action for false designation of origin only to a defendant that makes an improper "use in commerce" of the plaintiff's trademark. Although the term "commerce" has for many years been defined by the Lanham Act to extend to the full reach of the commerce clause, 15 U.S.C. § 1127 (second unnumbered paragraph), the term "use in commerce" was given a far more restrictive meaning when the Lanham Act was amended in 1988. "Use in commerce" is defined by the seventh unnumbered paragraph of Section 45 of the Lanham Act, 15 U.S.C. § 1127, as meaning "bona fide use of a mark in the ordinary course of trade" Without "use in commerce," there is no violation of section 43(a). *Endoscopy-America v. Fiber Tech Medical*, 243 F.3d 538 (4th Cir. 2001), published at <http://pacer.ca4.uscourts.gov/opinion.pdf/001032.U.pdf> (copy attached). "The act's purpose, as defined in Section 45, is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct." *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971). *See also* S. Rep. 100-515, 100th Cong., 2d Sess. 44 (1988), *reprinted* in 1988 U.S. Code Cong. Ad. News at 5607 ("Amendment of the definition of 'use in commerce' [in section 45 of the Lanham Act] is one of the most far-reaching changes the legislation contains. . . . The committee intends that the revised definition of 'use in commerce' be interpreted to mean **commercial use** which is typical in a particular industry.") (emphasis added); *accord, Chance v. Pac-Tel Teletrac*, 242 F.3d 1151, 1157 (9th Cir. 2001). Cohn engages in none of these activities.

At the same time it was amending section 45, Congress amended section 43(a) to create a

cause of action for false representations about products represented by trademarks. As explained by Representative Kastenmeier, the sponsor of the legislation and the Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, the sponsors recognized that this change threatened to raise “a host of constitutional problems” insofar as the section applied to non-commercial speech. “To avoid legitimate constitutional challenge, it was necessary to carefully limit the reach of the section. . . . [T]he reach of the section specifically extends only to false and misleading speech that is encompassed within the “commercial speech” doctrine developed by the United States Supreme Court.” 135 Cong. Rec. H-1216, 1989 WL 191679 (April 13, 1989). It is apparent from the web site that Cohn’s speech is not “commercial speech.” Hence, it is outside the purview of section 43(a).

Sections 43(c) and 43(d) also include express limitations to “commercial” uses of trademarks. Thus, the cause of action for dilution in section 43(c) entitles the owner of a famous mark “to an injunction against another person’s **commercial use in commerce** of a mark or trade name.” (emphasis added) And not only does section 43(d) extend the cause of action for cybersquatting only to actions of a person who has “a bad faith intent **to profit** from that mark” (emphasis added), and includes as a factor militating against a finding of bad faith the defendant’s “**bona fide noncommercial** or fair use of the mark” (emphasis added), but Congress added a savings clause that explicitly disclaimed any intent that the cybersquatting law override either the First Amendment or section 43(c)(4) of the Lanham Act. Public Law 106-113, Section 3008, 113 Stat. 1501A-551. The sponsors of the cybersquatting law specifically disclaimed any intention to provide a cause of action against persons who registered domain names for the purpose of delivering comment or criticisms of trademark owners by identifying the owners with their marks. *See House*

Report 106-412, 106th Cong. 1st Sess. (1999), at 10.

