

1 F. Bari Nejadpour (SBN 216825)
2 Law Offices of Bari Nejadpour & Associates
3 A Professional Law Corporation
4 3540 Wilshire Blvd. #715
5 Los Angeles, CA 90010
6 Telephone: (213) 632-5297
7 Facsimile: (213) 632-5299 (fax)
8 *Attorney for: William Silverstein*

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 WILLIAM SILVERSTEIN, an individual,
12 Plaintiff,
13 vs.
14 E360INSIGHT, LLC, BARGAIN DEPOT
15 ENTERPRISES, LLC AKA
16 BARGAINDEPOT.NET,
17 DAVID LINHARDT,
18 MONIKER ONLINE SERVICES, LLC,
19 and DOES 1-50;
20 Defendants.

Case No.: CV07-02835-CAS (VBKx)

**PLAINTIFF'S SUPPLEMENTAL BRIEF
ON DEFENDANT'S MOTION TO
DISMISS FOR LACK OF
JURISDICTION**

Date: June 25, 2007
Time: 10:00 am
Location: Courtroom 5
Honorable Christina A. Snyder

21 **I. INTRODUCTION**

22 Defendants Moniker and Linhardt filed a motion to dismiss for lack of jurisdiction.

23 The other defendants E306Insight ("e360") and Bargain Depot Enterprises ("Bargain
24 Depot") waived any objection to this jurisdiction by not joining in the 12(b)(2) motion.

25 Pursuant to the ruling of June 25, 2007, Plaintiff submits this supplemental
26 brief regarding jurisdiction on Defendants Linhardt and Moniker.

1 **II. ARGUMENT**

2 **A. THE OTHER FACTORS**

3
4 The Court’s decision complained that there were no discussion of the other factors
5 that weigh in the determination of the proper forum for this dispute. These “other” factors
6 clearly weigh in the favor of California.

7 **1. California’s Interest.**

8
9 California has clearly expressed its interest in protecting its citizens from the illegal
10 e-mail by passing three separate laws against deceptive unsolicited commercial e-mail
11 (“spam”).¹ California passing a bill to clarify Business & Professions Code § 17529.5 in
12 response to the CAN-SPAM Act, further shows California’s intent to protect its citizens
13 from illegal spam. **This factor clearly favors California.**

14
15 **2. Conflict of Laws.**

16
17 The CAN-SPAM Act has eliminated the conflict of laws. One may argue that the
18 California laws may be tougher than Florida and Illinois law, but that is irrelevant. By
19 obeying Federal law, Defendants would be in compliance with ALL states’ laws. **This**
20 **factor is neutral.**

21
22 **3. Alternative Forum.**

23 Defendants didn’t offer an alternative forum to hear this case as there is none. There
24 is no alternative common forum. Where Moniker is a Florida citizen and Linhardt is an
25 Illinois citizen, granting Defendants’ motion will force Plaintiff to litigate this case in
26

27
28

1. California Business & Professions Code §§ 17538.4, 17538.45, and 17529.5.

1 three separate Courts. Litigating this case in either Florida or Illinois will be asking those
2 courts to interpret California law. **This factor clearly favors California.**

3
4 **4. Burden on Parties.**

5 There minimal burden to litigate in this jurisdiction on Defendants Linhardt and
6 Moniker. Most discovery will be done in writing so there would be minimal additional
7 burden upon Defendants to litigate in this jurisdiction. Currently, in this Court, all
8 Defendants are being represented by the same Counsel, who represents e360 and
9 Linhardt, in other cases.²

10
11 There is no additional burden upon Linhardt where Linhardt will appear on behalf of
12 both e360 and Bargain Depot, as president of both of these corporations.

13
14 Where Moniker have sent representatives to a trade shows within California, it is
15 hard to imagine that it is an undue burden upon Moniker to defend a case here – in a
16 jurisdiction that it has significant contact.³ Moniker, as an ICANN accredited Registrar,
17 has agreed to jurisdiction in Los Angeles, California.⁴

18
19 Plaintiff on the other hand has NO contact or relationship with either Illinois or Florida.
20 Plaintiff is not and never have been represented by an attorney in either of those jurisdiction.

21 **This factor clearly favors California.**

22
23 **5. Judicial Economy.**

24
25 2. See Silverstein declaration, Exhibit A, page 9, paragraphs 5 which shows that Kish
26 represents Linhardt and e360 in another case.

27 3. See the declaration of Joseph Wagner.

28 4. Please see Silverstein declaration, Exhibits C and D. Exhibit D, page 20, paragraph 5.6
contains the forum selection clause that all ICANN approved registrars are subject.

1 Judicial economy would be better served by litigating this case as one case with all
2 Defendants, not as three separate cases.

