

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. 23-CV-719

ROBERT A. DOANE,  
*Plaintiff*

v.

XANADU MARKETING, INC., and  
JOSEPH DELFGAUW,  
*Defendants.*

**RECEIVED**

7/5/2023

MOTION TO DISMISS  
(MEMORANDUM OF LAW INCORPORATED)

Defendants Xanadu Marketing, Inc. (“Xanadu”) and Joseph Delfgauw (“Delfgauw”) move to dismiss Robert A. Doane’s (“Plaintiff”) amended complaint (“Complaint”). The Complaint’s defects are not curable and should be dismissed with prejudice.

Neither Defendant defamed Plaintiff in the podcast referenced by Plaintiff. If neither Defendant stated any improper facts about Plaintiff, then he could not have been damaged, and therefore, the claim fails. In fact, Defendants found no mention of Plaintiff anywhere in the podcast, so all of Plaintiff’s claims fail because the facts support no claims of him being damaged.

Finally, even if there were a viable claim, Plaintiff would have no jurisdiction over Defendant Delfgauw because he lives in Michigan. Nor does Plaintiff allege facts that support a claim to pierce Xanadu’s corporate veil to hold Delfgauw liable.

I. ALLEGED FACTS.

Plaintiff alleges that Delfgauw has contacts with Massachusetts. Complaint (“Comp.”) at ¶ 13. In or about September 2019, Plaintiff brought a claim against Xanadu and Motor Trend

Group. *Id.* at ¶ 14; *see also* 1:19-cv-12018-FDS filed in the United States District Court for District of Massachusetts. On or about February 17, 2020, Plaintiff and Xanadu entered into a settlement agreement (“Agreement”). *Id.* at ¶ 15. Under Section 12 of the Agreement, Plaintiff and Xanadu agreed that “neither party to it shall disparage the other or share any information related to this Agreement with any third party, or party not a signatory to Agreement.” *Id.* at 18. All disputes related to the Agreement would be in Massachusetts. *Id.* at 19.

In February 2023, Delfgauw was on Episode 10 of the “Deserve to Win” podcast (“Podcast”) produced by The Troutman Firm. *Id.* at ¶ 21; *see also*

[https://youtu.be/ahz\\_1MQP60?t=2037](https://youtu.be/ahz_1MQP60?t=2037).<sup>1</sup>

Plaintiff alleges that Delfgauw made these statements on the Podcast: that Plaintiff fraudulently manufactured claims under the TCPA by opting in on websites; Plaintiff would not sue Xanadu as Xanadu has evidence of Plaintiff’s fraudulent opt-ins; that Plaintiff filed frivolous court cases; Plaintiff is actually “thrown ...out of court” because the Court is “like dude, you again, the judge is like, you again, get out of here.”; and that the Massachusetts courts were “mad” at Plaintiff as a result of Plaintiff’s “frivolous lawsuits.” *Id.* at ¶ 23.

Plaintiff references the Podcast being shown on [www.tcpaworld.com](http://www.tcpaworld.com), YouTube, and [www.natlawreview.com](http://www.natlawreview.com). *Id.* at ¶ 27.<sup>23</sup>

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<sup>1</sup> A web search for this Podcast directs searchers to the YouTube channel for The Troutman Firm. This link takes you to that Podcast where Delfgauw appears.

<sup>2</sup> <https://tcpaworld.com/2023/02/23/here-it-is-deserve-to-win-ep-10-is-out-now-and-chock-full-of-tcpa-goodness/>

<sup>3</sup> <https://www.natlawreview.com/article/here-it-deserve-to-win-ep-10-out-now-and-chock-full-tcpa-goodness-podcast>

## II. MOTION TO DISMISS STANDARD.

Mass. R. Civ. P. 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Mass. R. Civ. P. 12(b)(6) allows for the dismissal of a complaint if it fails to state a claim on which relief can be granted. A 12(b)(6) motion “is to permit prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff’s claim is legally insufficient.” *Nguyen v. William Joiner Center for the Study of War and Social Consequences, et al.*, 450 Mass. 291, 295, 877 N.E.2d 1266, 1270 (2007) citing *Harvard Crimson, Inc. v. President & Fellows of Harvard College*, 445 Mass. 745, 748, 840 N.E. 2d 518 (2006).

