

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

DYNETECH CORPORATION and
GLOBALTEC SOLUTIONS, LLP,
Plaintiffs,

v.

Case No. 6:07cv114-Orl-28-DAB

LEONARD FITNESS, INC. and
JUSTIN LEONARD, individually,
Defendants.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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July 30, 2007

GlobalTec's response to Leonard's motion to dismiss is notable more for what it does not say than for what it says:

- **Lack of Personal Jurisdiction:** Leonard explained (at 11-12) that personal jurisdiction is lacking because Leonard's websites do not purposefully target Floridians any more than the residents of any other state. GlobalTec offers no response.
- **First Amendment & Lack of Trademark Injury:** Leonard explained (at 14) that GlobalTec's trademark claims fail because the First Amendment limits the reach of trademark law to its source-identifying function. Similarly, Leonard explained (at 16-17) that GlobalTec's trademark claims fail because the complaint alleges no cognizable trademark injury. GlobalTec offers no response to either point.
- **Fair Use, Non-Trademark Use, and Nominative Fair Use:** Leonard explained (at 20-21) that GlobalTec's trademark claims all fail because they cannot overcome the defenses of fair use, non-trademark use, and nominative fair use. Rather than respond on the merits, GlobalTec inexplicably asserts that affirmative defenses may not be raised in a motion to dismiss (Opp'n at 16).

Instead of addressing these critical flaws in its complaint, GlobalTec tries to establish that Leonard's consumer-review websites are "commercial" because of (a) the presence of advertising on those websites and (b) alleged commercial activity on prior versions of unrelated websites. Neither attempt succeeds. But even assuming that GlobalTec were able to establish that the websites are commercial in any relevant sense, it still cannot demonstrate personal jurisdiction or potential liability. GlobalTec appears to believe that a website operator is subject to jurisdiction in any state if the website is deemed "commercial," and is liable for trademark infringement if the website refers to another's trademark in any way—even if only descriptively, to refer to the subject of criticism, and even if the parties are not competitors. To state these positions is to refute them. GlobalTec's lawsuit is not simply meritless; it is frivolous. *See Whitney Info. Network v. Xcentric Ventures, LLC*, 2005 WL 1677256 (M.D. Fla. July 14, 2005); *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089 (11th Cir. 1994).

Before filing his motion to dismiss, Leonard provided GlobalTec with a detailed explanation of the deficiencies in its complaint, served it with a Rule 11 motion, and offered it an opportunity to withdraw its complaint within the 21-day safe harbor period. Because GlobalTec persisted in pursuing its frivolous claims, Leonard intends to move separately for sanctions.

I. GlobalTec Has Not Established Personal Jurisdiction Over Leonard.¹

GlobalTec spends much of its argument on its contention that Leonard is subject to Florida's long-arm statute, a contention that Leonard has not disputed. Satisfying the long-arm statute, however, is only the first step; the requirements of due process must also be met.² When GlobalTec does address the question of due process, it is only to argue that Leonard's websites are interactive under the *Zippo* test. But, as this Court recognized in *Instabook Corp. v. Instantpublisher.com*, the question of interactivity does not supplant the fundamental requirement that the defendant must have purposefully targeted the forum state. 469 F. Supp. 2d 1120, 1125-26 (M.D. Fla. 2006). GlobalTec makes no effort to show that Leonard personally targeted Florida residents with his websites.³

In any case, GlobalTec has not shown that the websites are interactive under *Zippo*. Although Leonard's sites allow users to post and read reviews of infomercial products, "in-

¹ The Court is not required to address Leonard's personal jurisdiction argument if it finds it easier to dismiss on the merits. See *McBee v. Delica Co., Ltd.*, 417 F.3d 107, 127-28 (1st Cir. 2005) (holding that the court could dismiss meritless trademark claims against a website for failure to state a claim rather than deciding the more difficult question of personal jurisdiction).

² Indeed, the cases that GlobalTec relies on to demonstrate that use of a trademark on a website satisfies Florida's long-arm statute also recognize that such use is not sufficient to satisfy due process. *Nida Corp. v. Nida*, 118 F. Supp. 2d 1223, 1230 (M.D. Fla. 2000); *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363, 1367 (S.D. Fla. 1999).

³ The negative reviews about GlobalTec that make up the substance of its claims were made by users of Leonard's websites, not by Leonard himself. See Leonard Decl. ¶ 6. GlobalTec asserts that Leonard is personally responsible for adding "inflammatory headlines" to his websites, along with "commentary on certain products." But the headlines and commentary referenced in GlobalTec's exhibits are about products made by companies other than GlobalTec.

teractivity is important only insofar as it reflects commercial activity.” *Instabook*, 469 F. Supp. 2d at 1125 (internal quotation omitted). The mere posting of passive advertisements on Leonard’s sites does not make them commercially interactive. *See JB Oxford Holdings*, 76 F. Supp. 2d at 1368 n.9. GlobalTec does not dispute this point, but argues (without supporting case law) that Leonard should nevertheless be subject to jurisdiction in Florida if his *advertisers* do business in the state. Leonard, however, has no control over which companies’ advertisements his advertising brokers place on his websites, Leonard Decl. ¶ 10, or in which states these advertisers do business. Subjecting Leonard to jurisdiction based on factors over which he has no control does not comport with the most fundamental requirement of due process—that of fair warning. *See Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985).⁴

Unable to demonstrate that Leonard’s websites are interactive in their present form, GlobalTec points to “prior versions” of the sites that offered a book and web hosting services for sale. The exhibits GlobalTec submits, however, show only that Leonard may have offered products for sale from unrelated websites at a time when the infomercial-review websites at issue in this case had not even been created. This alleged commercial activity has nothing to do with GlobalTec’s claims against Leonard and thus cannot be the basis of personal jurisdiction. *See Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 297 F. Supp. 2d 1154, 1160 (W.D.

