

According to the complaint, the Gentle Wind Project does not engage in commerce in any conventional sense. The “healing instruments” “are given free of charge to individuals who request them, while a suggested donation is requested,” Compl. ¶ 25; “Gentle Wind’s income comes entirely from donations,” *id.*; and the Project “has never publicly advertised its products.” Compl. ¶ 26.

The complaint (¶ 24) directs the reader to the Project’s web site (<http://www.gentlewindproject.org>). At this web site, the Project has made some extraordinary if not miraculous claims about its “healing instruments:”

- that the blueprints for the Project’s “healing instruments” come from “telepathic communication with non-physical entities living outside of the Earth’s physical and astral systems;”²
- that “[t]he technology available through The Gentle Wind Project comes from the Spirit World, not the human world;”
- that “[t]his healing technology was designed to restore and regenerate a person’s energetic structure when used one time in a person’s life;”
- that the Project’s instruments “would alleviate most negative human conditions, along with telepathic abilities to transmit these healings to anyone;”
- that “there are few people on this planet who cannot benefit from this healing;” and
- that its instruments change people’s lives when used one time in a person’s life.”³

² Gamble Aff., ¶ 27.

³ The Gentle Wind Project web site also contains the following assertions, among others:

The Gentle Wind Project is a not-for-profit world healing organization with a remarkable healing technology. The Project began researching this technology in the late 1970s. By 1983, working Instruments had been developed that would alleviate most negative human conditions, along with telepathic abilities to transmit these healings to anyone. By 1990, a Healing Instrument was developed that changes people’s lives when used one time in a person’s life. Since then, over 6 million people in more than 150 countries throughout the world have obtained this healing. This Project has never advertised and, until very recently, has not been involved in the media in any way. News of this healing has spread primarily by word of mouth.

There are few people on this planet who cannot benefit from this healing. There are innumerable ways in which human beings can be harmed, from the starvation, homelessness and untreated illnesses found in third world nations to the improper parenting practices found in all societies, all traumatizing children for the remainder of their lives. If you attended

Two former enthusiasts of Gentle Wind Project, defendants Judy Garvey and William Bergin, apparently have become disenchanted with the Project, and have authored revelatory pieces about their negative experiences with the Project. Fully twelve pages of the complaint are devoted to a description of Garvey's and Bergin's expose, which the complaint characterizes as false and defamatory. Compl. ¶¶ 30-59. Garvey and Bergin live in Blue Hill, Maine. Compl. ¶¶ 9-10.

The Moving Defendants, Steve Gamble and Ivan Fraser, have no connection to Maine or the United States. Gamble resides in England. Gamble Aff., ¶ 2. He has an academic interest in alternative medicine and claims of the so-called new age movement, and runs a small business in the United Kingdom called Equilibra that sells nutritional health products and radiation detection equipment. Gamble Aff., ¶¶ 3-6. Gamble is an active contributor to the public discussion of claims about so-called "new age" alternative health treatments. His web site contains links to Garvey's and Bergin's exposes, to articles, one of which was co-authored by Gamble that is critical of the Project's claims for its "healing instruments," but

school in America or a country with similar education practices before the age of ten to twelve years, you suffered severe forms of mental and emotional damage. Schools are not set up to support the well-being of children. If you have lost a loved one, experienced a divorce, or faced a long-term illness, you have been weakened by these experiences. The Gentle Wind healing technology can help.

This healing technology was designed to restore and regenerate a person's energetic structure when used one time in a person's life. Your energetic structure is the invisible etheric web in which you exist. The energetic web is, generally speaking, oval in shape. It extends 8 to 10 feet in height and 4 to 6 feet in width, with your physical body in the middle. Within this system, there are 32 different levels. Over 90 percent of the world's population is missing between 10 and 15 levels. If you had etheric vision and could see 32 layers deep, you would see fragmented, burnt-out, sub-atomic spiritual nets in just about everyone, including all the great spiritual leaders past and present.

At a different page on the same web site, (<http://www.gentlewindproject.org/gallery.htm>), the following appears: "We apologize for the "laundered" instrument descriptions found below. While our instruments work entirely with the spiritual etheric nature and because of their newness and unusual effectiveness we have been advised to limit our descriptive literature in order to remain in compliance with current FDA regulations.* * * These products listed below have not been evaluated by the FDA. These products are not intended to diagnose, treat, cure or prevent any disease."

also to sources that promote the Project's instruments, such as the Gentle Wind Project's own website. Gamble Aff., ¶¶ 21, 23-24, 27-28, 30-31, 33-36.

