UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-CV-12004-GAO

WILDFIRE COMMUNICATIONS, INC.,
Plaintiff

v.

GRAPEVINE, INC.,
d/b/a WILDFIRE INTERNET SERVICES,
Defendant

MEMORANDUM AND ORDER
September 28, 2001

O'TOOLE, D.J.

The plaintiff, Wildfire Communications, Inc. ("Wildfire"), a Delaware corporation with its principal place of business in Lexington, Massachusetts, originally brought this action in September 2000 alleging that the defendant, Grapevine, Inc., d/b/a/ Wildfire Internet Services ("Grapevine"), an Illinois corporation with its principal place of business in Granite City, Illinois, infringed upon plaintiff's trademark in violation of 15 U.S.C. § 1114(1), 15 U.S.C. §§ 1125(a), (c), (d), Mass. Gen. Laws ch.110B, § 12, Mass. Gen. Laws ch. 93A §§ 2 and 11, and the common law. The plaintiff further alleged that the defendant engaged in unfair competition under the common law. Grapevine moved to dismiss the Complaint, or in the alternative to transfer venue, on the ground that this Court does not have personal jurisdiction.

In February 2001, the plaintiff filed an Amended Complaint adding a claim for breach of a contract between the plaintiff and the defendant for the sale of the domain name "wildfire.net,"

which the parties signed in 1996. Grapevine moved to dismiss the breach of contract claim under Fed. R. Civ. P. 12(b)(6). This motion is GRANTED. Grapevine's motion to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction is also GRANTED.[1]

## I. Background

Wildfire develops, manufactures, markets and sells telecommunications, telephony, Internet and computer-related goods and services, including computer hardware and software for use in communications management and control. The plaintiff markets and sells its goods and services under its trademark "Wildfire," as well as the name "Wildfire Communications, Inc." in connection with its company and its goods and services. The plaintiff has used both names since at least as early as 1994. Am. Compl. ¶¶ 4, 5.

Grapevine markets and sells Internet services such as World Wide Web site developing and hosting, and Internet applications, products, and services. Grapevine markets these services on the Internet under the domain names "wildfire.net" and "wildfireinternet.com." Am. Compl. ¶ 13. Grapevine operates as an Internet Service Provider ("ISP") under the name Wildfire, providing local ISP services exclusively to the 618 area code in southern Illinois. Grapevine cannot provide this service outside of the 618 area code. Sykes Aff. ¶¶ 4-6. In August 1995, Grapevine contacted Wildfire via e-mail in an effort to market defendant's internet "business card" product to the plaintiff for $14.95/month. Plaintiff did not purchase the business card product. Sykes Dep. at 109-12.

[1] The defendant's motion for leave to file a reply brief to plaintiff's opposition to defendant's motion to dismiss is GRANTED. The plaintiff's motion to strike the supplemental affidavit of George H. Sykes, Jr. is DENIED.

In 1996 the plaintiff offered to purchase the domain name "wildfire.net" from the defendant for $10,000. The parties signed a contract to that effect on or about October 17, 1996. Compl. Ex. D.

Grapevine owns and operates three websites, which are accessible to anyone with Internet access anywhere in the world. The three websites are: Wildfire Internet, WakeUpMoney, and GolfTracker. The services provided at the Wildfire Internet site are described above. WakeUpMoney is a software development and Internet implementation product that facilitates e-commerce for Grapevine customers. GolfTracker is free, server-based software, which Grapevine placed in the public domain and which allows golfers to track their handicaps and scores. Supplemental Affidavit of George H. Sykes, President and CEO of Grapevine ¶¶ 3, 4, 7, 9.

## II. Motion to Dismiss under Fed.R.Civ.P. 12(b)(6)

### A. Standard of Review

In evaluating a motion to dismiss, the Court must take as true all well-pleaded facts and draw all reasonable inferences favorable to the complainant. See Papasan v. Allain, 478 U.S. 265, 283 (1986); Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). However, the standard that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), is not toothless. See Burnett v. Grattan, 468 U.S. 42, 50-51 n.13 (1984) (stating that an injured person "must look ahead to the responsibilities that immediately follow filing a complaint . . . [and] be prepared to withstand various responses, such as a motion to dismiss," and noting that "[a]lthough the pleading and amendment of pleadings rules in federal court are to be liberally construed, the administration of justice is not well served by the filing of premature, hastily drawn complaints"). Rule 12(b)(6) allows the plaintiff a highly deferential reading of the complaint, however, the rule "does not entitle a plaintiff to rest on

'subjective characterizations' or conclusory descriptions of 'a general scenario which could be dominated by unpleaded facts.'" Correa-Marinez**,** 903 F.2d at 53 (quoting Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982).