3
4 The gravamen of the instance case is that Plaintiff received illegal unsolicited
5 commercial e-mail. This issue will be decided by this Court as it applies to Defendants
6 e360 and Bargain Depot. If the Court decides that the complained of spam does not
7 violate the law, the same would apply Moniker and Linhardt.
8

9 Denying Defendants’ motion, if this Court finds that the e-mails are illegal, then
10 this Court only has to determine Linhardt’s and Moniker’s involvement. By granting
11 Defendants’ motion, two other courts have to make this in regards to Linhardt and
12 Moniker, after repeating the work of this Court in regards to the illegality of the e-mails.
13

14 **This factor clearly favors California.**

15
16 **B. JURISDICTION OVER MONIKER**

17
18 **1. General Jurisdiction.**

19 Moniker conducts regular and substantial amounts of business in California.
20 Moniker has disclosed that more than 20 percent (478,993 of 2.3 million) of domain
21 names registered through Moniker are based in California.⁵ Moniker further stated that
22 more than 11 percent (5,238 of 43,835) of its customers are in California.⁶ Moniker
23
24
25
26

27 5. See Nejadpour Declaration, ¶¶ 4,5 and “Exhibit C.”

28 6. Ibid.

1 operate its business Moniker using a highly interactive web site that is specifically
2 programmed to accept orders from California residents.⁷

3
4 Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1079 (9th Cir. 2003) clearly
5 established general jurisdiction over Moniker in California when it said.

6 “[E]ven if the only contacts L.L. Bean had with California were through
7 its virtual store, a finding of general jurisdiction in the instant case would be
8 consistent with the ‘sliding scale’ test that both our own and other circuits have
9 applied to internet-based companies.”

10 The Gator Court in determining that there was general jurisdiction noted that L.L. Bean
11 attributed six percent of its sales to California. Moniker attributes more than three times
12 that, 20 percent, to California sales, in the form of domain registrations. Furthermore,
13 Moniker admitted that over 11 percent of its customers are in California.

14
15 Even ignoring the significant amount of business that Moniker has with California
16 residents, the web site interactivity is sufficient to confer jurisdiction. “Under the
17 sliding-scale analysis, L.L. Bean's contacts with California are sufficient to confer general
18 jurisdiction. L.L. Bean's website is highly interactive and very extensive.” Gator.com
19 Corp. v. L.L. Bean, Inc., supra at 1080. Moniker targets California residents with a web
20 site is specifically programmed to accept orders from California residents.
21
22

23 By creating continuing relationships with California residents, Moniker has
24 purposely availed itself of California law. See Burger King, supra at 474. Moniker’s
25 continuing and extensive involvement with this forum, thus making this forum’s general
26 jurisdiction reasonable. Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. 1991).
27

28

7. See Silverstein declaration ¶¶ 7-10.

1 Registering a domain name is more akin to a lease than a purchase, creating a continuing
2 relationship between the registrant and the registrar. When registering a domain name,
3 Moniker offers to register the domain name of multiple years with the option of automatic
4 renewal.⁸ While making the sale, moniker offers web site hosting services based on
5 quarter year, half year or an annual basis. Additionally, Moniker offers other annual based
6 services relating to the domain name registration. Moniker has availed itself to the
7 privileges and protections of this jurisdiction by creating continuing relationships with
8 residents of California.
9
10

11 **2. Specific Jurisdiction.**

12 The “effects test” established in Calder v. Jones, 465 U.S. 783, 104 S.Ct 1482, 79
13 L.Ed.2d 804 (1994) upon “(1) intentional actions (2) expressly aimed at the forum state
14 (3) causing harm, the brunt of which is suffered - and which the defendant knows is lilly
15 to be suffered – in the forum state.” (Core-Vent Corp. v. Nobel Industries AB 11 F3d
16 1482, 1486 (9th Cir. 1993).).
17
18

19 Defendant Moniker owns the domain names that were advertised by the spam at
20 issue in this case. Moniker then leased these domains to the other Defendants.⁹ The harm
21 complained of was from the advertising domain names owned by Moniker names being
22 directed to and received within this jurisdiction. See First Amended Complaint (“FAC”)
23 ¶¶ 75-79.
24

25
26 8. See Silverstein declaration ¶¶ 10-11 and “Exhibit D”.

27 9. Moniker’s privacy service operates by taking ownership of the domain name, and then
28 leasing the domain name to their customer for a fee, while keeping the identity of the actual and
current domain name lessor secret.

1 Moniker admits that it has have control of these domains, by either suspending or
2 cancelling these domains.¹⁰ Moniker is aware that domain names registered to them,
3 through their domain privacy service, are being used for sending spam.¹¹
4

5
6 **C. JURISDICTION OVER LINHARDT**

7 **1. Linhardt is subject to general jurisdiction in California.**

8
9 Despite his declaration to the contrary, Linhardt personally maintains a mailing
10 address in Laguna Hills, California. Linhardt has appointed an agent for service of
11 process in California. Linhardt has stated that he has Defendant Linhardt personally
12 conducts significant amount of business in California.
13

14 Linhardt personally maintains a mailing address in California. Linhardt’s claim that
15 it is for the corporation is false, as the he is the applicant for the mailbox service, not the
16 corporation.¹² Linhardt’s utilization of a commercial mail receiving agency (“CMRA”)
17 in Laguna Hills results, as a function of Business & Professions Code § 17538.5, in his
18 appointing them as his agent for service of process.
19

20 Defendant Linhardt has admitted in a declaration to another Federal Court, **that he**
21 **personally** lost significant business and business opportunities with multiple
22 California-domiciled corporations when Linhardt said,
23
24
25

26 10. See Nejadpour Declaration, ¶¶ 4,5 and “**Exhibit C.**”

27 11. See Silverstein decl. ¶¶ 12-14.

