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

10 WILLIAM SILVERSTEIN, an individual,
11 Plaintiff,

12 vs.

13 E360INSIGHT, LLC, et al,
14 Defendants.

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

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
OF ORDER DISMISSING DAVID
LINHARDT FOR LACK OF
JURISDICTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
RECONSIDERATION; DECLARATION
OF F. BARI NEJADPOUR IN SUPPORT
OF MOTION FOR
RECONSIDERATION**

[Local Rule 7-18(b),(c)]

Date: October 15, 2007
Time: 10:00 am
Courtroom: 5

15 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

16 PLEASE TAKE NOTICE that on Monday October 15, 2007, or as soon thereafter as
17 counsel can be heard, in the Courtroom of Christina A. Snyder, Courtroom 5, at 10:00 am
18 in the United States Courthouse, 312 N. Spring St., Los Angeles, CA 90012. Pursuant to

1 local rule 7-18(b) and 7-18(c), Plaintiff will, and does move the Court to reconsider it's
2 ruling to dismiss David Linhardt for lack of jurisdiction.¹
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28 1. This motion is made following the conference of counsel, Joseph Kish, pursuant to L.R. 7-3
which took place via e-mail on August 10, 2007 and August 13, 2007.

1 **MOTION**

2 Plaintiff respectfully disagrees with the Court’s ruling that Linhardt is not subject to
3 personal jurisdiction of this Court. In reaching this decision Plaintiff believes that the
4 court failed to consider evidence in front of it, that there was additional evidence
5 unavailable at the time of the hearing, and there have been changes of case law since the
6 briefing.
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9 The evidence not available at the time of ruling is Linhardt’s own filing in
10 E360Insight, LLC and David Linhardt v. Mark James Ferguson, et al. (Attached as
11 “Exhibit A”).
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13 The rulings of law not available at the time of hearing is Goldhaber v. Kohlenberg,
14 — A.2d —, 2007 WL 219181 (N.J. Super.A.D.) (Attached as “Exhibit B”). There are
15 several items of evidence which Plaintiff believes that the Court did not consider, though
16 it was before the Court contained as exhibits within Plaintiff’s supplemental opposition to
17 dismissal and Plaintiff’s motion to strike and remand..
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21 Dated: August 24, 2007
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23
24 Respectfully submitted,
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27 _____
28 F. Bari Nejadpour
Attorney for Plaintiff, William Silverstein

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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR RECONSIDERATION
OF ORDER DISMISSING DAVID
LINHARDT FOR LACK OF
JURISDICTION**

Date: October 15, 2007
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17 **I. SUMMARY**

18 Plaintiff contends that the following case law and party admissions were not
19 available to Court at the time of hearing:

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- 21 • Linhardt’s own opposition to a motion to dismiss for lack of personal jurisdiction in
22 e360Insight, LLC and David Linhardt v. Mark James Ferguson, et al. (Attached as
23 “Exhibit A”) served on August 10, 2007. In his brief, Linhardt admits that a newsgroup
24 posting made by a person with no ties to Illinois is subject to Jurisdiction in Illinois where
25 the internet posting would be read by an Illinois resident.
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1 • The ruling from the New Jersey Court of appeals in Goldhaber v. Kohlenberg, —
2 A.2d —, 2007 WL 219181 (N.J. Super.A.D.), published on August 3, 2007. (Attached as
3 “Exhibit B”). A case with the identical fact pattern as the instant case applied Calder v.
4 Jones in ruling that an individual making a harmful newsgroup posting in California,
5 directing harm to New Jersey does subject that California resident to jurisdiction in New
6 Jersey. In the instant case, Linhardt, an Illinois resident, made harmful newsgroup
7 postings, using a server in California, directing harm to California.
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10 Plaintiff is informed and believes the Court did not consider the following evidence
11 before it when ruling on Linhardt’s motion at the August 6, 2007 hearing:

- 12 • Plaintiff’s first amended verified complaint (“FAC”), which indicates that the harm
13 was directed to California; and
- 14 • Linhardt’s standing as Plaintiff in E360Insight et al, v. Spamhaus. This is evidenced
15 by Linhardt’s personal request for damages, Lothan’s declaration, and the appeals Court
16 Rule 26.1 disclosure.
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20 Linhardt is subject to specific jurisdiction in this Court. While the Court accepted
21 Linhardt’s argument that he is protected by a corporate shield, his act of libeling Plaintiff
22 falls outside of that ‘corporate shield’.² Linhardt argued in e360Insight LLC v. Mark
23 James Ferguson, et al. (“Ferguson case”, s ee “Exhibit A”) that directing harm to a
24 jurisdiction confers jurisdiction over the tortfeasor, in that jurisdiction.
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26

27 **Linhardt knowingly and intentionally directed harm to California.**

28 _____
2. Plaintiff respectfully disagrees decision of the issue of corporate shield.

