

1 William Silverstein
2 XXXX
3 XXXX
4 in propria persona

5 CALIFORNIA SUPERIOR COURT
6 COUNTY OF LOS ANGELES
7 CENTRAL DISTRICT - UNLIMITED CIVIL

8 WILLIAM SILVERSTEIN,
9 Plaintiff,

10 vs.

11 WORLD WIDE WEB ENTERPRISES, LC,
12 ROBERT SMOLEY, DARIN GREY,
13 AND DOES 1-50
14 Defendants,

CASE NO.: BC326033

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
QUASH SERVICE OF SUMMONS**

Date: July 29, 2005
Time: 8:30 am
Department 47

15 Plaintiff William Silverstein hereby submits his opposition to Defendant Darin Grey's
16 motion to quash service of summons.

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19 **I. INTRODUCTION**

20 ___Defendant Darin Grey (herein referred to as Defendant) seeks to quash service of
21 summons claiming that Defendant has no contacts with California sufficient to infer
22 jurisdiction. Defendant, along with his co-Defendants, is alleged to have sent illegal
23 unsolicited commercial e-mail ("spam") to Plaintiff and though Plaintiff's servers – both
24 located in Los Angeles California.

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26 Plaintiff admits that he mistakenly failed to included a section specifically pleading
27 jurisdiction. Plaintiff pled the facts sufficient to infer jurisdiction, which is obvious from
28 reading the complaint.

1 This motion is moot as the Plaintiff has amended the complaint, as of right, which
2 corrects Defendant's claimed shortcomings of the complaint.
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5 **II. THIS COURT HAS JURISDICTION OVER THE MOVING PARTY**

6 Defendants directed harm to California by sending by sending unsolicited commercial e-
7 mail ("spam") to Plaintiff and through Plaintiff's servers – both located in California.
8 Defendants also agreed, by contract, to Jurisdiction in California. (See First Amended
9 Verified Complaint ("FAC") paragraph 96.
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11 Jurisdiction is determined on the basis of the complaint, and the defendants' denial of the
12 facts did not deprive the District Court of its jurisdiction (Arch Pers. Care Prods., L.P. v.
13 Malmstrom, 90 Fed. Appx. 17, 21 (3d Cir., 2003)).

14 California, in Sanders v. CEG Corp. (1979) 95 Cal. App. 3d 779, adopted the Federal
15 analysis for determining jurisdiction.
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17 Under federal law, a court may exercise jurisdiction if there have been "minimum
18 contacts" between a non-resident defendant and the state of California and so long as the
19 exercise of personal jurisdiction does not offend "traditional notions of fair play and
20 substantial justice." (*International Shoe Company v. Washington*, 326 U.S. 310, 316
21 (1945).) There are two different types of personal jurisdiction: general jurisdiction, which
22 permits a non-resident to be sued on any cause of action, and specific jurisdiction, which
23 permits suit only on claims relating to defendants' contacts with the forum. (*See, e.g.,*
24 *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, fns. 8 and 9, and 418, fn.
25 12 (1984).) This Court has both general and specific personal jurisdiction over the moving
26 parties.
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"In order to sustain a claim of personal jurisdiction over a nonresident defendant on

1 defendant's motion to dismiss for lack of personal jurisdiction, a plaintiff need only establish
2 a *prima facie* case for jurisdiction." (*Edias Software International, L.L.C. v. Basis*
3 *International Ltd.*, 947 F.Supp. 413, 416-17 (1996).) Defendant must then "present a
4 compelling case" that the exercise of jurisdiction would be unreasonable. (*Bridgestone*
5 *Corp. v. Superior Court (T & T Truck & Crane Service, Inc.)*, 99 Cal.App.4th 767 (2002)
6 (citing *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at p. 477, 105 S.Ct. 2174).)
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10 **1. California Courts May Exercise General Jurisdiction In This Case.**