**B. Discussion**

In this case, the plaintiff has not met the burden required by the rules of notice pleading, and accordingly the motion to dismiss Count IX of the Amended Complaint is granted. The breach of contract claim alleges that defendant "has breached one or more provisions" of the contract, and simply incorporates the contract into the Amended Complaint as Exhibit D. The plaintiff does not state any facts regarding the alleged breach. The mere legal conclusion that a breach has occurred does not satisfy the Rule 8 requirement of a short and plain statement of the claim.

**III. Motion to Dismiss under Fed. R. Civ. P. 12(b)(2): Specific Personal Jurisdiction**

**A. Standard of Review**

The plaintiff bears the burden of demonstrating that defendant's conduct satisfies the Massachusetts Long-Arm statute and that the exercise of personal jurisdiction in this case "comports with the strictures of the Constitution." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 144-45 (1st Cir. 1995) (quoting Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994)) (other citations omitted). The Court will use the prima facie standard for analyzing a motion to dismiss for want of personal jurisdiction as outlined by the First Circuit. Under this standard, the Court will "consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." The plaintiff ordinarily cannot rest upon the pleadings, but

is obliged to adduce "evidence of specific facts." Foster-Miller, 46 F.3d at 145 (quoting Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 675 (1st Cir. 1992)). While Section 3(c) of the Massachusetts Long-Arm statute[2] arguably reaches the defendant, plaintiff fails to meet the burden of proving the due process requirements for establishing personal jurisdiction over a non-resident defendant.

Constitutional due process requires that a defendant have certain "minimum contacts" with the forum state before personal jurisdiction may be recognized so that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945). The three requirements of this "minimum contacts" test are: (1) relatedness; (2) purposeful availment; and (3) reasonableness. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-78 (1985). A plaintiff must satisfy all three prongs of this test to meet the due process requirements. The First Circuit illuminated these prongs with a three-part analysis:

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

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[2] Section 3 of the Massachusetts Long-Arm statute reads in pertinent part: "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's . . . (c) causing tortious injury by an act or omission in this commonwealth. . . ." Mass. Gen. Laws ch. 223A, § 3. The Court assumes that defendant's alleged trademark infringement would constitute a tortious injury in the Commonwealth despite the fact that the Complaint does not clearly plead the specifics of any injury.

Foster-Miller, 46 F.3d at 144 (citing United Elec. Radio and Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992)).

The purposeful availment prong of the test focuses on the deliberateness of the defendant's contacts with the forum state and requires that the contracts be voluntary, see Burger King, 471, U.S. at 474-75, and foreseeable such that the defendant could reasonably be able to anticipate "being haled into court" in the forum state. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

**B. Discussion**

The plaintiff does not satisfy the second prong of the "minimum contacts" test because it has failed to allege sufficiently the defendant's purposeful availment of the laws and privileges of the Commonwealth. The sum of defendant's contacts with Massachusetts include three web pages that are accessible from Massachusetts; a contract with a Massachusetts corporation for the sale of a domain name, which is governed by a Massachusetts choice-of-law provision but which does not contain a forum-selection clause; and a one-time, unsuccessful solicitation of a Massachusetts corporation for an internet advertisement at a price of $14.95/month. The plaintiff has proffered no evidence that the defendant has any Massachusetts customers or that it regularly solicits business in Massachusetts.[3] Wildfire solicited the purchase of the defendant's domain name, which resulted in the 1996 contract. Grapevine's web-pages do not directly solicit Massachusetts customers, and in fact, so far as appears from the record, Grapevine can only provide Internet service to customers in the 618 area code, which is located in southern Illinois. Massachusetts residents could theoretically purchase defendant's services off of its WakeUpMoney.com web page or utilize the free services of GolfTracker.com, but the existence of the pages alone, without any evidence of actual purchases by

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Though Wildfire argues that its efforts at discovery addressed to Grapevine's Massachusetts contacts have been stymied, it rather appears that Wildfire has been quiescent in seeking to pursue any further discovery.

Massachusetts customers or direct solicitation of Massachusetts customers, is not sufficient to satisfy the "minimum contacts" required.

Under these facts, the Court finds that defendant has not purposefully availed itself of the laws and privileges of the Commonwealth such that it could reasonably foresee being haled into a Massachusetts courtroom. The constitutional requirements for personal jurisdiction are not satisfied, and the defendant's motion to dismiss the Amended Complaint for lack of personal jurisdiction is granted.

It is SO ORDERED.

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DATE DISTRICT JUDGE