Consequently, several courts have refused to countenance Lanham Act claims against disgruntled consumers whose web sites criticized a company and used that company's trademarked name in the Internet address for the web site. Cohn's web site is similar to the web sites at issue in *Northland Insurance Companies v. Blaylock*, 115 F. Supp.2d 1108 (D. Minn. 2000) and *Bally Total Fitness v. Faber*, 29 F. Supp. 2d 1161, 1165 n.2 (C.D. Cal. 1998); in both cases, consumers were allowed to keep operating their sites. *Northland Insurance* is especially instructive. A disgruntled patron of Northland Insurance Company obtained the domain name "northlandinsurance.com" and posted his criticism of Northland on that site. The site did not display an explicit disclaimer, but nonetheless made clear that it was not sponsored by Northland itself. The court denied Northland Insurance's motion for a preliminary injunction, concluding that defendant's website would not create sustained consumer confusion because it was self-evidently not sponsored by Northland Insurance. The also court held that even if consumers suffered some momentary confusion when searching for Northland Insurance's official website, this did not satisfy the standard for a finding of trademark infringement. Although "initial interest confusion" can be the basis of an infringement action when defendant attempts to "bait" away customers and "switch" them to its own product, it is not evidence of infringement where defendant has no commercial interest in the matter. *See Northland Insurance*, 115 F. Supp.2d at 1119-1120. Because Cohn is not a competing vendor seeking to divert to his web site customers for the sort of commercial goods that Falwell allegedly peddles using his name as a trademark, his use of Falwell's name in his Internet address is entirely proper.

Bally also concerned a disgruntled customer's critical web site. The court in that case

rejected claims of trademark infringement and dilution because the site was non-commercial consumer commentary: “Faber is exercising his right to publish critical commentary about Bally. He cannot do this without making reference to Bally . . . [and a]pplying Bally’s argument would extend trademark protection to eclipse First Amendment rights.” 29 F. Supp.2d at 1164, 1165-1166, 1167. Like the defendants in *Bally* and *Northland Insurance*, Ballock's website is clearly a critical website; his “non-commercial” defense is even stronger than those cases, however, because unlike those defendants who were criticizing a business, Cohn’s web site contains discussion of Falwell’s political and religious views, which are core speech protected by the First Amendment against suppression.

In a few cases, courts have suggested that certain web sites and domain names were rendered “commercial” by dint of their potential for adverse impact on the commercial activities of the plaintiffs in those cases. *E.g.*, *Trade Media Holdings v. Huang & Assoc.*, 123 F. Supp.2d 233, 242 (D.N.J. 2000); *Christian Science Bd. v. Robinson*, 123 F. Supp.2d 965, 971 (W.D.N.C. 2000), *aff’d*, 259 F.3d 209 (4th Cir. 2001) (citing several cases); *Bihari v. Gross*, 119 F. Supp.2d 309, 317 (S.D.N.Y. 2000). However, in every one of these cases, the opinion goes on either to uphold the defendant’s use of the mark, or to find that the defendant was using the mark to raise money or sell its own goods or services or the goods of some other person; admittedly, even a non-profit group uses a trademark “in commerce” when it seeks to raise funds or sell goods or services. Consequently, the cited language is plainly dictum. For example, in *Christian Science*, the defendant **both** solicited donations on the web site, and sold various books, classes and services on the site. 123 F. Supp.2d at 970, 971. In affirming the Fourth Circuit did not discuss the issue of

commerce.⁶

Moreover, the dicta in these cases are not persuasive. None of them discuss the statutory terms at issue here and explain how their dictum is consistent with the statutory definition of the terms and with Congress' evident intent to confine the meaning of the terms. In *Christian Science*, for example, the issue was infringement under section 32, not section 43, and the court discussed the meaning of the term "commerce," but not "use in commerce." Moreover, if any use of a trademark becomes "commercial" simply because it has an adverse impact on the plaintiff's commercial activities, then all consumer commentary and all news reporting would automatically be commercial, and Congress' amendments to sections 43 and 45, and the 1999 proviso to the cybersquatting statute that explicitly preserves the protections of section 43(c)(4)'s "noncommercial use" proviso for the registrants and users of domain names, would be rendered nugatory. Accordingly, the Court should not follow these dicta, but should dismiss the trademark claims on the ground of the web site's noncommercial character.⁷