1 While the Court accepted, Linhardt’s explanation that his statement “e360 and I”
2 really meant “e360” in his affidavit submitted in e360Insight LLC, et al. v. Spamhaus
3 (“Spamhaus case”), the Court ignored Linhardt’s standing as Plaintiff.
4

5 For these reasons, Plaintiff respectfully requests that this Court reconsiders its order
6 of August 6th and now find that David Linhardt, the individual, is subject to the
7 jurisdiction of this Court.
8

9 **II .ARGUMENT**

10 **A. This Court May Reconsider Its Prior Ruling**

11 After a court enters an order, it may set aside or change its order pursuant to either
12 its own local rules or Rule 60 of the Federal Rules of Civil Procedure. (Ground v.
13 Sullivan, 785 F.Supp. 1407, 1411 n.3 (S.D. Cal. 1992).) Granting relief under Rule 60 is a
14 matter within the discretion of the district court. (Thompson v. Housing Auth. of Los
15 Angeles, 782 F.2d 829, 832 (9th Cir. 1986).) Plaintiff asks for reconsideration of this
16 Court’s August 6, 2007 order as permitted by Local Rule 7-18.
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20 **B. The Illinois Court of Appeals ruled that jurisdiction is proper in the** 21 **same fact pattern.** 22

23 The Court in Goldhaber v. Kohlenberg, — A.2d —, 2007 WL 219181 (N.J.
24 Super.A.D.), ruled that a California resident is subject to jurisdiction in New Jersey for a
25 newsgroup posting.³ The Goldharber court, relying upon Calder v. Jones, ruled that the
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27 3. A newsgroup is group of messages relating to a particular topic within USENET. This could
28 be analogized as a single channel on a TV, where a newsgroup would represent one channel and
USENET would be the entire TV broadcast system.

1 harm of the newsgroup posting was directed to a New Jersey resident. As In the instant
2 case, Goldharber, and Calder, each Defendant knew that the Plaintiff was in a distant
3 jurisdiction, but the Court’s founds that harm was directed to, and would be felt in, those
4 distant jurisdictions. For that reason, the Courts in Goldharber and Calder found
5 jurisdiction proper and this Court should do the same.
6

7 **C. Linhardt argued that this Court does have jurisdiction over him.**

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9 Linhardt has argued that a person who causes harm is subject to the jurisdiction
10 where the harm is felt. In his opposition to a motion to dismiss for lack of jurisdiction in
11 the Ferguson case, Linhardt argued that, “Ferguson clearly had minimum contact by
12 knowingly posting defamatory comments on an internet site he knew would be accessed
13 by an Illinois resident.”⁴ In the instant case, Linhardt not only knew that the posting
14 would be read in California, that the posting was made onto a computer located in
15 California, but also that the harm would be felt in California.⁵ Linhart, by making his
16 libelous posting, directed the harm to California, and should be subject to jurisdiction
17 here – as he himself argued in the Ferguson case.
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20 **D. This Court ignored Linhardt’s Standing in the Spamhaus case.**

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22 Linhardt, as Plaintiff, in the Spamhaus case asserted that he had lost business and
23 business opportunities in California. While the Court permitted Linhardt correction that
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27 4. See Exhibit A, paragraph 5.

28 5. Plaintiff agrees that a gmail user in Japan, should not be subject to jurisdiction here, unless that user directed harm to this jurisdiction.

1 he really meant e360 and not “e360 and I,” the Court never addressed standing. Without
2 personally suffering losses, Linhardt would not have standing to be Plaintiff.

3
4 Evidence regarding Linhardt’s standing as Plaintiff was before the Court in multiple
5 documents as follows:

- 6 1. Linhardt asked for punitive damages in his affidavit for default
7 judgment, submitted to the Spamhaus Court (See “*Exhibit C*”, ¶ 37).⁶
8
- 9 2. Loethaen’s affidavit declaration clearly states, in paragraph 1, that
10 Linhardt is a plaintiff in that case. (See the last two pages of *Exhibit*
11 *C*”).
- 12 3. The ruling in e360Insight and David Linhardt v. Spamhaus.⁷
13
- 14 4. The appeals Court rule 26.1 disclosure, states, that “David Linhardt, an
15 individual,” is a plaintiff in that case.⁸

