IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

AMERUS GROUP CO., an Iowa corporation, and ACM PROPERTIES, INC., an Iowa corporation, Plaintiffs, v. AMERIS BANCORP, a Georgia corporation, Defendant.	* * * * * * * * * * * * *	4:06-cv-00110 ORDER ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Before the Court is Defendant's Motion to Dismiss for Lack of Jurisdiction (Clerk's No. 11), filed April 4, 2006. Plaintiff filed a resistance to the motion, as well as supporting documentation, on April 18, 2006. A hearing was held on May 16, 2006. The matter is fully submitted.

I. BACKGROUND

On March 17, 2006, Plaintiffs, AmerUs Group Co. ("AmerUs") and ACM Properties, Inc. ("ACM"), filed a Complaint against Defendant Ameris Bancorp ("Ameris"), alleging Trademark Infringement and Unfair Competition under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). Plaintiffs also filed a Motion for Preliminary Injunction (Clerk's No. 2), however, hearing on that matter was stayed pending the Court's consideration of the present Motion to Dismiss.

Plaintiff's Complaint alleges that AmerUs is an Iowa corporation with its headquarters and principal place of business in Des Moines, Iowa. Through its subsidiaries, AmerUs engages in two primary lines of business: life insurance and annuities. AmerUs currently has more than 620,000 life

insurance policy holders, and 272,000 annuity owners in all fifty states, the District of Columbia, and the U.S. Virgin Islands. AmerUs owns and controls ACM, an Iowa corporation with its headquarters and principal place of business in Des Moines, Iowa, through an intermediate subsidiary. AmerUs owns numerous federal trademark registrations, including stylized marks and word marks, for use in connection with its various businesses.

Defendant Ameris Bancorp ("Ameris") is a Georgia corporation with its principal place of business in Moultrie, Georgia. Ameris is a bank holding company whose shares trade on the public stock exchange under the symbol "ABCB." Its operations are centered in Georgia, Florida, and Alabama, and offer a broad range of retail and commercial banking services. Formerly known as ABC Bancorp, Ameris adopted its new name effective December 1, 2005, and began using it extensively in connection with its business.

In early 2006, AmerUs contacted Ameris regarding possible infringement of the AmerUs marks. Ameris's counsel, Kimberly Myers, contacted AmerUs and informed it that she had done the trademark clearance work involved in adopting the Ameris name, and that at the time the name was adopted, Ameris was aware of AmerUs and its marks. AmerUs informed Ameris of its belief that Ameris was infringing on AmerUs's marks, but on March 3, 2006, Ameris filed a trademark application, Serial No. 78828207, for the stylized mark Ameris. The present litigation resulted.

II. FACTS

The facts regarding personal jurisdiction over Ameris in this matter are largely undisputed. As noted, Ameris is a Georgia corporation with its principal place of business in Moultrie, Georgia. It has

no offices, agents, representatives, or employees in Iowa. Ameris is not qualified to do business in Iowa, and has never done business, or applied to do business in Iowa. Ameris has no property holdings in Iowa and has never paid taxes in Iowa or mailed any IRS form 1099s to Iowa. Ameris has never advertised in Iowa or solicited business from Iowa. While it maintains a website, www.amerisbank.com, only someone who is already a customer of Ameris, and who pays a monthly fee, can engage in Internet banking and online bill-paying through the Ameris website. The only way to become a customer of Ameris is to make an in-person visit to one of its local banks in Georgia, Florida, or Alabama. Ameris claims that its records reveal only four tangential and tenuous connections with Iowa: 1) existing bank customers moving from Florida to Iowa; 2) an existing Florida customer adding an Iowa relative to a bank account; 3) Florida property being purchased by part-time Iowa residents who financed the transaction through Ameris at the recommendation of a Florida real estate broker; and 4) three Iowa residents purchasing certificates of deposit from a Georgia bank prior to that bank's acquisition by Ameris.