Ivan Fraser is also a resident of the United Kingdom. Fraser Aff., ¶ 2. He too is engaged in a small business based in England. Fraser publishes a quarterly newsletter called The Truth Campaign that covers topics of current interest, such as the current debate over "new age" alternative health treatments. Fraser Aff., ¶¶ 4-11. Fraser also has contributed his own writings to the dialogue, both in the Truth Campaign publication and on its web-site, and posted replies to attacks made upon his views on an internet newsgroup devoted to Gentle Wind Project. Fraser Aff., ¶¶ 23-29.

Gamble and Fraser have been drawn into the fray of this suit primarily because their articles and internet web sites and postings. They have cited, re-printed or provided links to the Garvey and Bergin exposes. They have also or commented upon the claims of Gentle Wind Project and its "healing instruments."

The complaint reads like a classic, albeit unusual, claim for defamation, but the asserted basis for jurisdiction in this Court is federal question jurisdiction. Compl. ¶ 21.⁴ In Count I, plaintiffs contend that the Moving Defendants are liable to Gentle Wind Project and the individual plaintiffs under RICO for having engaged in the predicate crime of wire fraud (18 U.S.C. § 1343), by publishing such allegedly defamatory material on their web sites and (in the case of Fraser) in his periodical and e-mails. Compl. ¶133. Without further elaboration, the complaint alleges that plaintiffs have been injured in "their business and property" by these statements, and thus that Gamble and Fraser (among others) are liable to plaintiffs under the RICO statute, 18 USC 1962(c). Compl. ¶ 139.

⁴ Diversity jurisdiction is lacking. Plaintiff Gentle Wind Project is identified as a Maine non-profit corporation, Compl. ¶ 2, and Defendants Bergin and Garvey are identified as citizens of Maine. Compl. ¶¶9-10.

In Count II, plaintiffs contend that the Moving Defendants' criticisms of the Gentle Wind Project's claims for its "healing instruments" were "false and misleading statements of fact," Compl. ¶ 142, which were made "in connection with goods or services," and ostensibly in violation of the Lanham Act, 15 U.S.C. § 1125(1)(1)(B). Only the entity Gentle Wind Project is a plaintiff on this Lanham Act claim. Compl. ¶ 146.

ARGUMENT

Although there is mystery about the Gentle Wind Project and its "healing instruments," there is no mystery about this lawsuit. This action represents an effort by a zealous band of plaintiffs to stifle criticism of their quasi-religious claims for their "healing instruments," and the re-publication of information authored by former associates about Gentle Wind Project's *modus operandi*.

There is and should be great doubt whether this dispute belongs in a court of law. There should be even greater doubt whether a federal court – a court of limited jurisdiction – should entertain this type of claim. But the first issue that the Court must address, because of the requirements the Rules of Federal Civil Procedure, and specifically F.R.Civ.P. 12(h)(1), is whether plaintiffs may court reach across the Atlantic Ocean and haul Gamble and Fraser into a court of the United States to defend statements each authored and published from their respective homes in the United Kingdom.

Plaintiffs bear the burden of establishing that this Court's exercise of personal jurisdiction over Gamble and Fraser is proper. *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir.2001). Plaintiffs may not rest on the allegations of the complaint, but 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." *Snell v. Bob Fisher Enter., Inc.*, 115 F.Supp.2d 17, 20 (D.Me.2000) (quoting *Boit v. Gar-Tec Prod.*, 967 F.2d 671, 675 (1st Cir.1992)).

There are two strands of personal jurisdiction analysis: general jurisdiction and specific jurisdiction. *Massachusetts School of Law at Andover, Inc. v. American Bar Associates*, 142 F2d. 26, 34 (1st Cir. 1998). General jurisdiction exists when the litigation is not directly founded on the defendants' foreign based contacts, but the defendant is nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the foreign state. Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and defendants' foreign based activities. See *United Electrical Radio and Machinists Works v. 163 Pleasant St. Corp.*, 160 F2d 1080, 1088 (1st Cir. 1992).

The complaint contains no allegations of fact that either Steve Gamble or Ivan Fraser engaged "continuous and systematic general business contacts" with Maine or the United States that would support the exercise of personal jurisdiction over either of them on a "general jurisdiction" theory. In any event, the affidavits of Steve Gamble and Ivan Fraser submitted herewith establish that they have no such presence in the United States.⁵ Absent material of evidentiary quality that establishes a *prima facie* case to the contrary, personal jurisdiction over these citizens of the United Kingdom will not lie on a general jurisdiction theory.⁶

⁵ Gamble Aff., ¶¶ 5-20; Fraser Aff., ¶¶ 1-6, 10-22.