“While a complaint attacked by a...motion to dismiss does not need detailed factual allegations...a plaintiff’s obligation to provide the ‘grounds’ for this ‘entitlement to relief’ requires more than labels and conclusions...Factual allegations must be enough to raise a right to relief above the speculative level...[based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . .” *Iannachino v. Ford Motor Company*, 451 Mass. 623, 636, 888 N.E. 2d 879, 890 (2008) quoting *Bell A. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-1965 (2007). “What is required at the pleading stage are factual ‘allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[] the threshold requirement of 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief’” *Iannachino*, at 636 quoting *Bell Alt. Corp.* 127 S.Ct. 1955, 1966.

In evaluating a 12(b)(6) motion, a court may consider “the allegations of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account.” *Shaer v. Brandeis University*, 432 Mass. 474, 477-478, 735 N.E.2d 373, 377-78 (2000). It need not accept legal conclusions cast in

the form of factual allegations. *Id.* Plaintiff may also not rely on “subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts.” *Id.*

### III. ARGUMENT.

#### a. Defendants Did Not Defame Plaintiff.

For the claim of defamation, Plaintiff must prove four elements: “(1) the defendant published a defamatory statement of and concerning the plaintiff; (2) the statement was a false statement of fact (as opposed to opinion); (3) the defendant was at fault for making the statement, and any privilege that may have attached to the statement was abused; and (4) the plaintiff suffered damages as a result, or the statement was of the type that is actionable without proof of economic loss.” *Lawless v. Estrella*, 99 Mass.App.Ct. 16, 18-19 (2020).

A review of the Podcast at [https://youtu.be/ahz\\_IMQP60?t=2037](https://youtu.be/ahz_IMQP60?t=2037) has no statements that reference Plaintiff.<sup>4</sup> The Court may consider materials without converting this motion to dismiss to one for summary judgment. *Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000). Because neither Defendant mentioned Plaintiff, the first element of defamation fails.

Further, even if Delfgaww did mention Plaintiff on the Podcast, it would still fail because it would have to be a false statement that “would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community.” *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975). As the Court can listen, Plaintiff is not mentioned on the Podcast; therefore, there are no false statements. But even if the Court took the Complaint’s allegations at face value, none of those statements would satisfy a defamation claim.

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<sup>4</sup> Plaintiff references this Podcast at Comp. at ¶ 21-23, 27.

Finally, Plaintiff pleads no damages from the alleged defamation, and his claim also fails. *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 630 (2003). Plaintiff alleges that the Podcast was viewed “in Massachusetts and across the county...” Comp. at ¶ 27. He further alleges various damages, including “irreparable injuries” and damage to his reputation. *Id.* at ¶ 38-39. Again, taken in light favorable to Plaintiff, even these damages do not rise to defamation because of viewings of the Podcast. However, as the Court has seen the Podcast, there is no mention of Plaintiff.

Because Plaintiff’s claim for defamation does not survive, Count One should be dismissed.

b. Defendants Did Not Breach The Agreement.

Plaintiff alleged Defendants breached the Agreement by alleging making disparaging statements. Plaintiff needs to establish the following for a claim of breach of contract: (1) the existence of a contract; (2) a breach; and (3) damages. *Sterilite Corporation v. Continental Casualty Co.*, 20 Mass. App. 215, 479 N.E.2d 205 (1985). It “must do more than allege, in conclusory fashion, that the defendant breached the contract, by describing, with ‘substantial certainty,’ the specific contractual promise the defendant failed to keep.” *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 586 (1st Cir.2007).