AmerUs maintains that, despite the lack of traditional contacts with Iowa, Ameris is still subject to personal jurisdiction in Iowa on the following basis:

> This Court has personal jurisdiction over Ameris because, as alleged herein, Ameris has knowingly and intentionally infringed trademark rights belonging to Plaintiffs. Ameris was well aware of AmerUs's rights in the mark AMERUS, yet deliberately chose to infringe that mark, thereby stealing AmerUs's goodwill and knowingly causing injury to AmerUs in Iowa, AmerUs's place of incorporation and principal place of business. Ameris continued its infringing activities even after AmerUs complained to Ameris about the infringing conduct. Ameris was thus fully aware that AmerUs was an Iowa company and that, as a result, the harm caused by Ameris's infringement would be felt primarily in Iowa. Ameris directed communications into Iowa regarding Ameris's infringing conduct. Ameris went so far as to file an application for United States

> trademark registration for the word AMERIS after being informed by AmerUs that Ameris's commercial use of the term AMERIS infringed AmerUs's rights. Accordingly, Ameris has committed intentional, tortious acts purposefully directed and expressly and uniquely aimed at Plaintiffs in Iowa, causing harm, the brunt of which is suffered and which Ameris knows is likely to be suffered, by Plaintiffs in Iowa. Ameris also operates a website, available at www.amerisbank.com, which wrongfully displays and exploits the confusingly similar term AMERIS in connection with Ameris's business activities. Ameris's website is accessible in Iowa and nationwide. Ameris also distributes annuities through a strategic partner that specializes in the distribution of insurance and investment products throughout the United States, including Iowa. Iowa has a strong interest in providing a forum for Plaintiffs to protect themselves from Ameris's infringing activities. It is reasonable and fair to call Ameris to account for its wrongful conduct in Iowa, and Iowa is the most convenient forum for Plaintiffs to assert the claims stated herein.

Complaint at ¶ 6.

III. LAW AND ANALYSIS

To determine whether it has personal jurisdiction over a non-resident defendant, this Court is guided by two primary rules. First, the facts presented must satisfy the requirements of the state's long-arm statute. *See Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 225 (8th Cir. 1987). If the activities of the non-resident defendant pass the first level of analysis, the Court must then consider whether the exercise of personal jurisdiction complies with the requirements of constitutional due process. *See Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1387 (8th Cir. 1995); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1388 (8th Cir. 1991). "Because personal jurisdiction in Iowa reaches to the fullest extent permitted by the Constitution," however, this Court "need only examine whether minimum contacts sufficient to satisfy the Fourteenth Amendment exist." *Hicklin Eng., Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992) (per curiam) (citing *Newton Mfg. Co. v. Biogenetics, Ltd.*, 461 N.W.2d

472, 474 (Iowa 1990)); *see also Republic Credit Corp. I v. Rance*, 172 F. Supp. 2d 1178, 1182 (S.D. Iowa 2001) ("[B]ecause personal jurisdiction in Iowa is coterminous with the constitutional reach of due process, the two level inquiry collapses into one.").

Due process mandates that personal jurisdiction exists only if a defendant has sufficient "minimum contacts" with the forum state, such that summoning the defendant to the forum state would not offend "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). To maintain personal jurisdiction, a defendant's contacts with the forum state must be more than "random," "fortuitous," or "attenuated." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Rather, sufficient contacts exist when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In evaluating a defendant's reasonable anticipation, there must be "'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Jurisdiction is proper, therefore, where the contacts proximately result from actions by the defendant that create a "substantial connection" with the forum state. *Id.*; *World-Wide Volkswagen*, 444 U.S. at 297.

In addition to the basic principles of due process, the Court evaluates five factors in analyzing the constitutional requirements needed to sustain personal jurisdiction: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum; (3) the relation of the cause of

action to these contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *See Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1432 (8th Cir. 1995) (citing *Northrup*, 51 F.3d at 1388; *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983)); *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977). The first three factors are considered to be primary, with the third factor distinguishing whether jurisdiction is specific or general.[1] *See Wessels*, 65 F.3d at 1432 n.4. The latter two factors are considered "secondary factors." *Minn. Mining & Mfg. Co. v. Nippon Carbide Indus. Co.*, 63 F.3d 694, 697 (8th Cir. 1995); *Northrup King*, 51 F.3d at 1388.