⁶ Both Gamble and Fraser maintain web sites. Gamble Aff. ¶ 16; Fraser Aff., ¶ 5. Maintaining web sites that others may access from any location world-wide is not systematic and continuous presence that will support personal jurisdiction on a general jurisdiction theory. *Arriaga v. Imperial Palace, Inc.*, 252 F.Supp.2d 380 (S.D.Tex.2003) (general personal jurisdiction could not be exercised over out-of-state hotel in Texas forum, for purposes of hotel guest's personal injury action; although hotel maintained Internet website, and fraction of reservations made at hotel were by Texas residents, hotel did not conduct regular business in Texas, or make any business decisions in Texas, but merely made website available nationwide, and when guest made reservation at hotel through website, services were not provided and payment was not made until guest reached hotel); *Atlantigas Corp. v. Nisource, Inc.*, 290 F.Supp.2d 34 (D.D.C. 2003) (federal district court sitting in District of Columbia did not have general jurisdiction over nonresident natural gas pipeline operator sued for

Plaintiffs' argument for personal jurisdiction must therefore rest on a theory of specific jurisdiction. For purposes of argument only, the Moving Defendants will address the potentially broadest basis for personal jurisdiction, embodied in F.R.Civ.P. 4(k)(2). Under this rule, a federal court may exercise personal jurisdiction if: 1) the claim arises under federal law; 2) there is no other state court of general jurisdiction that could reach the defendant; and 3) the exercise of jurisdiction would comport with the defendants' rights under the Constitution of the United States or Federal Law. *See United States v. Swiss American Bank, supra*, 274 F3rd at 617. Here there is asserted a basis for federal question jurisdiction (the RICO and the Lanham Act claims in Counts I and II), and the Moving Defendants will assume *arguendo* that there is no state court of general jurisdiction that could reach them. Accordingly, the relevant inquiry for personal jurisdiction purposes is whether respectively, Gamble and Fraser, have sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction over them. *Swiss American Bank, supra*, 274 F3rd at 618.

The three pronged test for specific jurisdiction in these circumstances is well established:

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.

antitrust violations, under District law, based on maintenance of Internet website used sporadically by three District-based companies to schedule movements of natural gas; usage of website was insufficient to constitute "continuous and systematic general business contacts" required for personal jurisdiction).

Swiss American Bank, supra, at 620-21 (quoting *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 288 (1st Cir.1999)).

A. Plaintiffs' RICO and Lanham Act Claims Do Not Arise Out of In-Forum Contacts

As the First Circuit explained in *Swiss American*, the relevant inquiry under the relatedness prong is whether the suit “arise[s] out of, or [is] related to, the defendant's in-forum activities . . .” (citing *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994). “The relatedness inquiry for tort claims focuses on whether the *defendant's in-forum conduct* caused the injury or gave rise to the cause of action.” *Donatelli v. UnumProvident Corp.*, __ F.Supp. 2d ___, 2004 WL 1570133 (D. Me.) (emphasis added) (quoting *Swiss Am. Bank*, 274 F.3d at 622.)

Here, there is no allegation that Gamble or Fraser were ever in the United States conducting themselves tortiously. All of the conduct alleged to be actionable under federal law consists of false statements made on web pages or links on web sites published in the United Kingdom and (in the case of Fraser) e-mails authored in the United Kingdom and posted through an internet news server. There is no in-forum-based conduct alleged.

Plaintiffs’ argument for satisfying the “relatedness” prong thus reduces to the proposition that because the plaintiffs who allegedly suffered injury by this conduct are located in the United States, the locus of their injury is a sufficient contact with the United States to assert personal jurisdiction over Gamble and Fraser in these circumstances. However, as the First Circuit made clear in *Swiss American Bank, supra*, 274 F2nd at 625, this is not enough to satisfy the “relatedness” prong:

We have wrestled before with this issue of whether the in-forum effects of extra-forum activities suffice to constitute minimum contacts and have found in the negative.” *Mass. Sch. of Law [Mass. Sch. of Law at Andover. Inc. v.*

Am. Bar Ass'n., 142 F.3d 26, 35 (1st Cir.1998)] at 36; accord *Sawtelle* [*Sawtelle v. Farrell*, 70 F.3d 1381, 1388 (1st Cir.1995)] at 1390-91 (relatedness showing was "tenuous at best" when based on "effects" of defendants' malpractice, committed outside of forum, and on ancillary legal advice mailed into the forum); *Kowalski v. Doherty, Wallace, Pillsbury & Murphy*, 787 F.2d 7, 11 (1st Cir.1986) (finding that "effects" in the forum are not equivalent to an actual injury caused in the forum by in-forum activities.)