11 In order to establish general jurisdiction, Plaintiff must show that Defendants' "activities
12 within a state are 'substantial' or 'continuous and systematic'." (*Data Disc, Inc. v. Systems*
13 *Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); *Perkins v. Benguet Consol. Mining*
14 *Co.*, 342 U.S. 437, 446-47 (1952).) Plaintiff's Complaint demonstrates that the Defendants
15 have directed commercial advertising at California repeatedly. Plaintiff and his customers
16 have received many unlawful email messages, each message requesting (in one form or
17 another) that Plaintiff take some action that would result in commercial benefit to the
18 Defendants. Defendants systematically targeted their commercial advertising to multiple
19 California resident and thereby voluntarily submitted to jurisdiction in California. By
20 sending email to California, Defendants are making sales, soliciting business in the forum,
21 and serving California's markets. (*See Gator.Com Corp. v. L.L. Bean, Inc.* 341 F.3d 1072,
22 1078 (9th Cir. 2003) *Rehearing en banc granted*, 366 F.3d 789 (9th Cir. 2004).) The
23 exercise of general jurisdiction is appropriate where the "contacts are part of a consistent,
24 ongoing, and sophisticated sales effort that has included California for a number of years."
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27 (*Id.*)
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The nature of email advertising suggests that the Defendants have been sending their

1 messages to many other California residents besides Plaintiff. (*See, e.g., Ferguson v.*
2 *Friendfinders, Inc.*, 94 Cal.App.4th 1255, 1265 (2002) (acknowledging that "unsolicited
3 email advertising is sent in 'bulk, ' "); *see also Verizon Online Services, Inc. v. Ralsky*, 203
4 F.Supp.2d 601, 606 (E.D.Va.2002) (defining spam as "an unsolicited, often commercial,
5 message transmitted through the Internet as a mass mailing to a large number of recipients")
6 (quoting MICROSOFT ENCARTA COLLEGE DICTIONARY 1383 (2001)).) Sending
7 multiple email messages to each of thousands or perhaps millions of California residents is
8 substantial activity within the state. The Defendants have been benefiting economically from
9 their advertising directed to California residents. They should not have the luxury of lobbying
10 their ads over the border, accepting money for promotion of products within the forum, and
11 then being able to avoid responsibility for their actions. Requiring Plaintiff to travel to the
12 Defendants' jurisdictions would be an injustice to Plaintiff, to other recipients of the
13 Defendants' email messages, and to California as a whole. (*See West Corp. v. Superior*
14 *Court (Sanford)*, 116 Cal.App.4th 1167, 1180 (2004) (California "has a 'legitimate and
15 compelling interest in preserving a business climate free of fraud and deceptive practices' "
16 (quoting *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal.4th 1036, 1064
17 (1999)).)

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23 **2. California May Exercise Specific Jurisdiction Over Those Who Intentionally**
24 **Direct Email Advertising To California Residents.**

25 Even if this Court declines to exercise general jurisdiction over Defendants, "specific
26 jurisdiction may exist over a defendant who has no physical presence in the forum state."
27 (*Edias Software, supra*, 947 F. Supp. At 417 (citing *Burger King*, 471 U.S. at 476).)

28 The Ninth Circuit has a three part test for determining whether jurisdiction is reasonable:

1 (1) The non-resident defendant must do some act or
2 consummate some transaction with the forum or perform some
3 act by which he purposefully avails himself of the privilege of
4 conducting activities in the forum, thereby invoking the benefits
5 and protection of its laws. (2) The claim must be one which
6 arises out of or results from the defendant's forum related
7 activity. (3) Exercise of jurisdiction must be reasonable. (*Data*
8 *Disc, supra*, 557 F.2d at 1287; *see also Cornelison v. Chaney*,
9 16 Cal.3d 143, 148 (1976).)

10 The first requirement, that of purposeful availment, is the most critical. (*Cybersell v.*
11 *Cybersell*, 139 F.3d 414, 416-417 (9th Cir. 1997).) "The purposeful availment requirement
12 ensures that a nonresident defendant will not be haled into court based upon 'random,
13 fortuitous or attenuated' contacts with the forum state." (*Panavision International, L.P. v.*
14 *Toepen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (quoting *Burger King, supra*, 471 U.S. at 475).)
15 Defendants have purposefully availed themselves of the benefits of California by directing
16 misleading commercial solicitations at California residents in the hope of pecuniary gain.

17 Defendants sent unlawful email advertising to equipment located within California.
18 They should not now be rendered immune by the implied claim that they have not exacted
19 sufficient economic benefit from the forum to make it worth their while to defend a lawsuit
20 alleging harm that resulted from Defendants' unlawful activities.