A. *The Nature and Quality of Defendants' Contacts with Iowa*

AmerUs relies exclusively on the following assertions in its claim that personal jurisdiction over Ameris is proper: 1) Ameris "was well aware of AmerUs's rights in the mark AMERUS"; 2) Ameris "directed communications into Iowa regarding [its] infringing conduct" in response to AmerUs's cease and desist orders; 3) Ameris filed an application for a trademark of the word "Ameris"; and 4) Ameris "distributes annuities through a strategic partner." *See generally* Pl.s' Resistance Br. While AmerUs also points out that Ameris operates a website, viewable in Iowa and nationwide, AmerUs has specifically disclaimed reliance on this factor as supportive of personal jurisdiction. *See id.* at 20 n.14

[1] "It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (citation omitted). "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." *Id*. at n.9 (citations omitted).

("This Court need not delve into the "*Zippo*" standard for whether Ameris's website, taken alone, could give rise to personal jurisdiction in the forum because, as noted previously, the AmerUs Plaintiffs do not rely on [] Ameris's website for that purpose.").

There is no dispute that Ameris lacks the traditional types of contacts with Iowa that would normally subject it to jurisdiciton here, i.e., Ameris is not an Iowa business, has never done or applied to do business in Iowa, and has no employees, agents, property, or other contacts in Iowa. Moreover, the fact that Ameris made phone calls to Iowa in response to AmerUs's complaints about the alleged infringement is not dispositive. The Eighth Circuit has identified interstate facilities, such as telephone and mail, as "secondary or ancillary" factors which "cannot alone provide the minimum contacts required by due process." *Bell Paper Box, Inc. v. Trans Western Polymers, Inc.*, 53 F.3d 920, 923 (8th Cir.1995) (citing *Scullin Steel Co. v. National Ry. Utilization Corp*., 676 F.2d 309, 314 (8th Cir.1982); *Mountaire Feeds Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655-56 (8th Cir.1982)). While such contacts may be considered in conjunction with other contacts that support personal jurisdiction, it is undisputed that Ameris's phone or mail contacts with Iowa were only responsive to AmerUs's cease and desist letter. It is equally clear that the underlying basis of this suit, trademark infringement, did not arise from Ameris's communications with Iowa. Accordingly, the Court cannot conclude that Ameris's responsive communications present a viable consideration in the personal jurisdiction calculus. *See e.g.*, *Med-Tech, Inc. v. Kostich*, 980 F. Supp. 1315, 1329-31 (N.D. Iowa 1997) (finding that a notice of infringement mailed into a forum state could not form a basis for personal jurisdiction and collecting cases similarly finding that legal correspondence is generally insufficient for

personal jurisdiction unless the cause of action "arises from" that communication).

In sum, then, AmerUs's claim for the exercise of personal jurisdiction rests exclusively on its allegation that Ameris knowingly and tortiously interfered with AmerUs's trademark rights, knowing full well that the brunt of any injury associated with that conduct would be felt in Iowa, the place of AmerUs's incorporation and its primary place of business. AmerUs relies on *Calder v. Jones*, 465 U.S. 783 (1984), in support of its assertion that Ameris's tortious conduct alone subjects it to jurisdiction in Iowa.

In *Calder*, popular entertainer and California resident Shirley Jones brought suit in California claiming she had been libeled by an article written by John South and edited by Iain Calder in Florida, but published in the *National Enquirer*, a national magazine with a large California circulation. *Id*. at 784. Jones sued Calder and South for libel, invasion of privacy, and the intentional infliction of emotional harm. *Id*. at 785. Finding that the "allegedly libelous story concerned the California activities of a California resident," and was drawn from California sources, the United States Supreme Court held that personal jurisdiction was proper because "the brunt of the harm, in terms both of [Jones's] emotional distress and the injury to her professional reputation, was suffered in California." *Id*. at 788-89. "In sum, California [was] the focal point both of the story and of the harm suffered." *Id*. While Calder and South argued that they were not responsible for the article's circulation in California, the Court found:

> [P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon [Jones]. And they knew that the brunt of that injury would be

> felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. An individual injured in California need not go to Florida to seek redress from persons who, through remaining in Florida, knowingly cause the injury in California.

Id. at 789-90.