There must be actionable conduct by the defendant in the relevant forum to support the exercise of personal jurisdiction on a specific jurisdiction theory. Effect in the forum is not sufficient.⁷

Even if the situs of alleged "injury" alone could give rise to personal jurisdiction on a specific jurisdiction theory, it will not do so in this case. The alleged effects of Gamble's and Fraser's conduct are not legally cognizable under the federal claims asserted, which are the basis for jurisdiction in this Court.⁸

RICO affords standing to plaintiffs only if they are injured in their "business or property by reason of a violation of [RICO]" 18 U.S.C. § 1964(c). In the context of predicate claims based on wire fraud, such as those claimed here, the plaintiffs, in order to have standing under RICO, must plead and prove that they relied on fraudulent

⁷ The locus of effects is only relevant to the second prong – whether the defendants purposely availed themselves of the privilege of doing business in the forum – but does not of itself satisfy the first "relatedness" prong. *Swiss American*, 274 F3rd at 623 (discussing *Calder v. Jones*, 465 US 783 (1984)). In *Calder*, the Supreme Court permitted the exercise of jurisdiction in California over a defamation claim for conduct that occurred at least in part outside of California. As the First Circuit noted in *Swiss American*, *supra*, the effects analysis in *Calder* concerned the "purposeful availment" prong, not the prior "relatedness" prong, and there was evidence in *Calder* that the defendant's actionable conduct occurred in part in the relevant forum as well as outside of it, thus meeting the test for in-forum conduct under the first "relatedness" test. In addition, the court in *Swiss American* noted that in *Calder* there was both in-forum publication as well as in-forum injury, and therefore the Supreme Court did not need to address the relatedness elements of the first prong. *Swiss American*, 274 F3rd at 624, 625.

⁸ The Court must analyze the issue of personal jurisdiction in relation to the peculiarities of the claims asserted. See *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir.1999) (analyzing personal jurisdiction separately for tort and contract claims); *New Life Brokerage Services, Inc., v. Cal-Surance Associates, Inc.*, 222 F.Supp. 2d 94, 102 (D. Me. 2002). As the wording of FRCP 4(k)(2) dictates, a proponent of personal jurisdiction under this rule must in the end show that the conduct giving rise to the federal question claims – here the RICO and Lanham Act – have a sufficient connection to the forum to justify the exercise of personal jurisdiction. The Court must therefore scrutinize the nature of the alleged injuries under the federal statutes invoked.

representations, and thereby suffered injury to their “business or property” (not their reputations):

When the predicate act giving rise to civil liability under RICO [is] alleged to have been mail [or wire] fraud, prospective plaintiffs must, in order to demonstrate their standing to sue, plausibly allege both that they detrimentally relied in some way on the fraudulent mailing [or wiring], and that the mailing [or wiring] was a proximate cause of the alleged injury to their business or property.

Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 337 (4th Cir.1996). *See McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir. 1990) (“We do not believe the deceptive scheme to obtain ATC-IATA approval can somehow be transformed into a scheme to deceive [the plaintiff] . . .[w]hile deceiving [ATC-IATA] may have been part of a larger plan having an adverse impact upon [plaintiff], this fact did not make [plaintiff] the object of an act of mail or wire fraud”).⁹ In this case, there is no allegation that Gentle Wind Project or its affiliated plaintiffs have relied to its or their detriment on any false misrepresentation of its “healing instruments” or modus operandi. Plaintiffs thus lack standing to complain of injury resulting from wire fraud causing reliance by others.

Moreover, the complaint provides no facts that the “business or property” of the natural person plaintiffs was injured in any way by Gamble or Fraser’s statements on their respective United Kingdom web sites. The natural person plaintiffs do not allege that they are in any business at all, or have suffered any loss of property. Nor are any facts pleaded that the non-profit Gentle Wind Project was injured in its “business or property.” Gentle Wind Project essentially denies that it is engaged in commerce, alleging that it “does not sell its healing instruments, but are given free of charge to those who request them....” Compl. ¶ 25.