28 12. See declaration of Matthew Boyd.

1 “e360 and I also have had active and pending contracts cancelled as a result of
2 Spamhaus’ conduct. Contract that have been cancelled include SmartBargains,
3 Vendare Media, and OptinBig.” and “e360 and I also lost numerous
4 opportunities to obtained future work as a result of Spamhaus’ conduct.” and “
5 Lost business opportunities include Net Blue, Cogent, Habeas, Yipes.”¹³

6 Linhardt claims \$11,715,000.000 in losses to him and E360 involving seven
7 corporate entities, four of which are based in California. Linhardt representations that he
8 lost business and business opportunities with California residents makes it abundantly
9 clear, in the Defendant Linhardt's own words, that he personally conducts business with,
10 and solicits business from California residents.
11

12 Linhardt utilizes two Google accounts under both David Linhardt and e360insight.
13 Usage logs of his personal account indicated that he used his California based Google
14 account at lest 12 times a month, and this account was created in 2004.¹⁴
15

16 **2. Linhardt is subject to specific jurisdiction in California.**

17 California Courts have specific jurisdiction personal over Defendant Linhardt as
18 knowingly directed the harm to this jurisdiction. The Complaint alleges that Linhardt was
19 personally involved in the acts complained of.¹⁵ The complained of acts, attributed
20 Linhardt, are the transmission and/or procurement of illegal spam to Plaintiff and the
21 libelous statements made about Plaintiff.
22
23
24

25 13. Please see Silverstein declaration, **Exhibit A**. Please note that Vendare Media, Netblue,
26 Habeas, and Yipes are all corporations whose principal places of business are in California.
27 Nedjapour declaration, **Exhibits A** and **Exhibit B**.

28 14. See Nejadpour declaration ¶¶ 4, 7 and Exhibits C and E.

15. See ¶¶ 7, 11, 12, 135-149 of the First Amended Complaint.

1 Linhardt attempts to create a corporate shield for liability for his personal actions.
2 Both Davis v. Metro Productions, Inc., 885 F.2d 515 and Retail Software Services, Inc. v.
3 Lashlee, 854 F.2d 18, 21 (2d Cir. 1988) rejects the idea of the corporate shield.

4
5 “Directors are jointly liable with the corporation and may be joined as defendants if
6 they personally directed or participated in the tortious conduct.” Seagate Technology v.
7 A. J. Kogyo Co., 219 Cal. App. 3d 696, 701-702 (Cal. Ct. App. 1990). The complaint
8 alleges that Defendant Linhardt is personally liable because he actively and personally
9 participated in the acts complained of. These specific allegations, set forth within the
10 complaint in the instant case, renders Defendant Linhardt's reference to Shearer v.
11 Superior Court, 70 Cal. App. 3d 424 irrelevant.

12
13
14 Linhardt’s libel, the sixth cause of action in the FAC, is intentional and clearly
15 directed to and causing effect in California. Linhardt made libelous statements about
16 Silverstein. Not only did Linhardt direct these libelous statements to California, but he
17 used California servers and services to make these libelous statements. This libel claim
18 closely parallels Calder v. Jones, 465 U.S. 783 in that the statements were made by the
19 distant defendant aimed at the Plaintiff in California.
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

When a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the Plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss. *Ballard v. Savage et al*, 65 F.3d 1495 (1995). "[T]he plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant." *Id*, citing *Data Disc, Inc. v. Systems Technology Assos.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The facts are viewed in the light most favorable to the Plaintiffs. *Compuserve Inc. v Patterson*, 89 F.3d 1257, 1262, (6th Cir. 1996), citing *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Furthermore, a court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal, ' ... because we want `to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts.' *Id* at 1459 (emphasis added). Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff alleges collectively fail to state a prima facie case for jurisdiction. *Id*. Unless directly controverted, the plaintiff's version of the facts is taken as true. *Doe v. Unocal, Corp.*, 248 F. 3d 915, 922 (9th Cir. 2001).

Conflicts in the evidence set forth in the parties' affidavits must be resolved in the Plaintiff's favor. *Id*. Here, Plaintiff has clearly met his burden, and Defendant's Motion should be denied..

Dated: July 26, 2007

Respectfully submitted,

By: _____
F. Bari Nejadpour
Attorney for Plaintiff