The so-called *Calder* "effects test" was evaluated in a trademark infringement action by the Eighth Circuit Court of Appeals in *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d at 1384. There, the South Dakota owner of the "Dakota" trademark brought an infringement suit against a California competitor holding the trademark "Dakota Sportswear." *Id*. at 1386. The South Dakota plaintiff relied on *Calder* in its assertion of personal jurisdiction. *Id*. at 1390. The Circuit Court recognized that *Calder* permits the assertion of personal jurisdiction over a non-resident defendant whose acts "'are performed for the very purpose of having their consequences felt in the forum state.'" *Id*. at 1390-91 (quoting *Brainerd v. Governors of Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989)). The Court found that *Calder* applied in the case, despite certain distinctions:

> The allegedly wrongful act in *Calder* was perhaps more directly aimed at the plaintiff and her work in the forum state than may be true in this case. Moreover, the *National Enquirer*, which has its biggest circulation in California, may have a stronger sales presence in the forum state than Dakota Sportswear does. These distinctions do not prevent the applicability of *Calder* to the facts of this case, however.

Id. at 1391.

Relying on *Calder*, the Court found that the fact that plaintiff had sent defendant a cease and desist letter, and the fact that defendant had twice been rejected in its attempts to register the trademark "Dakota," supported a preliminary finding that defendant knowingly and intentionally infringed on

plaintiff's trademark. *Id*. at 1391. AmerUs relies on *Dakota* because it demanded that Ameris cease its allegedly infringing activity, because Ameris was undisputedly aware of AmerUs's marks when it adopted its own mark, and because AmerUs's principal place of business is in Iowa and it will thus feel the "brunt" of injury here. It is this knowing targeting of injury, according to AmerUs, that satisfies the requirements of due process.

Dakota, however, has several distinguishing features. The Court discussed two various methods for determining where a trademark action "arises:" 1) where the "'passing off,' which is 'where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's'" occurs; and 2) where the plaintiff suffers the economic impact of the tortious conduct, i.e., where its principal place of business is situated. *Id*. at 1388. The Court declined to adopt one position or the other in *Dakota*, noting that "[t]he fact that some of the 'passing off' occurred in South Dakota, along with the fact that [plaintiff's] principal place of business is in South Dakota, demonstrates that [defendant's] actions were uniquely aimed at the forum state and that the 'brunt' of the injury would be felt there." *Id*. at 1391. In the present case, there was clearly no "passing off" of Ameris's products in Iowa, and no real likelihood that any persons in Iowa would reasonably have been confused by Ameris's allegedly infringing marks. Moreover, the *Dakota* Court found that its conclusion that jurisdiction was proper under *Calder* was "bolstered by the fact that there is at least some suggestion in the record that [defendant] directly shipped to South Dakota." *Id*. The present record is devoid of any evidence that Ameris ever solicited or attempted to purposefully establish any business connections with any person or entity in Iowa.

More importantly, the *Dakota* Court stated: "In relying on *Calder*, we do not abandon the five part test of *Land O'Nod*. We simply note that *Calder* requires the consideration of additional factors when an intentional tort is alleged." This continued reliance on the traditional five factor test was reaffirmed by the Court in *Hicklin Engineering, Inc. v. Aidco, Inc.*, 959 F.2d at 738. In *Hicklin*, an Iowa business operating exclusively in Iowa sued a Minnesota corporation in Iowa court for intentional interference with prospective business advantage, interference with contractual relations, and libel. *Id*. at 739. Aidco, like Ameris, was not licensed to do business in Iowa, maintained no employees, offices, or agents here, and did not own any Iowa property or bank accounts. *Id*. Hicklin nonetheless contended that the case was governed by *Calder*, stating that the intentional torts at issue were specifically targeted at it knowing that the brunt of injury would be felt by Hicklin in the forum where it maintained its principal place of business. *Id*. The Eighth Circuit rejected Hicklin's claim, emphasizing that "it was more than mere effects that supported the [*Calder*] Court's holding." *Id*.