⁹ Additional authorities concerning standing requirements under RICO are cited in the Moving Defendants’ motion to dismiss the complaint under F.R.Civ.P. 12(b)(6), filed separately.

This philanthropic approach is inconsistent with the proposition that Gentle Wind Project has been injured in its “business or property” in the RICO sense.

The Lanham Act’s Section 43(a), plaintiffs’ other putative basis for subject matter jurisdiction, provides standing to Gentle Wind Project to complain of false advertising only if Gentle Wind Project thereby suffered competitive injury. *Telecom Intern. America, Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2nd Cir. 2001); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir.1995) (“[T]o have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.”)¹⁰

As noted above, the complaint essentially refutes the notion that Gentle Wind Project has suffered competitive injury. The complaint alleges that Gentle Wind Project donates its “healing instruments,” and “its income comes entirely from donations,” not competitive sales of “healing instruments.” Compl. ¶ 25. In addition, the affidavits of Gamble and Fraser submitted herewith refute the notion that Fraser or Gamble engage in competition with Gentle Wind Project’s alleged donation of “healing instruments.” Fraser publishes a quarterly newsletter. Fraser Aff., ¶¶ 4-7. Gamble sells nutrition products, radiation protection devices, and devices that energize water, not devices that, according to the Gentle Wind Project web site, “open up the human etheric system...which triggers a connection to an area of the World of Benevolent Spirits . . .” Gamble Aff., ¶¶ 5-6, 25.

These points have obvious implications for whether the complaint states a cognizable cause of action under federal law with the meaning F.R.Civ.P. 12(b)(6).¹¹ This is not such a motion, but the same points bear upon the Rule 12(b)(2) motion. Because the federal claims are unrelated to any conduct that the Moving Defendants actually performed in the forum –

¹⁰ Additional authorities concerning standing requirements under the Lanham Act are cited in the Moving Defendants’ Motion to Dismiss the Complaint under F.R.Civ.P. 12(b)(6), filed separately.

¹¹ See the Moving Defendants’ F.R.Civ.P. 12(b)(6) motion, filed separately.

here the United States – and the only remaining pretext for personal jurisdiction under the federal statutes invoked is injury in the forum, the absence of cognizable injury under federal law undercuts the basis for personal jurisdiction based on an effects-based “relatedness” criterion.

Plaintiffs’ federal claims do not arise out of in-forum conduct or cognizable injuries in the forum, and thus will not support the exercise of personal jurisdiction over Gamble and Fraser under F.R.Civ.P. 4(k)(2). Failure to satisfy the “relatedness” prong is alone sufficient to warrant dismissal of the claim against Gamble and Fraser for lack of personal jurisdiction. *Swiss American Bank, supra*, 274 F. 3rd at 625.

B. The Allegedly Actionable Conduct by Gamble and Fraser Does Not Reflect Their Purposeful Availment of the Benefits and Protections of the Forum’s Law

If this Court nevertheless proceeds to consider the second prong for specific personal jurisdiction – whether Gamble and Fraser purposely availed themselves of the benefits and protections of the forum’s laws, it may consider only those contacts that it finds to be “related” to the cause of action under the first prong. *Swiss American Bank*, 274 F. 3rd at 621 (“Second, the court must ask whether *those* contacts constitute purposeful availment of the benefits and protections afforded by the forum's laws”) (emphasis added). To warrant a basis for personal jurisdiction under the second prong, the actions by the Moving Defendants must be found to be "purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (plurality opinion) (citing *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 476 (1985)).

In Gamble’s case, the allegedly actionable conduct consists of statements and links on his United Kingdom web-site. Compl. ¶ 64-77. No such statements have been made in

connection with the sale of Equilibra products in the United States or elsewhere.¹² In Fraser's case, the allegedly actionable contacts comprises statements in his quarterly newsletter, links on his web site and follow-up postings on an internet bulletin board and e-mails to its members. Compl. ¶¶ 84-99.¹³

Although the complaint recites that such statements over the internet might be read by persons in Maine, Compl. ¶¶ 61, 85, there is nothing either Maine- or United States-specific in their respective statements. Gamble's and Fraser's statements may be read by anyone who reaches their respective web sites and (in the case of Fraser) internet newsgroup, regardless of where located. There is no indication that Gamble or Fraser specifically targeted a United States audience with their respective statements about which plaintiffs complain, and Gamble and Fraser each specifically deny such a purpose. Gamble Aff., ¶ 18; Fraser Aff., ¶ 20.