The Parties agree there was a valid contract. However, there was no breach and no damages based on the facts. The Podcast did not mention Plaintiff, so Defendants could not have breached the Agreement. Additionally, the damages alleged by Plaintiff are unsupported and are not linked to the Defendants’ actions.

However, a review of the allegations in Paragraph 23, taken in the light most favorable to Plaintiff, would not be a breach of the Agreement. The Agreement stated no party “disparage the

other or share any information related to this Agreement...” Comp. at ¶ 18. Neither Defendant mentions anything related to the Agreement in Paragraph 23.

This Count should be dismissed because Plaintiff’s claim for breach of contract does not survive.

c. Plaintiff Has No Personal Jurisdiction Over Delfgauw.

Plaintiff has no personal jurisdiction over Delfgauw because he is not a resident of Massachusetts, not a signatory to the Complaint, nor has he personally transacted business in the state. Comp. at ¶ 7, 13. Delfgauw does not have enough contacts with the Commonwealth of Massachusetts to subject him to the jurisdiction of this Court under the Massachusetts Long Arm Statute, G.L. c. 223A, §3, or the Due Process Clause of the United States Constitution.

Delfgauw lives in Michigan. *Id.* at ¶ 4. Delfgauw did not consent to jurisdiction in the Agreement because he was not a signatory. *Id.* at ¶ 15, 17. And finally, the Complaint has no facts that support a claim Delfgauw conducted business in Massachusetts.

The burden is on Plaintiff to confirm that this Court has personal jurisdiction over Delfgauw. *Lechoslaw v. Fleet Bank*, 18 Mass. L. Rptr. No. 24, 521 (Mass. 2004). The Plaintiff then must establish a “substantial nexus between that business and the cause of action.” *Id.*; see also *Schaefer v. Cybergraphic Sys., Inc.*, 886 F.Sup. 921, 924 (D.Mass. 1994). Plaintiff cannot meet that burden because no facts support that Delfgauw lives in Massachusetts or works in Massachusetts. The cause of action is a breach of a settlement agreement. No facts support that any of Delfgauw’s actions relate to that breach (to which he was not a signatory) that rises to a level of personal jurisdiction.

Plaintiff alleges that Delfgauw conducts business by evidenced by information on his webpage ([www.joedelfgauw.com](http://www.joedelfgauw.com)) and via his LinkedIn page

(<https://www.linkedin.com/services/page/62989a3078b5991902/>). Comp. at ¶ 13. However, a review of those sites show no mention of Massachusetts. *See Clorox Co. at 32; see also* attached at Exhibit 1.

Finally, it would violate Delfgaw's due process if he was forced to defend this action because he did not expect to be brought into this forum. *Id.; see also Heins v. Wilhelm Loh Wetzlar Optical Mach*, 26 Mass.App.Ct. 14 (1988). No facts support the theory that Delfgaw's actions would expect him to be brought into a Massachusetts court.

This Court should dismiss all claims against Delfgaw for lack of personal jurisdiction.

d. Delfgaw Should Be Dismissed Because Plaintiff Fails To Pierce The Corporate Veil.

Plaintiff attempts to pierce the corporate veil against Delfgaw with illusory facts. "The court can allow the corporate veil to be pierced in rare particular situations to prevent gross inequity." *AA & D Masonry, LLC v. Crowsnest Corp.*, No. MICV201300133F, 2013 WL 2445504, at \*3 (Mass. Super. May 10, 2013), *aff'd sub nom. AA&D Masonry, LLC v. Franchi*, 87 Mass. App. Ct. 1136, 33 N.E.3d 1269 (2015) *quoting My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 620 (1968). A complaint must contain facts about the need to pierce the corporate veil. *Lipsitt v. Plaud*, 466 Mass. 240, 252, 994 N.E.2d 777, 788 (2013).