> The [Supreme] Court found that Calder intentionally aimed his tortious action at California and could, therefore have "reasonably anticipated being haled into court there." Additionally, the Enquirer had a substantial percentage of its national circulation in California. . . .
>
> Assuming Hicklin's allegations to be true, Aidco sent correspondence containing defamatory statements to several of Hicklin's customers and interfered with its business. None of the correspondence, however, was published in Iowa. Nor can we say that Aidco's actions were targeted to have an effect in Iowa. When a business seeks to promote its products and solicit the customers of its competitors, it necessarily wishes to have customers believe that its products are superior and to place its competitor's products in a less favorable light. Although this promotion and solicitation *may have an effect on a competitor, absent additional contacts, this effect alone will not be sufficient to bestow personal jurisdiction.*"

Id. at 739 (emphasis added, internal citations omitted).

In attempting to reconcile *Calder* with *Dakota* and *Hicklin*, courts in this circuit have reached a general consensus that the effects of a tortious act can serve as a source of personal jurisdiction only where they: 1) are intentional; 2) are uniquely or expressly aimed at the chosen forum; and 3) caused harm, the brunt of which was suffered in the forum and which the defendant knew was likely to be suffered there. *See e.g.*, *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 729 (N.D. Iowa 2005) (citing *Calder*, 465 U.S. at 900); *Zumbro, Inc. v. California Natural Prods.*, 861 F. Supp. 773, 783 (D. Minn. 1994) (citing *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)); *see also Efco Corp. v. Aluma Systems, USA, Inc.*, 983 F. Supp. 816, 821 (S.D. Iowa 1997) (defendant's actions must be intentional and the "'focal point'" of the act, i.e., where the 'brunt' of the harm is intended, must be within the chosen forum"). This consensus does not, however, answer the question of whether, standing alone, the "effects" of a tortious act can subject a defendant to personal jurisdiction in a forum where no other contacts exist. This Court holds it cannot. As noted by the Third Circuit in *Imo Industries, Inc. v. Kiekert Ag*, 155 F.3d 254 (3d Cir. 1998), *Calder* did not "carve out a special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state." *Id*. at 265.

Apart from the constitutional requirement that personal jurisdiction be exercised in such a way as to comport with traditional notions of fair play and substantial justice, another problem with exercising jurisdiction over a defendant solely on the basis of "effects" was astutely stated by the Ninth Circuit: "[I]f an allegedly wrongful act were the basis for jurisdiction, a holding on the merits that the act was not wrongful would deprive the court of jurisdiction." *Yahoo! Inc., v. La Ligue Contre Le*

Racisme Et L'Antisemitisme, 433 F.3d 1199, 1208 (9th Cir. 2006). Thus, numerous courts have recognized the impropriety of basing a constitutionally required determination solely on the effects of allegedly wrongful conduct, and have required something more to support the exercise of personal jurisdiction. *See Lindgren v. GDT, L.L.C.*, 312 F. Supp. 2d 1125, 1133 (S.D. Iowa 2004) ("While *Calder* lends support to Lindgren's jurisdictional claims, it does not provide an independent basis for personal jurisdiction in the Eighth Circuit."); *Mulcahy v. Cheetah Learning LLC*, 2002 WL 31053211, *5 (D. Minn. 2002) (stating: "[I]t is clear that the effects test does not entirely supplant minimum contacts analysis," and finding that satisfaction of effects test merely bolstered the conclusion that the exercise of personal jurisdiction over a defendant was proper when other traditional factors also supported jurisdiction) (unpublished disposition). Moreover, while no Court has explicitly held that the effects test alone is sufficient, those that have applied the test have generally found that jurisdiction was proper only where some additional contact with the forum state was present. *See e.g.*, *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (finding personal jurisdiction in California over an Illinois resident proper where defendant knew his actions would have the effect of injuring plaintiff in California where plaintiff had its principal place of business *"and where the movie and television industry is centered*") (emphasis added); *Imo*, 155 F.3d at 264 (finding that the mere assertion that defendant knew the plaintiff's principal place of business was located in the forum "would be insufficient in itself" to meet the requirement of *Calder* that the tortious conduct be expressly aimed at the forum); *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club, Ltd.*, 34 F.3d 410 (7th Cir. 1994) (finding personal jurisdiction proper in trademark infringement action on the basis that the

"largest concentration of consumers likely to be confused by broadcasts implying some affiliation between the Indianapolis Colts and the Baltimore team is in Indiana," and noting that in *Calder*, the plaintiff did more than show that an out-of-state act caused an injury in the forum state, i.e., the Court also found that defendants had "entered the state in some fashion, as by the sale . . . of the magazine containing the defamatory material"); *Wallace v. Herron*, 778 F.2d 391, 394 (7th Cir. 1985) ("We do not believe that the Supreme Court, in *Calder*, was saying that any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff.").