Such publications from the United Kingdom are not purposefully directed to the United States and therefore do not represent purposeful availment of the privilege of conducting activities in the United States. *Young v. New Haven Advocate*, 315 F.3d 256, 258-59 (4th Cir. 2002) (Virginia court could not constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their

¹² Gamble Aff., ¶ 22. See *Revell v. Lidov*, 2001 WL 285253 (N.D. Tex. 2001), *aff'd*, 317 F.3d 467, (5th Cir. 2002) (the fact that other aspects of Columbia University's website may be more interactive, and allow for the order of goods and services, is irrelevant, where claim of specific jurisdiction is premised on statements made in article and the forum in which it was posted.)

¹³ Fraser's posting of responses to criticisms of his views on an internet news server is not purposeful availment. *Barrett v. Catacombs Press*, 44 F.Supp.2d 717, 728 (E.D.Pa.1999) *Id.* ("We agree with the Plaintiff that posting of messages to listserves and USENET discussion groups technically differs from the maintenance of a "passive" Web page because messages are actively disseminated to those who participate in such groups. [cit om.] However, for jurisdictional purposes, we find that these contacts are akin to a "passive" Web site and insufficient to trigger this court's jurisdiction. Here, the nature and quality of the contacts made by the Defendant were accessible around the world and never targeted nor solicited Pennsylvania residents. Every listserv or discussion group that the Defendant posted a message to was concerned with health care issues and was national in scope. [cit om.] Not unlike the maintenance of a "passive" Web site, anyone who is interested could become a member of such listserves or USENET groups, and we cannot see how from that fact alone, it can be inferred that the Defendant directed its efforts towards Pennsylvania residents.")

websites or the posted articles at a Virginia audience);¹⁴ *Barrett v. Catacombs Press*, 44 F.Supp.2d 717, 727 (E.D.Pa.1999) (“The Defendant's Web sites may include defamatory information about the Plaintiff as the creator of the Quackwatch Web site, but the fact that such information is accessible worldwide does not mean that the Defendant had the intent of targeting Pennsylvania residents with such information”); *Bailey v. Turbine Design, Inc.*, 86 F.Supp.2d 790, 796 (W.D.Tenn. 2000) (“[T]he mere fact that the website contained defamatory information concerning the plaintiff does not, absent some supporting evidence, mean that the defendant possessed the intent to target residents of the forum state.”)¹⁵

In this regard, it should be emphasized that Gentle Wind Project does business worldwide. Its website boasts that “[t]he Project has over 6500 volunteers world-wide who offer the use of their instruments free of charge.”¹⁶ If Gentle Wind Project or its promoters were to suffer any injury cognizable under RICO (“business or property”) or the Lanham Act (competitive injury) as a result of such statements, the effect would be diffuse, not specific to

¹⁴ In *Young, supra*, the plaintiff, a Virginia warden, argued that “(1) the newspapers, knowing that Young 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 Young's reputation were felt in Virginia. Young emphasizes that he is not arguing that jurisdiction is proper in any location where defamatory Internet content can be accessed, which would be anywhere in the world. Rather, Young argues that personal jurisdiction is proper in Virginia because the newspapers understood that their defamatory articles, which were available to Virginia residents on the Internet, would expose Young to public hatred, contempt, and ridicule in Virginia, where he lived and worked.” *Id.* at 261-62. The Fourth Circuit nevertheless rejected a claim of specific personal jurisdiction over the Connecticut newspaper. “[T]he fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to “indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state,” *Virginia Panavision Int'l, L.P. v. Toebben*, 141 F.3d 1316, 1321 (9th Cir.1998) (quotation omitted). The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.” *Id.* at 263.

¹⁵ See also *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004) (nonresident operator of Internet website collecting negative comments regarding businesses did not purposely avail itself of opportunity to do business in Wisconsin); *Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*, 989 F. Supp. 265(D.D.C. 1998) (posting message on AOL message board in Washington D.C. not purposeful availment of protections of District of Columbia); *Novak v. Bem*, 2004 WL 692147 (Ala. Civ. App. 2004) (posting defamatory statements on internet provider's forum was insufficient to find that user expressly aimed his allegedly tortious conduct at Alabama; user's internet message was accessible to anyone, whether located in State or not, who had a computer and an internet connection.)

¹⁶ The reference is to the Gentle Wind Project's website e referenced in the complaint at the following web address: <http://www.gentlewindproject.org>. Compl. ¶ 24. See p. 2, n. 3, *supra*.

the United States, and therefore not reflect purposeful availment of the protections of United States laws. *See Conseco, Inc. v. Hickerson*, 698 N.E.2d 816 (Ind. Ct. App. 1998).¹⁷

The allegations and facts of record fail to establish that Gamble and Fraser purposely availed themselves of the benefits and protections of the forum's laws.