21 **3. The "Effects Test" Satisfies The Purposeful Availment Prong**

22 Defendant ignores the effects of their actions. Defendants relayed their spam through
23 servers in multiple countries then, illegally relayed through Plaintiff's servers in California
24 and finally illegally deposited on Plaintiff's workstation in California so that the Plaintiff in
25 California can read Defendants' advertising. Defendant ignores ignore the "effects test"
26 established in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1994) allows
27 the exercise of personal jurisdiction based upon "(1) intentional actions (2) expressly aimed at
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1 the forum state (3) causing harm, the brunt of which is suffered - and which the defendant
2 knows is likely to be suffered - in the forum state." (*Core-Vent Corp. v. Nobel Industries AB*,
3 11 F.3d 1482, 1486 (9th Cir. 1993).)

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5 Email messages can serve as the basis for the exercise of jurisdiction on this basis.
6 (*Edias Software, supra*, 947 F.Supp. at 420.) "Allowing Defendant to escape personal
7 jurisdiction in a forum they exploited for pecuniary gain while causing a tort to a ... resident
8 would constitute a manifest unfairness". (*Verizon, supra*, 203 F.Supp.2d at 604.)
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10 11 **4. Plaintiff's Cause of Action Arises From Defendants' Contacts With The Forum**

12 Email "does not differ substantially from other recognizable forms of communication,
13 such as traditional mail or phone calls." (*Edias Software, supra*, at 418.) The Ninth Circuit has
14 ruled that a single telephone call is sufficient for the exercise of jurisdiction. (*Brainerd v.*
15 *Governors of the University of Alberta*, 873 F.2d 1257 (9th Cir. 1989).) California courts have
16 found jurisdiction where there has been only a handful of email messages. (*See, e.g., Hall v.*
17 *Laronde*, 56 Cal.App. 4th 1342 (1997).) In this case, Defendants sent multiple email messages
18 to Plaintiff. But for Defendants' transmission of the messages to him, Plaintiff would not have
19 suffered injury in California.
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22 23 **5. Defendants Bear The Burden Of Showing That The Exercise Of Jurisdiction** 24 **Would Be Unreasonable**

25 Where a defendant has purposefully availed itself of the forum state, and the cause of
26 action arises from the defendant's contacts with the forum state, an inference of reasonableness
27 arises. (*Verizon, supra*, 203 F.Supp.2d at 621 (quoting *Compuserve*, 89F.3d at 1268).) To
28 avoid jurisdiction, a defendant must show compelling evidence. The court "should not weigh

1 the controverting assertions of the party seeking dismissal because to do so would allow
2 Defendants to 'avoid personal jurisdiction simply by filing an affidavit denying all
3 jurisdictional facts.' " (*Verizon, supra*, 203 F.Supp.2d at 609 (quoting *Compuserve*, 89 F. 3d
4 at 1262).) Defendants have not presented any uncontroverted facts which would show that the
5 exercise of jurisdiction would be unreasonable.
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7 "[B]y sending an e-mail solicitation to the far reaches of the earth for pecuniary gain,
8 one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that
9 she will be haled into court in a distant jurisdiction to answer for the ramifications of that
10 solicitation." (*Internet Doorway, Inc. v. Parks* (S.D.Miss.2001) 138 F.Supp.2d 773, 779-80.)
11 Email messages, "like letters and phone calls, can constitute minimum contacts, at least if the
12 defendant or his agents sent the message for pecuniary gain rather than substantially personal
13 purposes." (*Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assur. Corp, et al.*, 160 F.Supp.2d
14 1327, 1333 (M.D.A1.2001).) Failing to exercise jurisdiction over senders of marketing
15 effectively immunizes them from liability. (*West Corp. supra*, at 1180.)
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18 The Defendants' conduct and connections to the forum are of the Defendants' own
19 choosing. Plaintiff never requested to receive any email communication from Defendants.
20 (FAC ¶ 37) Instead, Defendants appear to attempt to argue that when sending e-mail the
21 violation is where send button is pressed instead of where the e-mail is received or where the
22 unauthorized use of servers occurred – here in California.
23

24 Requiring Plaintiff to travel to the Defendants' jurisdictions would be an injustice to
25 Plaintiff, an injustice to other recipients of the Defendants' email messages, and an injustice to
26 California as a whole. (*See West Corp. v. Superior Court (Sanford)* 116 Cal.App.4th 1167,
27 1180 (2004) (California "has a 'legitimate and compelling interest in preserving a business
28 climate free of fraud and deceptive practices' ") (quoting *Diamond Multimedia Systems, Inc.*

1 v. *Superior Court* (1999) 19 Cal.4th 1036, 1064.)

2 **III. CONCLUSION**

3 The court should deny defendant's motion.

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6 Dated: July 12, 2005

7 Plaintiff,

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William Silverstein

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