⁶ As in *Christian Science* case, the Fourth Circuit's decision in *PETA v. Doughney*, 263 F.3d 359 (4th Cir. 2001), did not involve the issue of "commerce" at all. The parties had assumed use in commerce, but litigated the issue whether Doughney's use of the PETA mark was "in connection with goods and services." *Id.* 365. Moreover, assumption that Doughney used PETA's mark in commerce is consistent with Cohn's theory in this case for two reasons: first, because the whole point of Doughney's "parody" was to direct internet viewers to commercial services such as sales of furs, leather goods and meat, that were anathema to PETA, *Id.* 363, 366, and second, because Doughney made public statements suggesting that his ultimate purpose was to extort money from PETA for the sale of his domain name. *Id.* 363. Finally, Falwell does allege that he uses his name to sell credit cards and other merchandise, but even if these allegations are taken as true, the web site is not directed at his commercialization of his religion, but rather at the core political and religious views of which Cohn disapproves. There is no nexus, therefore, between Cohn's web sites and the "use in commerce" of the Falwell name, as defined by the statute.

⁷Count VI, which alleges a common law claim of unfair competition based on the use of the Falwell trademark, similarly falls because of the noncommercial character of the web site in question. The Virginia courts have treated the claim of unfair competition as one of "unfair trading" and "Virginia

III. THE LIBEL CLAIM SHOULD BE DISMISSED BECAUSE COHN'S ASSERTION THAT FALWELL IS A "FALSE PROPHET" IS A STATEMENT OF CONSTITUTIONALLY PROTECTED OPINION.

Count II should also be dismissed because the only statement that is of and concerning Falwell is a statement of opinion, not a statement of fact, and consequently cannot constitutionally be the basis for a libel action.

Count II alleges that the web sites publish an accusation that the Bible is written in a code, and that the code identifies three false prophets: Jim Jones, David Koresh, and Jerry Falwell. The complaint also includes a footnote citing a web site about a book entitled "The Bible Code" which apparently contains a series of "wild, unfounded claims based on stretching statistical evidence to the breaking point." Finally, Count II alleges that defendants have "made other false statements."

Many of these "claims" do not pass the facial standards for a libel claim. The assertion that the web site contains the "accusation" that the Bible is written in a code, and most of the other assertions alleged in the Count, are not "of and concerning" Falwell and hence cannot be the basis for a libel suit, either as a matter of Virginia law, *Scheduled Airlines Traffic Offices v. Objective*, 180 F.3d 583, 593 (4th Cir. 1999), and as a matter of First Amendment law under *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964). Statements about the Bible are not statements about Falwell, however much he may feel that he embodies the Bible. Moreover, the assertion that Cohn has

continues to adhere to a narrow, sharply defined common law definition of unfair competition, *i.e.*, deception by means of which goods of one dealer are palmed off as those of another." *Monoflo Int'l v. Sahm*, 726 F. Supp. 121, 127 (E.D. Va. 1989). The Virginia Supreme Court has held that "the essential element of unfair trading is deception, by means of which goods of one dealer are palmed off as those of another, whereby the buyer is deceived, and the seller receives the profit which, but for such deception, he would not have received." *Rosso & Mastracco, Inc. v. Giant Food*, 104 S.E.2d 776, 781, 200 Va. 159, 166 (1958). Here, Cohn does not appeal to buyers or sellers but only to the public perception of a major religious figure.

“made other false statements” cannot be the basis for a libel claim, both because those statements are not alleged to be of and concerning Falwell, and because both federal and Virginia law require that the defamatory words be set forth in the complaint verbatim. *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215, 3 S.E.2d 405, 410-411 (1939); *Eslami v. Global One Communications*, 48 Va. Cir. 17 (1999); *Bobal v. RPI*, 916 F.2d 759, 763 (2d Cir. 1990); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). Only by such pleading does the plaintiff give the defendant a fair opportunity to file a proper answer to the complaint, or to discern whether the complaint should be dismissed because the alleged defamation is constitutionally protected opinion. *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 707 (N.D. Ill.1990) (plaintiffs alleging defamation must recite the precise language alleged to be defamatory). Accordingly, the viability of Count II (and of other counts which depend on a finding of libel), rests entirely on Falwell’s claim that the web site’s assertion that he is a “false prophet” is false.