C. The Gestalt Factors Weigh Against the Court's Exercise of Personal Jurisdiction of the Claims against Gamble and Fraser

Finally, even where the plaintiff can surmount the threshold requirements of forum-related conduct and purposeful ailment, the Court must consider whether under all the circumstances, it is reasonable to exercise jurisdiction over the foreign defendant. *Pleasant Street*, 960 F.2d at 1089. Among the factors to be considered are Gamble's and Fraser's burden in appearing before this Court; the forum's interest in adjudicating dispute; the plaintiffs' interest in obtaining convenient and effective relief; the judicial systems' interest in obtaining the most effective resolution of the controversy; and the common interest of all governed in promoting substantive social policies. *Asahi Metal Industries Co., Ltd. v. Superior Court of California*, 480 US 102 113, 116 (1987). These are known as the "gestalt factors." *Pleasant Street*, 960 F.2nd at 1088. In close cases, these gestalt factors may tip the constitutional balance. *Asahi Metal Indus. Co. v. Superior Court, supra; Ticketmaster-New York, Inc. v. Alioto, supra*. 26 F.3rd at 210 ("gauging fairness requires an assessment of reasonableness for, in certain circumstances, unreasonableness can trump a minimally sufficient showing of relatedness and purposefulness").

¹⁷ In *Conseco, supra*, the court declined to find personal jurisdiction over a Texas defendant, whose interactive Web site posted solicitation of information concerning fraud or other evidence of unfair treatment by any of the plaintiff's insurance subsidiaries. The court observed that effects test in defamation cases was not readily applicable in cases involving national or international corporations and the Internet, because a corporation's harm is generally not located in a particular geographic location in the same manner as an individual's harm. The plaintiff was a national corporation with insurance subsidiaries and policyholders located throughout the United States, and the potential harm that might be incurred as a result of the alleged defamation would not only be suffered in Indiana, but throughout the nation.

In this case, Gamble’s and Fraser’s burden of defending themselves in the United States is particularly and specially onerous. Each is operating a one-employee business out of a home in the United Kingdom. Gamble Aff., ¶¶ 5-8. Fraser Aff., ¶¶ 10-12. Neither realizes even gross revenue from activities in the United States that approaches the cost of defense in this matter. Gamble Aff., ¶¶ 27-20, 37-38; Fraser Aff., ¶¶ 30. In Fraser’s case, his total revenues from publishing and distributing The Truth Campaign are less than his costs. Fraser Aff., ¶¶ 10-11.¹⁸

By comparison, Gentle Wind Project is well-endowed, reporting in its IRS Form 990 under the name “Gentle Wind Retreat” that its revenues from contributions, gifts, grants and similar sources for the tax year ending August 31, 2002 was \$1,214,464, with total revenues of \$1,575,403.¹⁹ As noted earlier, Plaintiffs also tout the global expanse of their activities.²⁰ Indeed, Plaintiffs expect to use the courts of the United Kingdom to vindicate themselves in this dispute, stating in the course of their attacks on their detractors on their eyeofthesky.com website that,

Legal action is in process and all involved will be prosecuted to the fullest extent of British, New Zealand and American legal systems. If you are an Instrument Keeper and wish to join this legal action and/or wish to contribute to our legal defense fund, please contact us.²¹

¹⁸ As the First Circuit noted in *Ticketmaster-New York*, *supra*, most of the cases that have been dismissed on the grounds of unreasonableness are those in which the defendant’s center of gravity, be it a place a residence or a place of business was located, at an appreciable distance from the forum. *Id* at 209. This is such a case. The gestalt factors in this case are more compelling than those in *Ticketmaster-New York*, in which the court declined to exercise personal jurisdiction over a defendant, who was a prominent lawyer in California. The First Circuit characterized the burden on the attorney as “onerous in terms of distances... [with] its inevitable creating great inconvenience,” and stated that such facts are “entitled to substantial weight in calibrating the jurisdictional scales. *Id*, at 210.

¹⁹ The Gentle Wind Project website referenced in the complaint, ¶ 24, contains a web page link (<http://www.gentlewindproject.org/GWP2001-2002Form990.pdf>) to an IRS Form 990 for an organization called “Gentle Wind Retreat” of Durham, New Hampshire. The figures quote above appear on this Form 990.