In the present case, AmerUs has certainly presented sufficient evidence to infer that Ameris's adoption of the "Ameris" mark was intentional. The Court is unconvinced, however, that AmerUs has adequately shown that Ameris expressly intended Iowa as the focal point of any harm that would necessarily result from its alleged infringement. In *Calder*, California was deemed the focal point of the harm because it was the center of the entertainment industry in which the Plaintiff worked, in addition to being her primary place of residence. *Calder*, 465 U.S. at 790. Likewise in *Indianapolis Colts*, the Court concluded that Indiana was the focal point of harm because the highest concentration of Colt fans were located there and were the most likely to be confused by the defendant's offensive mark. Here, those persons likely to be confused by Ameris's mark are potential customers residing in Georgia, Florida, and Alabama. There is no indication in the present record that Ameris has ever attempted to solicit or otherwise profit from the AmerUs marks in Iowa. Indeed, there is no evidence in the record supporting the notion that any Iowa resident has been confused or is likely to be confused by Ameris's

use of the "Ameris" mark. *Imo*, 155 F.3d at 254 (stating that satisfaction of the "intentionally targeted and focused on" portion of the *Calder* test will generally "require some type of 'entry' into the forum state by the defendant"); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (holding a company's sales activities focusing "generally on customers located throughout the United States and Canada without focusing on and targeting" the forum state do not support personal jurisdiction); *Metallic Ceramic Coatings, Inc. v. Precision Prods. Inc.*, 2001 WL 122227 (E.D. Pa. 2001) (unreported disposition) (quoting *Imo*, 155 F.3d at 266, in support of its holding that mere knowledge that the plaintiff is located in the forum is insufficient to establish intentional targeting of the plaintiff). To hold that Ameris's mere knowledge that AmerUs maintains its primary place of business in Iowa is sufficient to exercise personal jurisdiction would subject every litigant accused of an intentional tort to jurisdiction in a remote forum without any consideration of the relationship between the parties and the litigation, and without consideration of the Supreme Court's holding, notably made after the decision in *Calder*, that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474.

AmerUs's contention that this Court's opinion in *Efco* mandates a different result is unconvincing. The plaintiff and defendant in *Efco* were two of only three major competitiors in the same market. *Efco*, 983 F. Supp. at 823. Efco alleged theft of trade secrets, inducement of breach of fiduciary obligation, conversion, and unjust enrichment. *Id*. at 818. Recognizing that "[t]he intended forum or 'focal point' regarding one international company's interactions with another international company is substantially more difficult than the classic instance of 'effects' [dealing with individual

parties]," this Court found that the focal point of any "theft" will arguably always be the place where the owner of the goods is located. *Id*. at 821-23. In a case such as this, where the allegedly wrongful conduct is infringement of a competitor's trademark, it is not so reasonable to presume that the "brunt" of the wrongdoing would be felt in a forum where the offensive mark was never publicized or injected into the market such that it would likely cause consumer confusion—the very essence of the protections afforded trademark holders. Additionally, AmerUs has not offered any *convincing* evidence that AmerUs and Ameris necessarily compete in the same market. While certainly the lines between various types of financial products are somewhat "blurred," the record evidence reflects that AmerUs sells life insurance and annuity products, while Ameris deals only in personal and commercial banking. While Ameris does have a "strategic partner," namely PFIC corporation, the record does not reflect any evidence that any partner or subsidiary of Ameris which bears or uses the allegedly infringing mark has ever actually conducted or sought to conduct business in Iowa, such that Iowa could be considered the focal point of the infringement. Accordingly, the Court concludes that neither the nature or quality of Ameris's contacts with Iowa, nor the *Calder* effects test, support the exercise of personal jurisdiction in this matter.