However, the term “false prophet” is not a statement of verifiable fact, but rather is a statement of opinion about the validity of Falwell’s religious views that not only cannot possibly be shown to be true or false, but is beyond the proper subject of consideration in the civil courts. Under the First Amendment, although opinion is not per se immune from being the subject of a libel action, “a statement is not actionable unless it asserts a provably false fact or factual connotation.” *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993), citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). Put another way, the question is whether that the opinion “can be reasonably interpreted to declare or imply untrue facts.” *Biospherics v. Forbes*, 151 F.3d 180, 184-185 (4th Cir. 1998). The statement must be considered in the context of the overall publication, so that if it appears in a context where the reader would expect to find opinion rather than fact, a court

is much less likely to decide that the statement is actionable as defamation. *Id.* at 184-185. The question whether a statement is non-actionable opinion is one of law and not fact, and hence is properly decided on a motion to dismiss under Rule 12(b)(6), as was done in *Biospherics* and *Chapin*. See also *WJLA-TV v. Levin*, 264 Va. 140, 152, 564 S.E.2d 383, 390 (2002) (“Whether statements complained of in a defamation action fall within the type of speech which will support a state defamation action is a matter for the trial judge to determine as a matter of law before the matter may be properly submitted to the jury.”).

The web site’s statement that Falwell is a “false prophet” is inherently incapable of being proved true or false. The term “false prophet” is used to describe a person whose religious views the speaker disputes, such as when one religious sect characterizes the leader of another sect as a “false prophet.” *E.g.*, *Hakeem v. INS*, 273 F.3d 812, 814 (9th Cir. 2001); *In re Richards*, 213 F.3d 773 (3d Cir. 2000); *Johnson v. Mohammad*, 898 F.2d 156 (9th Cir. 1990) (table case; text published on Westlaw); *Barr v. Weise*, 412 F.2d 338 (2d Cir. 1969). See also *Dekoven v. Bell*, 140 F. Supp.2d 748, 763 n.8 (E.D. Mich. 2001) (quoting use of term false prophet in Mark 13:21-23). Because status as a false prophet is necessarily a function of the beliefs of the speaker, it is not possible to subject the term to any objective analysis of truth or falsity. See *Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992) (ruling as a matter of Virginia law, court decides that a statement is protected opinion when a charge “is in its nature a relative statement, depending for its import largely on the speaker’s viewpoint”). Indeed, an attempt to conduct a judicial inquiry into whether a particular religious figure is a “false prophet” would run the risk of resembling the cross-examination of William Jennings Bryan in the Monkey Trials. Although both defense counsel and plaintiff might welcome the opportunity for the encounter, resolving such a controversy is scarcely an appropriate function

for an American civil court.

The context of Cohn's statement that Falwell is a "false prophet" also shows that it is constitutionally protected opinion. The page is reached as a link from the home page of jerryfalwell.com, which is headlined, "God lifts veil of protection from Jerry Falwell" and "Click hereto get the whole story." Following either of these links, the viewer comes to the main page of the web site, whose text features an open letter to Falwell from Cohn, accompanied by a series of links, one of which is "The Bible Code." It is by clicking this link – which, according to the Complaint's footnote, is the name of a book that is full of wild predictions – that the viewer reaches the page that characterizes Falwell as a false prophet. Other links from the main page take the viewer to such pages as "Jerry's Lies", "Hate is not a Family Value," and "How to follow the Bible," which teases Falwell about his view that the Bible can be interpreted literally by asking for advice on whom to "smite" in certain circumstances, how a stoning should be conducted, and the like. In short, in the context of the entire web site, which is plainly a satirical expression of opinion, no viewer would read the accusation that Falwell is a false prophet as anything other than a further expression of opinion, not an actionable statement about verifiable facts. "The [reader] could only regard it as a relative statement of opinion grounded upon the speaker's obvious bias, and having notendency to defame." *Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992). Accordingly, Count II should be dismissed.