²⁰ See p.2, n. 3, p. 15, n. 16, *supra*;

²¹ One of the pages on the website of Gentle Wind Project referenced in the complaint (<http://www.gentlewindproject.org/news.htm>) contains the following:

The forum's interest in adjudicating this dispute is far less than in the usual case. This case – at the very least, the commercial causes of action under RICO and the Lanham Act that form the predicate for federal question jurisdiction -- is largely about the truth of remarkable claims made by Gentle Wind Project and its promoters that are, in many respects, religious in content. In evaluating whether Fraser and Gamble's review of Gentle Wind Project's "healing instruments" and the claims made for them are false, the Court will be called upon to determine whether in fact the "healing instruments" come from "telepathic communication with non-physical entities living outside of the Earth's physical and astral systems . . . the Spirit World, not the human world" and "would alleviate most negative human conditions, along with telepathic abilities to transmit these healings to anyone."²² Such propositions are not susceptible to proof by the standards that comport with the Federal Rules of Evidence, which require personal knowledge by lay witnesses and scientific rigor by experts. F. R. Ev. 601, 702.²³

Beyond these elemental problems of proof, the federal court system regards itself as not constitutionally competent to adjudicate matters that touch so closely on religious belief

On Tuesday May 18, 2004 The Gentle Wind Project filed a lawsuit in federal court in Portland, Maine to halt a smear campaign which it alleges is ruining The Gentle Wind Project's reputation and driving it out of existence. To see the complaint click here -
Lawsuit (In PDF Format)
Dated: 5:00 PM 05/19/04

For further legal explanation click here for Eye of the Sky Link.

The referenced "Eye of the Sky Link" (<http://www.eyeofthesky.org/>) contains information about Gentle Wind Project's lawsuit in this Court, and the statement quoted in the body of this memorandum above.

²² See p. 2, *supra*.

²³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-5 (1993) (reliability inquiry includes consideration of the verifiability of the expert's theory or technique, the error rate inherent therein, whether the theory or technique has been published and/or subjected to peer review, and its level of acceptance within the scientific community); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49, (1999)

and doctrine as do the claims of Gentle Wind Project for their “healing instruments.”²⁴ See *Presbyterian Ch. v. Mary E.B. Hull Mem. Pres. Ch.*, 393 U.S. 440, 449, (1969) (“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”) The forum for this dispute may be the internet and other organs of publication, but it is clearly not a federal court.

The three other gestalt factors are either neutral, or if tending to favor personal jurisdiction, are minor by comparison, or significantly diminished by the points above. Plaintiffs’ choice of forum is mitigated by the fact, noted above, that plaintiffs anticipate litigating this matter in the United Kingdom and New Zealand, and claim to be a “world healing organization.” See p. 2, n.3 *supra*; Compl. ¶ 24 (Gentle Wind Project conducts “seminars throughout the world”). The United States’ interest in having its courts resolve what is essentially a defamation claim is greatly reduced by Gentle Wind Project’s global scope, and by constitutional policies against court involvement in disputes over religious doctrine and in favor of the freedom of expression. Whatever administrative efficiency could be claimed by having all defendants in the same case will be overwhelmed by the acute adjudicatory conundrums the Court will face when called upon to evaluate whether, in the words of the Gentle Wind Project’s web site, “[t]he technology available through The Gentle Wind Project comes from the Spirit World, not the human world.”

CONCLUSION

²⁴ Nor can the federal courts have much interest in parsing the various meanings of the term “cult,” which plaintiffs characterize as defamatory. Compl. ¶ 1. According to the American Heritage Dictionary, (New College Edition 1975), the third definition of “cult” is “an exclusive group of persons sharing an esoteric interest.” By this definition, the application of the term “cult” to Gentle Wind Project and its promoters could be neither false nor defamatory.

The Court should dismiss the complaint against the Moving Defendants for lack of personal jurisdiction.

Date: August 30, 2004

/s/ Robert S. Frank

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CERTIFICATE OF SERVICE

The above signed person hereby certifies that on August 30, 2004, I electronically filed on behalf of Plaintiffs the foregoing document with the Clerk of Court, using the CM/ECF system which will send notification of such filing(s) to the following persons:

Daniel Rosenthal, Verrill & Dana, counsel for plaintiffs
Jerrold Crouter, Drummond, Woosdum, counsel for Defendants Garvey & Bergin

and the above person further certifies that on the same date, filed, he caused a copy of this document to be served on the following persons, by first class mail postage pre-paid:

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