The corporate veil "may be pierced where" the corporate principal exercises (1) "some form of pervasive control" over the activities of the corporation, and (2) "there is some fraudulent or injurious consequence" as a result. *Scott v. NG U.S. 1, Inc.*, 450 Mass. 760, 767, 881 N.E.2d 1125 (2008), *quoting My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 619, 233 N.E.2d 748 (1968).

As discussed above, there are no facts which support any claims against Delfgaw. Plaintiff further seeks claims against Delfgaw for him signing for Xanadu. Comp. at ¶ 17.

However, Plaintiff fails to allege facts needed to pierce to corporate veil. Plaintiff alleges no form of pervasive control or any actions that Delfgauw took in conjunction with the actions taken by Xanadu.

Because Plaintiff pleads no facts that support the piercing of Xanadu's corporate structure to obtain judgment (nor does Plaintiff plead any facts that support a judgment against Xanadu) Count III should be dismissed.

IV. CONCLUSION

This Court should dismiss all of Plaintiff's claims because the facts support none of the alleged claims. Especially when the Plaintiff misconstrues facts about Defendants' referencing Plaintiff in a podcast. As shown, the podcast has no mention of Plaintiff. If the podcast has no reference to Plaintiff, his claims must fail. Neither Defendant defamed nor breached a contract because there was never a mention of Plaintiff or the settlement agreement. Additionally, the facts support no facts that would let Massachusetts' courts have jurisdiction over Defendant Delfgauw. Nor are there any facts that support a claim against Delfgauw on behalf of Xanadu (e.g., piercing the corporate veil).

This Court should dismiss Plaintiff's Complaint with prejudice because the facts do not support any of the Plaintiff's claims.

Defendants,  
XANADU MARKETING, INC. and  
JOSEPH DELFGAUW,  
By their attorney,

/s/ Jeremy R. Bombard  
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June 23, 2023

**CERTIFICATE OF SERVICE:** I certify that a true and accurate copy of the foregoing was filed sent via email to:

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63 Atlantic Avenue, 3<sup>rd</sup> Floor  
Boston, MA 02110

/s/ Jeremy R. Bombard  
Jeremy R. Bombard

# EXHIBIT 1



Home



My Network



Jobs



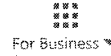
Messaging



Notifications



Me



For Business



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## Joe Delfgaw's Services

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Message

More

### Working with providers

Start by requesting a proposal from a provider. Once they respond, you can discuss how to start working together. [Learn more](#)