The title of Count II implies that Cohn is also being charged with the utterance of "insulting words," which are made actionable under Va. Code § 8.01-45. However, the text of the complaint does not state a cause of action, and in any event there is no allegation that the words used "tend to violence and breach of the peace." *Allen & Rocks, Inc. v. Dowell*, 252 Va. 439, 441-443, 477 S.E.2d

741, 742-743 (1996). Falwell's implicit characterization of the term "false prophet" as an insulting wordpoints up how inappropriate it is as the basis for a libel suit. After all, as the Supreme Court stated in connection with the use of the epithet "scab" during a labor controversy, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies . . . is not to falsify facts." *Letter Carriers Branch 496 v. Austin*, 418 U.S. 264, 284 (1984) (internal quotation marks and citations omitted). Similarly, "false prophet" is a rhetorical term that is customarily employed to denote sharp disagreement about religious views, and it cannot be the basis for a libel suit.

Count V, which purports to state a cause of action for conversion, should also be dismissed given Falwell's inability to state a claim for defamation. The federal courts have consistently applied a *New York Times v. Sullivan*-type analysis in interpreting the Virginia statute that creates a cause of action for the unauthorized use of one's name or likeness for advertising or trade purposes. Va. Code. §§ 8.01-40. See, e.g., *Friends of Phil Gramm v. Americans for Phil Gramm in '84, 1984*, 587 F. Supp. 769, 775-776 (E.D. Va. 1984) (political candidate may not sue organization for unauthorized use of his name where there is no allegation that his name was used in connection with false information); *Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir. 1986), *aff'd on other grounds*, 485 U.S. 46 (statute does not apply to use of name of a public figure, unless in connection with knowingly false information). Moreover, as Falwell has been repeatedly reminded in other cases, a claim that is predicated on alleged false statements cannot be maintained unless the full First Amendment standards required by *New York Times v. Sullivan* have been satisfied. E.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

IV. THE CONSPIRACY CLAIMS SHOULD BE DISMISSED BECAUSE THEY REST ON

COUNTS WHICH THEMSELVES ARE SUBJECT TO DISMISSAL ON THEIR FACE, AND BECAUSE THEY DO NOT ADEQUATELY PLEAD DAMAGE.

Falwell alleges that Cohn and an individual identified in the complaint as “Gary Williams” have, in pursuit of the “unlawful” means described in Counts I and II of the Complaint, conspired to injure Falwell’s “goodwill, reputation, trade or business” (Count III) or his “business, reputation and goodwill” (Count IV). Accordingly, the complaint alleges, Cohn and Williams are liable for civil conspiracy under both Virginia statute and Virginia common law. These allegations fall short for several reasons.

First, Cohn has already shown that both Count I and Count II must be dismissed on their face. Consequently, the conduct alleged in those counts cannot be deemed “unlawful” and cannot form the basis for a conspiracy claim.

Second, Falwell’s allegations of unlawful purpose damages are insufficiently precise to permit him to maintain an action for conspiracy under Virginia law. Insofar as the two counts are based on alleged injury to Falwell’s “reputation,” the claim must be dismissed because the cause of action for conspiracy may not be employed to vindicate a plaintiff’s interests in his personal reputation. *Moore v. Allied Chemical Corp.*, 480 F. Supp. 364, 374-375 (E.D. Va. 1979). Moreover, the allegations about damage to Falwell’s business are vague, despite the fact that the “gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use unlawful means.” *Gallop v. Sharp*, 179 Va. 335, 338, 19 S.E.2d 84, 86 (Va. 1942). *See also Blackwelder v Millman*, 422 F.2d 766, 775 (4th Cir. 1975) (conspiracy claim requires actual damages). Yet Falwell alleges only that he has suffered “irreparable” injury, implying that he has no specific damage that he can describe. Nor does the allegation about the

existence of an alleged conspiracy with Gary Williams describe what these allegedly separate individuals did, and allege facts showing that they acted wilfully and maliciously. *Michigan Mutual Ins. Co. v. Smoot*, 128 F. Supp.2d 917, 925 (E.D. Va. 2000) (“The Court need not accept the [plaintiff]’s conclusory statement in the Complaint that the [defendants] acted willfully and maliciously.”).⁸