⁴ As Leonard noted in his declaration, the advertising brokers responsible for placing the advertisements on his website compensate him based on the number of users who click through to the advertisers’ websites and complete a purchase. Leonard Decl. ¶ 9. This form of advertising is known as “Cost Per Action” or “CPA.” *See Sajjad Matin, Clicks Ahoy! Navigating Online Advertising in a Sea of Fraudulent Clicks*, 22 Berkeley Tech. L.J. 533, 548-49 (2007). A huge number of websites, many of them small personal sites or blogs, use CPA advertising, which is popular among advertisers because it avoids some common forms of fraud. *Id.* Leonard’s use of CPA advertising does not cause him to target Florida residents any more than he would if he used one of the other two popular payment models: “Cost Per Impression,” which compensates the website owner based on the number of users who view the advertisement, and “Cost Per Click,” which compensates the owner based on the number of users who click on the ad. *Id.* at 536-38.

Wis. 2004) (“[R]egardless how interactive a website is, it cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action . . .”).⁵

II. GlobalTec Has Not Alleged Any Viable Claims.

The central thrust of GlobalTec’s brief is that Leonard’s use of its trademarks is “commercial” for purposes of both First Amendment and trademark law, and is therefore illegal. *See* Opp’n at 10. Both the premise and the conclusion of that argument are mistaken. Leonard’s use of GlobalTec’s trademarks is not “‘commercial’ in the relevant sense under trademark law.” *Universal Commc’n Sys., Inc. v. Lycos*, 478 F.3d 413, 424 (1st Cir. 2007). As explained in our opening brief (at 15-16), the fact that a website is supported by advertising does not render the speech on that website commercial. To be sure, Leonard—like most publishers of consumer commentary—“might profit by encouraging others to talk about” products sold on infomercials, including those sold by GlobalTec, “but neither that speech nor [Leonard’s] providing a forum for that speech is the type of use that is subject to trademark liability.” *Id.*

Even setting aside the question of “commercial use,” GlobalTec has failed to demonstrate any potential legal liability. Indeed, GlobalTec makes no attempt to demonstrate any cognizable trademark injury; overcome the defenses of fair use, non-trademark use, or nominative fair use; or demonstrate likelihood of consumer confusion, the essential element of trademark infringement. Instead, GlobalTec invokes the doctrine of “initial-interest confu-

⁵ To demonstrate that Leonard offered to sell Internet hosting packages and books from his websites, GlobalTec attaches printouts of two of Leonard’s websites—neither of which displays GlobalTec’s trademarks or is otherwise related to GlobalTec’s claims—as they existed seven to eight years ago. *See* Opp’n Exh. F (displaying footers identifying them as archived printouts of the websites <http://www.leonardfitness.com/> and <http://www.absecrets.com/> as they existed in 1999 and 2000). GlobalTec’s remaining examples of allegedly

sion.” The Eleventh Circuit, however, has never adopted the initial-interest confusion doctrine, and even those courts that *have* adopted the doctrine require at least a showing of *initial* consumer confusion between competing products. *See Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 551 (6th Cir. 2005).⁶ Unlike defendants in cases that have found initial interest confusion, Leonard did not use GlobalTec’s trademarks in his domain name, in metatags, or in any other way that might lead consumers to even momentarily assume they were visiting GlobalTec’s official website. *See* Leonard Decl. ¶ 13. Moreover, initial-interest confusion has no role here, where Leonard is not selling any goods or services in competition with plaintiffs. GlobalTec’s argument essentially amounts to a claim that *any* use of its trademarks constitutes initial interest confusion, a claim that flies in the face of the First Amendment and has been repeatedly rejected by the courts. *See, e.g., Interstellar Starship Services, Ltd. v. Epix, Inc.*, 304 F.3d 936, 941-46 (9th Cir. 2002). Such a theory would subject a wide variety of consumer-review websites—not to mention newspapers and magazines—to liability merely for mentioning the names of the products they review.⁷

CONCLUSION

Leonard’s motion to dismiss should be granted.

commercial activity are either advertisements or articles written by Leonard and made available free of charge, most of which are from many years ago and none of which has anything to do with GlobalTec or its products.

⁶ The Sixth Circuit in *Gibson Guitar* reversed the district court decision on which GlobalTec relies, 311 F. Supp. 2d 690 (M.D. Tenn. 2004).

⁷ GlobalTec concedes that its remaining claims are merely derivative of its trademark claims. Opp’n at 16. These claims therefore fail for the same reasons. *See Nassau v. Unimotorcyclists Soc. of America, Inc.*, 59 F. Supp. 2d 1233 (M.D. Fla. 1999) (“Because Plaintiff’s claim of trademark infringement fails, his claim of unfair competition based on his trademark infringement claim fails as well.”). Moreover, GlobalTec has not responded to Leonard’s argument that sharing truthful information with the public cannot give rise to liability under these causes of action. *See Worldwide Primates v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) (imposing Rule 11 sanctions on the plaintiff for bringing a similar claim).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2007, I caused the foregoing reply brief to be filed with the Court's Electronic Case Filing (ECF) system, which is set to automatically send all filings in the case to the following counsel of record via electronic mail:

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