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Grand Rapids, Michigan

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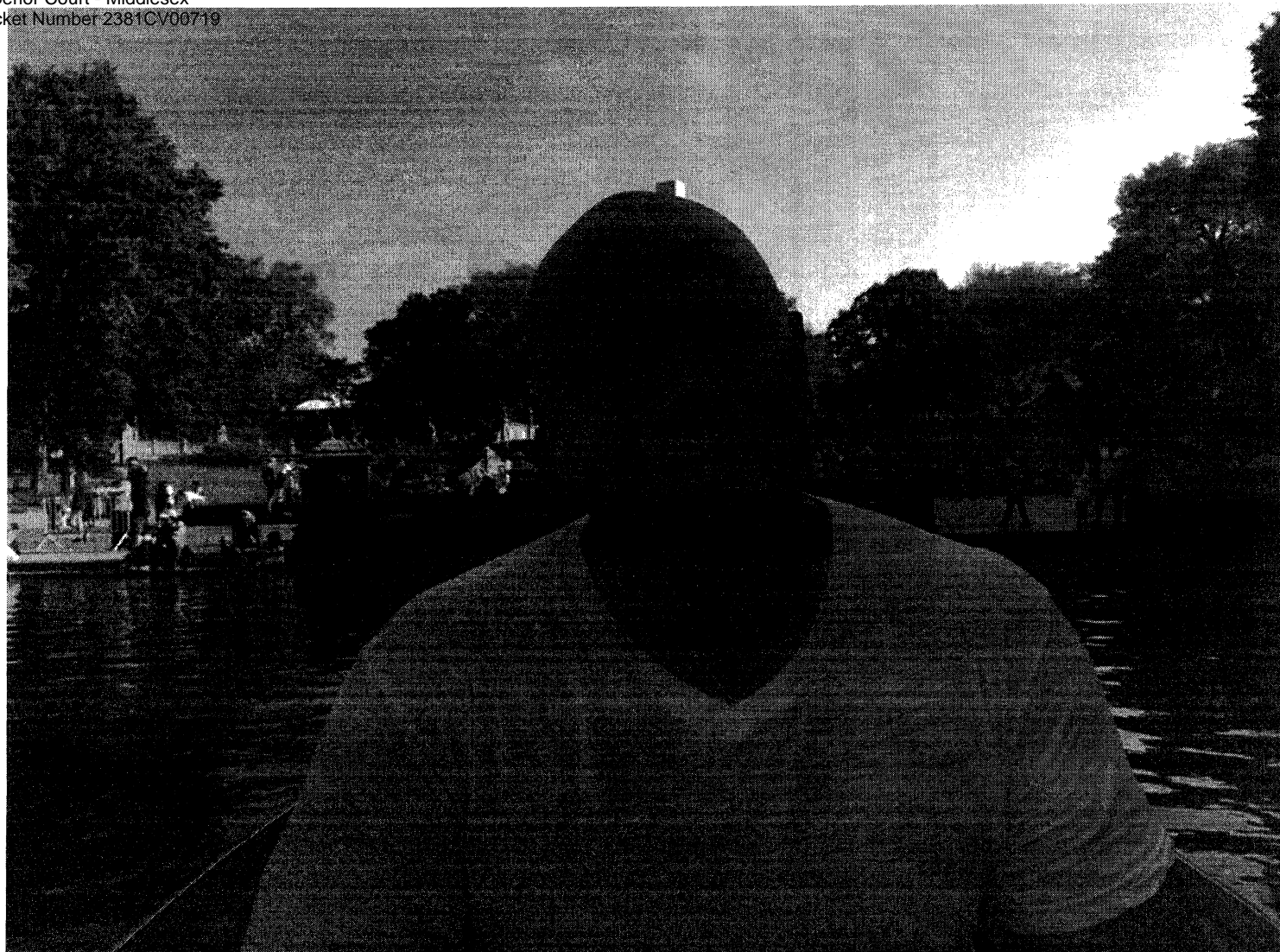
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Joel Nimar