16
17 *“Article III of the Constitution, however, limits the jurisdiction of the federal*
18 *courts to "cases and controversies," a restriction that has been held to require*
19 *a plaintiff to show, inter alia, that he has actually been injured by the*
20 *defendant's challenged conduct. Friends of the Earth, Inc. v. Laidlaw Envtl.*
21 *Servs., Inc., 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).” Lee*
22 *v. Am. Nat'l Ins. Co., 260 F.3d 997, 1001 (9th Cir. 2001)*

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24 6. This was previously submitted as Exhibit A to Silverstein’s declaration submitted
with Plaintiff’s supplemental opposition to Defendant’s 12(b)(2) motion. Plaintiff
includes this for the Court’s convenience.

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26 7. This was previously submitted as *Exhibit D* of the declaration of F. Bari Nejadpour
attached to Plaintiff’s motion to strike and remand. Plaintiff has attached this as *Exhibit E*
for the Court’s convenience.

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28 8. This was previously submitted as Exhibit C of the declaration of F. Bari Nejadpour
attached to Plaintiff’s motion to strike and remand. Plaintiff has attached that as *Exhibit D*
for the Court’s convenience.

1 If Linhardt personally didn't lose business and business opportunities, as claimed in
2 his statements, "e360 and I," Linhardt would not have standing to be a plaintiff in the
3 Spamhaus
4

5 **E. Linhardt should be judicial estoppel from taking a legal position**
6 **contradicted by his previously stated positions.**

7 *"In accordance with the purpose of judicial estoppel, we conclude that the*
8 *doctrine should apply when: (1) the same party has taken two positions; (2) the*
9 *positions were taken in judicial or quasi-judicial administrative proceedings;*
10 *(3) the party was successful in asserting the first position (i.e., the tribunal*
11 *adopted the position or accepted it as true); (4) the two positions are totally*
12 *inconsistent; and (5) the first position was not taken as a result of ignorance,*
fraud, or mistake." Jackson v. County of L.A., 60 Cal. App. 4th 171, 183 (Cal.
Ct. App. 1997)

13 In the Spamhaus case, Linhardt made a clear and distinct separation between himself
14 as an individual plaintiff and e360Insight as a Plaintiff. Linhardt, as plaintiff in Spamhaus
15 requested significant and received compensatory and punitive damages, based on his
16 declaration – which asserted lost business and opportunities with California based
17 corporations. Plaintiffs in the Spamhaus case, e360Insight **and Linhardt** were awarded a
18 Default judgment in the amount of \$11.7 million along with an injunction. This default
19 judgement was based upon Linhardt's sworn statements to the Spamhaus Court, that said
20 "e360 and I lost" significant business and business opportunities in California.⁹
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23 Judicial estoppel must be applied here where in the Ferguson case, Linhardt has
24 taken the position that a defamatory posting accessible in Illinois subjects Ferguson to
25 jurisdiction in Illinois.
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9. See *Exhibit E* for a copy of the judgment.

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4 **III. CONCLUSION**

5 When a district court acts on a defendant's motion to dismiss under Rule 12(b)(2)
6 without holding an evidentiary hearing, the Plaintiff need make only a prima facie
7 showing of jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage et al,
8 65 F.3d 1495 (1995). "[T]he plaintiff need only demonstrate facts that if true would
9 support jurisdiction over the defendant." Id, citing Data Disc, Inc. v. Systems Technology
10 Assos., 557 F.2d 1280, 1285 (9th Cir. 1977). The facts are viewed in the light most
11 favorable to the Plaintiffs. Compuserve Inc. v Patterson, 89 F.3d 1257, 1262, (6th Cir.
12 1996), citing Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991). Furthermore,
13 a court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the
14 party seeking dismissal,' ... because we want `to prevent non-resident defendants from
15 regularly avoiding personal jurisdiction simply by filing an affidavit denying all
16 jurisdictional facts.' Id at 1459 (emphasis added). Dismissal in this procedural posture is
17 proper only if all the specific facts which the plaintiff alleges collectively fail to state a
18 prima facie case for jurisdiction. Id. Unless directly controverted, the plaintiff's version of
19 the facts is taken as true. Doe v. Unocal, Corp., 248 F. 3d 915, 922 (9th Cir. 2001).

24 Conflicts in the evidence set forth in the parties' declaration affidavits must be
25 resolved in the Plaintiff's favor. Linhardt's declarations are not controverted by his own
26 affidavit, but by giving them weight, this Court will obstruct the purpose of judicial
27 estoppel.
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