Even when claims are directed at the purely business activities of defendant conspirators, the courts have demanded specific allegations about the alleged wrongdoing and the damage to the plaintiff’s business. *Luckett v. Jennings*, 246 Va. 303, 307-308, 435 S.E.2d 400, 402 (1993); *Geris v. Piedmont Fed’l Corp.*, 1993 WL 743566 (E.D. Va. 1993), *aff’d mem.*, 36 F.3d 1092 (4th Cir. 1994). The need for specific allegations is heightened when the complaint is directed as pure speech about political and religious subjects, as in this case. *Falwell v. Penthouse Int’l*, 521 F. Supp. 1204, 1209 (W.D. Va. 1981). In the *Penthouse* case, Falwell alleged generally that the defendants, who had published an interview in a magazine that he found offensive, had conspired to injure him and that his fund-raising efforts had suffered accordingly, but the Court held that these allegations were far too general: “[T]he court is of the opinion that this line [between lawful and unlawful motivation] must be rigorously observed when possible restriction of First Amendment activities is at stake.” *Id.* Similarly, in this case, the web site itself appears to be an expression of critical opinion about Falwell, and the complaint provides no factual basis for believing that Cohn’s intent was to do anything other than express his negative opinions about Falwell. Falwell should

⁸ If this case survives the motion to dismiss, the evidence will show there is no separate person named Gary Williams, simply a name used by Gary William Cohn in an effort to avoid exposure to some of the extremists who are associated with the plaintiff, would require the conversion of this motion into one for summary judgment. Defendant does not invoke this evidence lest this motion be converted to one for summary judgment.

not be permitted to pursue Count III and IV without far more specific allegations about what the conspirators are alleged to have done and what damage has been caused to Falwell's "business" and not merely his personal reputation. The conspiracy counts should be dismissed.

V. THE ACTION AGAINST GOD.INFO SHOULD BE DISMISSED UNDER RULE 17.

The action against God.info should be dismissed in its entirety because, as shown in Cohn's affidavit, at ¶ 7, the name is simply an invention by Cohn to identify the contact when registering the domain name. He used the name as part of his parody of Falwell, implying that it was the deity who was speaking out against Falwell. However, a name cannot sue or be sued except insofar as someone is doing business under it, *In re Midwest Athletic Club*, 161 F.2d 1005, 1008 (7th Cir. 1947); *Williamsport Firemen Pension Boards v. E.F. Hutton & Co., Inc.*, 567 F.Supp. 140, 142 (M.D. Pa. 1983); *Philadelphia Fac. Mgmt. Corp. v. Biester*, 60 Pa. Commw. 366, 373-374, 431 A.2d 1123 (1981); suit may be brought against the trade name or individual using it, but not both. *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997); *Moorer v. Hartz Seed Co.*, 120 F. Supp.2d 1283, 1288 (M.D. Ala. 2000). The actual person is the real party in interest. *Ashland-Warren v. Sanford*, 497 F. Supp. 374, 377 (M.D. Ala. 1980). *See also Leckie v. Seal*, 161 Va. 215, 226-227, 170 S.E. 844 (1944) (suit should be brought against true name of a corporation). Accordingly, the action against god.info should be dismissed under Rule 17 of the Federal Rules of Civil Procedure.

CONCLUSION

The complaint should be dismissed.

Respectfully submitted,

Paul Alan Levy (DC Bar No. 946400)
Allison Zieve (DC Bar No. 424786)

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Rebecca K. Glenberg (VSB 44099)

ACLU of Virginia
Suite 400
6 N. Sixth St.
Richmond, VA 23219
(804) 644-8080

Attorneys for Defendants

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