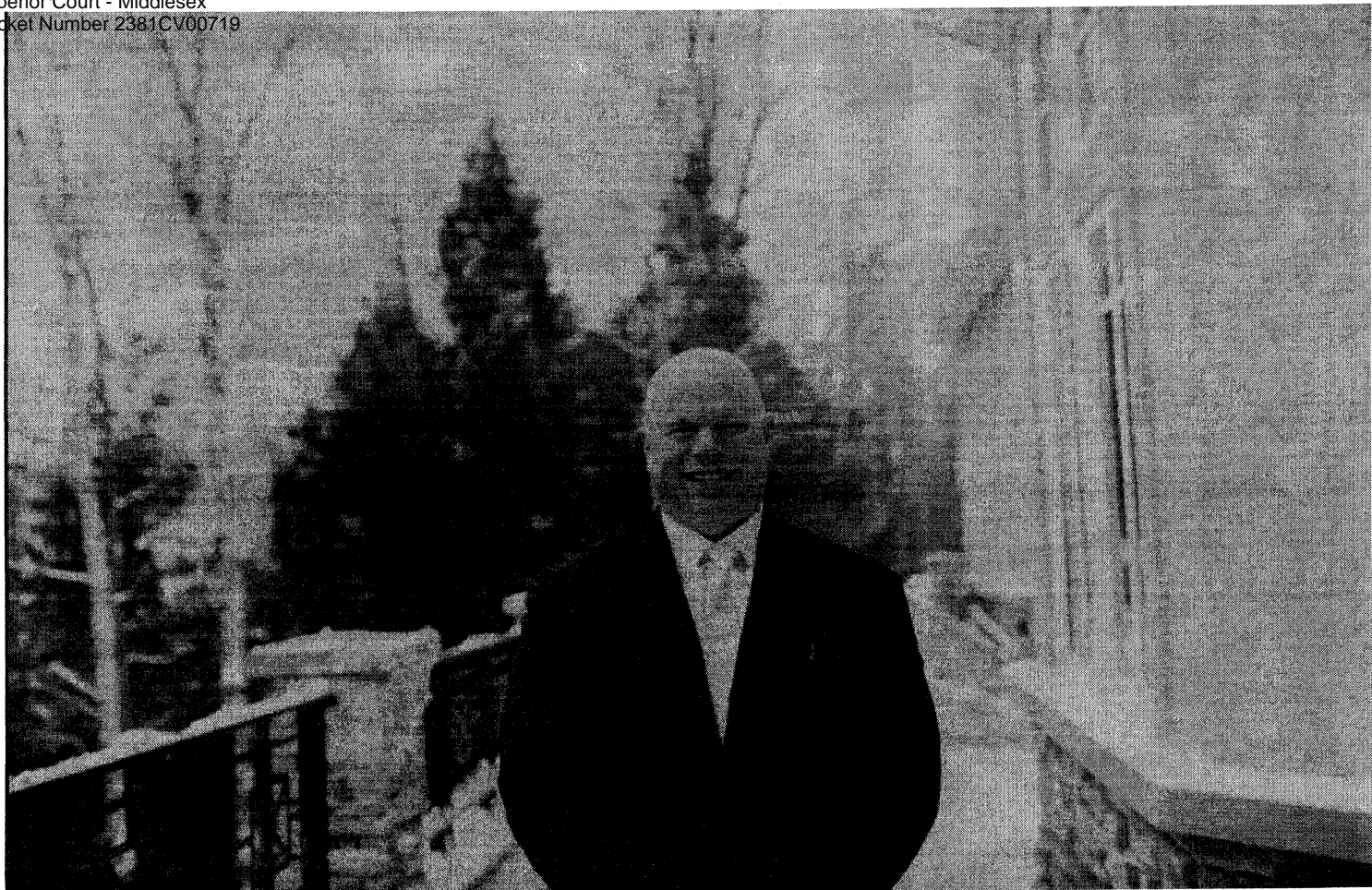




# About Me

**Hello, my name is Joe Delfgauw.** I used to be a line worker in Detroit. Driven by the will to improve my life, I started a career as an affiliate marketer. Today I have become an industry leader in dozens of marketing verticals, building and sharing amazing businesses with people across the country.

I do not accept failure, and this is reflected in my ethic, my businesses, and my success.



# What I Do **Services**



## Websites that Convert

My exceptional team of web developers have built an arsenal of feature-packed affiliate sites designed to convert traffic.



## Painting the Future

I am literally shaping the affiliate marketing industry, painting my own path for success.



## Find Your Fit

I work with you to find traffic that fits your business, business that fit your traffic, and everything in between.

## Video Training

Offer expert video training courses on how to establish yourself as an affiliate marketer and get



started dominating your vertical.

## Picture Yourself



Do you picture yourself as an affiliate marketer? Contact me today and let's talk shop.

## Contact Joe



### Office Address

3181 Prairie St SW #104  
Grandville, MI, 49418



### Phone Numbers

**Office:** 888.631.7141

**Mobile:** 248.890.5900



### Email Address

**Drop Me a Line:** [joe@joedelfgauw.com](mailto:joe@joedelfgauw.com)

**Website:** [www.joedelfgauw.com](http://www.joedelfgauw.com)

## Keep in Touch

Your name

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Message

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