B. *The Quantity of Defendants' Contacts with Iowa*

It is well-established that specific jurisdiction can arise from a single contact with the forum state. *R.H. Fulton v. Chicago, Rock Island & Pac. R.R. Co.*, 481 F.2d 326, 334-36 (8th Cir. 1973); *see also Burger King Corp*., 471 U.S. at 475 n.18 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)) ("So long as it creates a 'substantial connection' with the forum, even a single

act can support jurisdiction."). Thus, when specific jurisdiction is being alleged, the quantity of contacts is not determinative. *See Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 711 n.10 (8th Cir. 2003) (noting that quantity of contacts, nature and quality of contacts, and connection of those contacts to the cause of action are the three primary factors to be considered in the determination of personal jurisdiction, but stating that "in a specific jurisdiction case, we will consider the last two of the primary factors . . . ."). In any event, there is no dispute in the record that Ameris had no actual contacts with the state of Iowa such that quantity should be a consideration. This factor, therefore, weighs against the exercise of personal jurisdiction.

C. *The Relation of the Cause of Action to Defendants' Contacts*

The third factor in the analysis distinguishes general jurisdiction from specific jurisdiction. *Burlington Indus., Inc. v. Maples Indus., Inc.*, 97 F.3d 1100, 1102 (8th Cir. 1996). As noted, *supra*, specific jurisdiction refers to the state's assertion of personal jurisdiction over a defendant in instances where the defendant has purposely directed its activities at forum residents, and litigation results from injuries arising out of, or relating to, those activities

See id.; *Wessels*, 65 F.3d at 1432 n.4. Here, the Court has previously concluded, in its discussion of *Calder's* applicability to the present case, that Ameris's activities were not sufficiently uniquely or expressly targeted at Iowa such that it should reasonably anticipate being haled into Court in Iowa. Accordingly, this factor weighs against the exercise of personal jurisdiction over Ameris.

D. *The Interest of Iowa in Providing a Forum for its Residents*

There can be little doubt that Iowa has an interest in adjudicating AmerUs's claims and

providing a forum for its residents. Accordingly, the fourth factor weighs in favor of the exercise of specific personal jurisdiction over Ameris. *See Aylward v. Fleet Bank*, 122 F.3d 616, 618 (8th Cir. 1997) (summarily concluding that this portion of the test weighed in favor of jurisdiction by assuming the forum state has an interest in providing a forum for its residents).

E. *The Convenience of the Parties*

The final factor to be considered is the convenience of the parties. While normally a plaintiff is entitled to choose the forum in which to litigate a case, the Court is mindful that litigation between citizens of different states will virtually always result in an inconvenience to one party or the other. *See Northrup King*, 51 F.3d 1383 at 1389. Accordingly, the Court concludes that this factor does not weigh in favor of either party.

IV. CONCLUSION

Having considered the relevant factors, the Court concludes that, as both a prima facie matter, and by a preponderance of the evidence,[2] Ameris lacks sufficient minimum contacts with Iowa such that the exercise of personal jurisdiction in an Iowa Court would offend traditional notions of fair play and substantial justice. AmerUs has failed to carry its burden to show by the requisite standard that

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[2] **"**While it is true that the plaintiff bears the ultimate burden of proof on [the issue of personal jurisdiction], jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing." *Dakota*, 946 F.2d at 1387 (citing *Cutco Indus. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986)). AmerUs requests, in its resistance brief, that the Court should permit it to conduct expedited discovery to test the truthfulness of any factual assertions made by Ameris. The factual assertions of Ameris, however, are not contested by AmerUs and it is not clear that "further discovery would demonstrate facts sufficient to constitute a basis for jurisdiction." *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). Regardless, the Court finds that jurisdiction fails as a prima facie matter, obviating the need for additional jurisdictional discovery on the issues presented.

subjecting Ameris to jurisdiction in Iowa would comport with constitutional mandates. Accordingly, Ameris's Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(2) is GRANTED and the matter is Dismissed for lack of personal jurisdiction over Defendant Ameris Bancorp. Any remaining pending motions by either party are denied as moot, in light of this Court's order of dismissal.

IT IS SO ORDERED

Dated this ___22nd___ day of May, 2006.

ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT