

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. FAR-29122

APPLEAS COURT DOCKET NO. 2021-P-0909

**WERUVA INTERNATIONAL, INC.
Plaintiff-Appellant**

v.

**VETERINARY INFORMATION NETWORK, INC., AND EDIE LAU
Defendants-Appellees**

**ON APPEAL FROM A DECISION OF THE
MIDDLESEX SUPERIOR COURT**

**APPLICATION FOR FURTHER APPELLATE REVIEW
BY DEFENDANT-APPELLEE,
VETERINARY INFORMATION NETWORK, INC.**

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REQUEST FOR LEAVE TO OBTAIN
FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, for substantial reasons affecting the public interest and because it is in the interests of justice, Defendant-Appellee Veterinary Information Network, Inc. (“VIN”) requests further appellate review of the Appeals Court’s decision in *Weruva International, Inc. v. Veterinary Information Network, Inc.*, 2021-P-0909 (the “Decision”) and the related denial of VIN’s Motion for Reconsideration.

The Decision is the first ruling by an appellate court in Massachusetts implicitly holding that a non-resident can be sued in the Commonwealth if it publishes an allegedly defamatory statement about a Massachusetts resident on a publicly available website – and *this contradicts federal law* holding that doing so would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As such, further appellate review (i) would serve the public interest, because the Decision has the potential to unfairly impact innumerable people, and (ii) is in the interests of justice, as the Decision will result in VIN unfairly having to defend a case 3,000 miles from where it was incorporated and maintains its principal place of business.

STATEMENT OF PRIOR PROCEEDINGS

In June 2020, Plaintiff-Appellant Weruva International, Inc. (“Weruva”) filed a lawsuit in the Massachusetts Superior Court, alleging, *inter alia*, that VIN, a California corporation, with its principal place of business in California, had defamed Weruva by publishing material on a publicly available website and a publicly available Facebook page. VIN moved to dismiss for lack of personal jurisdiction because, in light of the fact that none of VIN’s *suit-related conduct* had anything to do with the Massachusetts, the essential element of “purposeful availment” could not be established. The Superior Court agreed and allowed VIN’s Motion to Dismiss.

Weruva appealed the Superior Court’s ruling, and the Appeals Court (i) ruled that purposeful availment could be established if VIN had engaged in “a regular course of sales” of memberships in Massachusetts because the alleged defamatory material was published on VIN’s website, which only was available to paying members—an incorrect factual assertion; and (ii) remanded the matter to the Superior Court so that either Weruva could take jurisdictional discovery on VIN’s course of sales in Massachusetts and/or an evidentiary hearing could be held on the matter.

While VIN, thereafter, moved for reconsideration of the Decision, the Motion for Reconsideration was denied.

STATEMENT OF RELEVANT FACTS

In 2008, VIN established the VIN News Service (“VIN News”) to act as an independent newsgathering organization that would examine issues of concern, importance and interest to the veterinary community, and communicate veterinary perspectives to the public. R.A., 125, ¶ 4. On or about June 9, 2017, an article containing allegedly defamatory statements about Weruva (the “Article”) was published on the *VIN News*’ website. R.A., 12. Subsequently, additional allegedly defamatory statements about Weruva appeared on *VIN News*’ Facebook page. R.A., 15. Significantly, Weruva does not allege that in order to have access to VIN News’ website or its Facebook page, a person has to purchase a VIN membership. R.A., 2-22. Indeed, to the contrary, that website and Facebook page are publicly available. R.A., 12 and 15 (where Weruva provides the public web addresses for the allegedly defamatory publications on each).

The Decision hinges on the incorrect premise that the Article was published on VIN’s website and only could be accessed by people to whom VIN had sold memberships. See, generally, Decision.

STATEMENT OF POINTS WITH RESPECT TO WHICH FUTHER APPELLATE REVIEW OF THE DECISION IS SOUGHT

Whether the Appeals Court committed reversible error by holding that VIN could be sued in Massachusetts for allegedly defamatory publications it made

through publicly available internet platforms simply because it generally engaged in a regular course of sales of memberships in the Commonwealth.

**STATEMENT AS TO WHY
FURTHER APPELLATE REVIEW IS APPROPRIATE**

As the Appeals Court notes on page 4 of its Decision:

When personal jurisdiction has been challenged under Mass. R. Civ. P. 12(b)(2), 365 Mass. 754 (1974), the plaintiff bears the burden of making a prima facie showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction. [Internal quotations and citation omitted.]

In this case, VIN argued that Weruva failed to carry that burden because it could not establish the essential element of purposeful availment. *See Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc.*, 825 F.3d 28, 35 (1st Cir. 2016) (holding that purposeful availment must exist for specific jurisdiction to attach). More specifically, VIN contended that Weruva failed to show that VIN's Massachusetts-based activities were related to the alleged defamation. *See United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001) (for purposeful availment to be established there must be "a demonstrable nexus between a plaintiff's claims and *a defendant's forum-based activities*." (quoting *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998) (emphasis added)). *See also Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("For a State to exercise jurisdiction consistent with due process, *the defendant's suit-*

related conduct must create a substantial connection with the forum State.”)

(Emphasis added).

While the Superior Court agreed with VIN, the Appeals Court noted that purposeful availment also could be established in a forum if a foreign citizen engaged in a “‘regular course’ of sales in the forum State.” Decision at pp. 5-6.

The Appeals Court went on to explain:

For example, in [*Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1981)], the Court held that a magazine publisher was subject to personal jurisdiction ***in a state where it regularly [sold] magazines***, reasoning that “[t]here is no unfairness in calling it to answer ***for the contents of that publication*** wherever a substantial number of copies are ***regularly sold and distributed.***”

Id. p. 6 (emphasis added).

In *Keeton*, there was a very clear and direct connection between the regular course of Hustler’s sales in New Hampshire and the alleged defamation, as the alleged defamatory material appeared in magazines Hustler sold in that state. Thus, as the Appeals Court noted, the Supreme Court of the United States held that “[t]here is no unfairness in calling [Hustler] to answer for the contents of that publication wherever a substantial number of copies are ***regularly sold and distributed.***” Decision at p. 6 (quoting *Keeton*, 465 U.S. at 781) (emphasis added). Although not expressly addressed by the Appeals Court, there can be no doubt that for the “regular course of sales” of an entity to provide a basis for exercising

personal jurisdiction over it, those sales also must be related to the alleged defamatory conduct because the concept of “general jurisdiction” has been virtually eliminated.¹ See *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (where the Supreme Court made it clear that so-called “general jurisdiction” is difficult or impossible to establish outside of the state where an entity is incorporated or maintains its principle place of business). See, also, *Gulf Oil Limited P’ship v. Petroleum Mktg. Grp., Inc.*, 308 F. Supp. 3d 453, 459 (D. Mass. 2018) (“Even though [defendant] does a substantial amount of business in Massachusetts, as it presumably does in other States, ... [t]here are no particular facts in the record to support a conclusion that BP’s business operations are ‘so substantial and of such a nature’ that it is ‘at home’ in Massachusetts, so to warrant characterizing this as the sort of ‘exceptional case’ the Supreme Court hypothesized.”).

The Appeals Court incorrectly concluded that VIN’s sale of memberships, which came with access to a members’ only website presented the same essential fact pattern as *Keeton*. Decision at pp. 7-9. Specifically, the Appeals Court reasoned that if VIN’s sale of memberships in Massachusetts rose to the level of being a “regular course of sales,” purposeful availment would be established, and it would not violate Due Process for the Superior Court to exercise personal jurisdiction over VIN. *Id.* Ultimately, therefore, the Appeals Court overruled the

¹ In fact, in the Superior Court, VIN specifically contended that there was no general

order of dismissal and remanded the matter to the Superior Court for jurisdictional discovery and/or an evidentiary hearing concerning VIN's Massachusetts sales. *Id.* at p. 12.

The flaw in the Appeals Court's analysis, however, is that it hinges on the patently false premise that the alleged defamatory publications were made on VIN's members-only website to which those members had to pay VIN for access. As Weruva acknowledges in its First Amended Complaint, however, the allegedly defamatory publications were on VIN News Service's ***publicly available*** website and Facebook Page for which no payment is required to access. *See* R.A., 12; 15 (setting out the public web addresses of the Website and Facebook page where the allegedly defamatory content can be viewed). As such, there is no connection whatsoever between VIN's course of sales in Massachusetts and the alleged defamatory publications. Thus, allowing VIN to be sued in Massachusetts in these circumstances effectively contradicts a mountain of federal case law holding that an entity cannot be sued for defamation in a jurisdiction simply because allegedly defamatory content on its website can be accessed there:

We have made pellucid that “the mere availability” of a defendant's primarily informational website in a forum is insufficient, without more, to subject a defendant to jurisdiction there. *A Corp. v. All Am. Plumbing, Inc.*, 812 F.3d 54, 61 (1st Cir. 2016). Otherwise, the universality of websites in the modern world would overwhelm

jurisdiction over it in Massachusetts, and Weruva did not contest this. R.A. 114-115, 128-144.

constitutional limitations on the exercise of personal jurisdiction.

Kuan Chen v. United States Sports Acad., Inc., 956 F.3d 45, 60 (1st Cir. 2020). *See also, Griffis v. Luban*, 646 N.W.2d 527, 536 (Minn. 2002) (“The mere fact that [the defendant, who posted allegedly defamatory statements about the plaintiff on the Internet] knew that [the plaintiff] resided and worked in Alabama is not sufficient to extend personal jurisdiction over [the defendant] in Alabama, because that knowledge does not demonstrate targeting of Alabama as the focal point of the ... statements”). *Ching-Yi Lin v. TipRanks, Ltd.*, No. 1:19-CV-11517-ADB, 2019 WL 6211246, at *5 (D. Mass. Nov. 21, 2019) (if posting something on a website was enough to subject a party to jurisdiction, “the simple fact that virtually every business now has a website would eviscerate the limits on personal jurisdiction over out-of-state defendants.”) (quoting *Media3 Techs., LLC v. CableSouth Media III, LLC*, 17 F. Supp. 3d 107, 111, 112 (D. Mass. 2014)); *Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25, 35 (1st Cir. 2010) (holding that an interactive website that did not sell or render services did not subject the owner of that website to jurisdiction in New Hampshire because “[t]he mere fact that such an interactive site is accessible in New Hampshire does not indicate that MMC purposefully availed itself of the opportunity to do business in New Hampshire.”).

CONCLUSION

In sum, (i) it would violate Due Process to exercise personal jurisdiction over VIN simply because it sold memberships in Massachusetts as the alleged defamation is unrelated to such sales; and (ii) allowing the Decision to stand would establish a precedent that (a) contradicts myriad federal cases holding that the posting of allegedly defamatory content on a publicly available website is *insufficient* to establish personal jurisdiction, and (b) could subject innumerable people and entities to suit in Massachusetts unjustifiably. For all of the foregoing reasons, VIN respectfully requests that this Court grant its Application for Further Appellate Review in order to advance the interests of justice and the public interest by correcting the manifest errors in the Appeals Court's Decision.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE
WITH MASS. R. APP. P. 27.1 and 16(k)**

I, Shepard Davidson, hereby certify that the foregoing Application of Appellee Veterinary Information Network, Inc. For Leave to Obtain Further Appellate Review complies with Mass. R. App. P. 27.1(b) with respect to format and length. Specifically, the brief is written in a proportional font (Times New Roman 14 point). The Statement As To Why Further Appellate Review Is Appropriate consists of 1,181 words as determined by the Microsoft Word's word count feature.

Shepard Davidson
Shepard Davidson, (BBO No. 557082)

CERTIFICATE OF SERVICE

I, Shepard Davidson, certify that on January 12, 2023, I served a true and accurate copy of the foregoing Application For Further Appellate Review By Appellee-Defendant Veterinary Information Network, Inc. on counsel for Appellant using the MA E-File system (e-file and courtesy copy option) as follows:

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Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-909

WERUVA INTERNATIONAL, INC.

vs.

VETERINARY INFORMATION NETWORK, INC. & another.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

So much of the judgment
allowing defendant
Veterinary Information
Network, Inc.'s motion to
dismiss for lack of
personal jurisdiction is
reversed. The remainder of
the judgment is affirmed,
and the matter is remanded
for further proceedings
consistent with the
memorandum and order of the
Appeals Court.

By the Court,

Joseph F. Stanton, Clerk
Date November 9, 2022.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-909

WERUVA INTERNATIONAL, INC.

vs.

VETERINARY INFORMATION NETWORK, INC. & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Weruva International, Inc. ("Weruva") filed an action seeking recovery for the harm it allegedly suffered when the defendants -- Veterinary Information Network ("VIN") and its employee Edie Lau -- published an article online about cat food that Weruva manufactures exclusively for the Australian market. The defendants moved to dismiss the amended complaint in its entirety for lack of personal jurisdiction or to dismiss one of the counts, alleging civil conspiracy, for failure to state a claim on which relief can be granted. A Superior Court judge allowed the motions to dismiss, agreeing with both grounds asserted in the motions, and denied Weruva's motion for jurisdictional discovery. Weruva appeals. We affirm the

¹ Edie Lau.

dismissal of the civil conspiracy claim and the allowance of Lau's motion to dismiss for lack of personal jurisdiction. We reverse the allowance of VIN's motion to dismiss for lack of personal jurisdiction and remand for further proceedings.

Background. Weruva is a Massachusetts corporation with its principal place of business in Natick. It manufactures natural pet foods, including a cat food called "Best Feline Friends" (BFF). VIN is a California corporation with its principal place of business in California. It operates an online community and information service for veterinarians, and its content is available only to subscribing members. VIN has two employees who live in Massachusetts but does not have a Massachusetts office. Lau resides in Washington State and is the News Service Director of VIN News Service, a division of VIN.

In June 2017 VIN published an article titled "Low thiamine suspected in cat illnesses linked to BFF food" to its website. The article, which was also accessible from VIN News Service's Facebook page and Internet search engines, was authored by Lau and consists mostly of an interview with an Australian veterinarian who identified BFF as the cat food linked with pet illnesses and deaths in Australia. The article states that "Weruva International Inc. of Natick, Massachusetts, recalled its [BFF] brand of canned cat food in Australia . . . but reports of illnesses are ongoing."

In its amended complaint, Weruva alleged that the article contains false statements, which damaged Weruva's reputation and resulted in business losses, including lost sales in Massachusetts. Weruva further alleged that it contacted VIN and Lau, but they refused to correct or retract the false statements. Based on these allegations, Weruva raised claims of commercial disparagement, defamation, negligence, G. L. c. 93A violations, and civil conspiracy.

In allowing the motions to dismiss, the judge concluded that, although the defendants' contacts with Massachusetts were sufficient to satisfy the long-arm statute, G. L. c. 223A, § 3, the exercise of personal jurisdiction over the defendants would not comport with the requirements of due process.² Specifically, the judge concluded that Weruva failed to establish the requirement of purposeful availment because "the alleged facts . . . do not suggest that the defendants aimed their conduct at Massachusetts such that they should have anticipated being haled into court here to answer for their conduct." Addressing Weruva's request for jurisdictional discovery, the judge found that the discovery sought -- such as VIN's sales data and

² The defendants do not challenge the judge's ruling regarding the long-arm statute. But as they correctly observe, "the long-arm statute's reach is not coextensive with what due process allows." SCVNGR, Inc. v. Punchh, Inc., 478 Mass. 324, 330 n.9 (2017).

membership numbers in Massachusetts -- "would not alter the purposeful availment analysis."

Discussion. Where, as here, a judge allows a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, our review is de novo. See von Schönau-Riedweg v. Rothschild Bank AG, 95 Mass. App. Ct. 471, 484 (2019). We review the denial of a motion for pretrial discovery for abuse of discretion. See Bishop v. Klein, 380 Mass. 285, 288 (1980).

When personal jurisdiction has been challenged under Mass. R. Civ. P. 12 (b) (2), 365 Mass. 754 (1974), the plaintiff bears the burden of making "a prima facie showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." Fern v. Immergut, 55 Mass. App. Ct. 577, 579 (2002). "Unless and until an evidentiary hearing is held, 'a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.'" von Schönau-Riedweg, 95 Mass. App. Ct. at 483, quoting Cepeda v. Kass, 62 Mass. App. Ct. 732, 738 (2004). "In conducting the requisite analysis under the prima facie standard, we take specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe them in the light most congenial to the plaintiff's jurisdictional claim." Cepeda, supra.

1. Personal jurisdiction over VIN. "'[T]he constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established "minimum contacts" in the forum state.'" Tatro v. Manor Care, Inc., 416 Mass. 763, 772 (1994), quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). The minimum contacts analysis has three prongs: the defendant must have purposefully availed itself of the privilege of conducting activities in the forum; the claim must arise out of or relate to the defendant's contacts with the forum; and the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice." Bulldog Investors Gen. P'ship v. Secretary of the Commonwealth, 457 Mass. 210, 217 (2010), quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

VIN relies solely on the first prong, purposeful availment, and argues that it requires a showing that a defendant's suit-related conduct specifically targeted the forum State. But the United States Supreme Court has made clear that targeting of a forum is not the only means of proving purposeful availment: "continuously and deliberately exploit[ing] the [forum] market" also suffices. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984). To establish purposeful availment through this means, the plaintiff must show a "regular . . . flow" or

"regular course" of sales in the forum State. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 889 (2011) (Nicastro) (Breyer, J., concurring).³ See Plixer Int'l, Inc. v. Scrutinizer GmbH, 905 F.3d 1, 10 (1st Cir. 2018); Williams v. Romarm, S.A., 756 F.3d 777, 785 (D.C. Cir. 2014). For example, in Keeton, supra, the Court held that a magazine publisher was subject to personal jurisdiction in a State where it regularly circulated magazines, reasoning that "[t]here is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." In contrast, a "single isolated sale" is insufficient to support jurisdiction. Nicastro, supra at 888 (Breyer, J., concurring).

Specifically in the Internet context, the Federal circuit courts have held that a regular flow or regular course of sales in the forum State is enough to establish purposeful availment. See, e.g., Chen v. U.S. Sports Acad., Inc., 956 F.3d 45, 59 (1st

³ The Nicastro plurality would have held that targeting is required to establish purposeful availment. See Nicastro, 564 U.S. at 882. But "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quotation and citation omitted). Marks v. United States, 430 U.S. 188, 193 (1977). Under this rule Justice Breyer's concurrence in Nicastro is controlling. See Plixer Int'l, Inc. v. Scrutinizer GmbH, 905 F.3d 1, 10 (1st Cir. 2018).

Cir. 2020); Plixer, 905 F.3d at 10; Williams, 756 F.3d at 785. Because of the omnipresent nature of Internet activity, "[t]he maintenance of a web site does not in and of itself subject the owner or operator to personal jurisdiction, even for actions relating to the site, simply because it can be accessed by residents of the forum." Shrader v. Biddinger, 633 F.3d 1235, 1241 (10th Cir. 2011). See Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010); Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 401 (4th Cir. 2003). But where there is evidence that a defendant used a website to conduct a "regular course of sale[s] in the [forum]," the exercise of jurisdiction may be proper. Chen, supra at 59-60, quoting Knox v. MetalForming Inc., 914 F.3d 685, 691 (1st Cir. 2019). See Plixer, supra (although record did not reveal what percentage of defendant's business came from forum market, purposeful availment shown by evidence that defendant used website to derive "not insubstantial income from that market").

Although there is no bright line establishing what constitutes a regular course of sales, see Plixer, 905 F.3d at 10-11, we think that the allegations here, if true, would suffice to make out a prima facie showing of purposeful availment. The amended complaint alleges that at least seventeen Massachusetts animal hospitals and veterinary clinics are VIN members and that members must pay an annual membership

fee to access VIN's website, which includes VIN's portal, searchable database, news service, and online community. Attached to the amended complaint are printouts from the websites of those hospitals and clinics, identifying themselves as "part of the VIN family." Also attached is a printout from VIN's website listing its annual membership rates, which range from \$810 for an individual membership to \$2,310 for a five-person group practice membership.

Were these allegations undisputed, we would conclude that Weruva met its prima facie burden of showing purposeful availment based on VIN's regular course of sales in Massachusetts. See Cannonball Fund, Ltd. v. Dutchess Capital Mgmt., LLC, 84 Mass. App. Ct. 75, 97 (2013) (in determining whether plaintiff made prima facie showing, court "accept[ed] the factual allegations of the complaint as true" where defendant did "not dispute any factual allegation, and submitted no affidavit showing its lack of contacts with Massachusetts"). But we must also consider the affidavit submitted by VIN, which does dispute some of the amended complaint's allegations; in particular, as pertinent to purposeful availment, the affidavit avers it to be "false[]" that seventeen Massachusetts animal hospitals or veterinary clinics are VIN members because "institutions" cannot join VIN. This dispute does not necessarily defeat Weruva's prima facie case because, even if

the allegation in the amended complaint is untrue, the affidavit does not otherwise "show[] [VIN's] lack of contacts with Massachusetts." Id. To the contrary, VIN admits in the affidavit that "a few of its members, less than [two percent], report that they live or work [in Massachusetts]." Because VIN did not provide its actual number of Massachusetts subscribers or total subscribers, however, the amount of revenue it derives from Massachusetts is unclear on this record.

In these circumstances we believe that the proper course of action is to remand for jurisdictional discovery, or for an evidentiary hearing or trial. See von Schönau-Riedweg, 95 Mass. App. Ct. at 491 & n.24 (remanding for evidentiary hearing or trial to determine facts relevant to personal jurisdiction and instructing that plaintiff be allowed to renew discovery request). The judge's denial of Weruva's motion for discovery was based on his accepting VIN's argument that purposeful availment requires specific targeting of the forum State. As we have explained, that is incorrect as a matter of law. Remand is therefore warranted.

2. Personal jurisdiction over Lau. With respect to Lau, Weruva has failed to meet its prima facie burden of showing that the exercise of personal jurisdiction would comport with due process. An employee's contacts with the forum State "are not to be judged according to [the] employer's activities there."

Calder v. Jones, 465 U.S. 783, 790 (1984). Rather, "[e]ach defendant's contact with the forum State must be assessed individually." Id.

Contrary to the teachings of Calder, Weruva did not differentiate, either in its arguments below or in its brief on appeal, between Lau's and VIN's activities in Massachusetts. That VIN has a subscriber base in Massachusetts is not sufficient to assert jurisdiction over Lau. We must look to the allegations in the amended complaint relevant to Lau, which are that she is the News Service Director of VIN News, derives her income from authoring and publishing articles through VIN, has frequently reported on veterinary issues in Massachusetts using information gathered from Massachusetts sources,⁴ authored the article in question, and refused to correct or retract the allegedly false statements in the article. These allegations do not establish the minimum contacts with Massachusetts necessary to satisfy due process. Unlike in Calder, on which Weruva relies, Weruva offered no evidence that Lau's conduct was directed at the forum State. In Calder the Court held that the forum State (California) could exercise jurisdiction over two employees of a national magazine -- a reporter and the

⁴ Lau disputes this allegation, stating in her affidavit that she has "rarely" reported on veterinary issues in Massachusetts or gathered information from Massachusetts sources.

president/editor⁵ -- because the allegedly libelous article "concerned the California activities of a California resident" and "was drawn from California sources," "and the brunt of the harm . . . was suffered in California." Id. at 789-790. In other words California was "the focal point" of the article. Id. at 790. Here, in contrast, the article was drawn mainly from sources in Australia and none in Massachusetts, and it concerned a line of cat food that Weruva manufactured exclusively for the Australian market. Even accepting Weruva's allegation that it suffered harm in Massachusetts, "Calder made clear that mere injury to a forum resident is not a sufficient connection to the forum." Walden v. Fiore, 571 U.S. 277, 290 (2014).

We are unpersuaded by Weruva's argument that it should be allowed alternatively to conduct discovery into the nature and extent of Lau's contacts with Massachusetts. Because Weruva did not make a colorable case for personal jurisdiction over Lau, the judge was within his discretion to deny discovery. See von Schönau-Riedweg, 95 Mass. App. Ct. at 491 n.24. See also United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 625-626 (1st Cir.

⁵ The magazine itself and its distributing company did not object to jurisdiction in California. See Calder, 465 U.S. at 785.

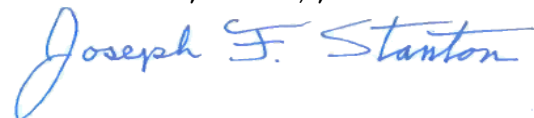
2001) (diligent plaintiff who has made "colorable claim for personal jurisdiction" may be entitled to discovery).

3. Civil conspiracy claim. The judge also concluded that the allegations of the amended complaint did not plausibly suggest the existence of a civil conspiracy. We agree. The amended complaint contains only conclusory assertions that VIN and Lau acted in a joint and deliberate effort to disparage and defame Weruva. Conclusory assertions such as these are insufficient to withstand dismissal. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008).

Conclusion. So much of the judgment allowing VIN's motion to dismiss for lack of personal jurisdiction is reversed. The remainder of the judgment is affirmed, and the matter is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Rubin, Shin & Ditzkoff, JJ.⁶),



Clerk

Entered: November 9, 2022.

⁶ The panelists are listed in order of seniority.