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10 Experienced Internet.Com, Inc.,
11 Patricia Quesada, and Sylvia Bedoya

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 WILLIAM SILVERSTEIN, an individual,) Case No. 05-00160 PVT
16)
17 Plaintiff,)
18 vs.) REPLY BRIEF IN SUPPORT OF MOTION
19) TO DISMISS; DECLARATION OF GARY
20) JAY KAUFMAN, ESQ.
21)
22) Date: April 5, 2005
23) Time: 10:00 a.m.
24) Dept.: 5
25)
26) EXPERIENCED INTERNET.COM, INC., a)
27) a Florida corporation, PATRICIA)
28) QUESADA, an individual, SYLVIA)
29) BEDOYA, an individual, and DOES 1-50,)
30)
31) Defendants.)

1 Defendants respectfully submit their Reply Brief in Support of Motion to Dismiss
2 as follows:

3
4 **I. PLAINTIFF HAS NOT PROFERRED ANY COMPETENT EVIDENCE TO**
5 **SUPPORT JURISDICTION**

6 **A. There is no Jurisdiction Over Either Sylvia Bedoya or Patricia Quesada.**

7 It remains inexplicable why either Sylvia Bedoya or Patricia Quesada have been
8 dragged into this dispute as individuals. The only “fact” proffered against either is that
9 Ms. Quesada is alleged in the improper Request for Judicial Notice to be the registrant of
10 experiencedinternet.com, a website that has nothing to do with the allegations in this case.
11 Moreover, the very same Godaddy.com website referenced by the Request identifies
12 Experienced Internet.com, Inc. as the owner, not Ms. Quesada individually. Kaufman
13 decl., ¶2 and Exh. A. Therefore the motion to dismiss should be granted as to the
14 individual defendants immediately.

15 **B. Plaintiff Has Not Made a Prima Facie Case Against EIC.**

16 **1. Plaintiff’s Request for Judicial Notice is Invalid.**

17 Rather than provide a single piece of competent evidence, Plaintiff responds with an
18 invalid “Request for Judicial Notice” of “matters of public record.” Pursuant to FRE
19 201(b)(2), the Court may take judicial notice of any “judicially notice[able] fact ... either
20 (1) generally known within the territorial jurisdiction of the trial court or (2) capable of
21 accurate and ready determination by resort to sources whose accuracy cannot reasonably
22 be questioned.” FRE 201(b)(2). Plaintiff boldly and improperly asks the Court to take
23 judicial notice of the accuracy of the content of various websites owned by third parties.
24 The only aspect of the Internet that cannot reasonably be questioned is that *the Internet is*
25 *intrinsically full of inaccuracies*. Godaddy.com’s website, referenced by Plaintiff’s
26 Request, even provides the following disclaimer:

27 “The data contained in GoDaddy.com's WHOIS database, while believed by the
28 company to be reliable, is provided ‘as is’ with no guarantee or warranties regarding
its accuracy.”

1 This is clearly not a proper use of FRE 201. Plaintiff, who failed to provide a competent
2 declaration as to the accuracy of any of these websites (nor could he), has not proffered
3 ANY support for jurisdiction.

4 **2. Even if Judicial Notice is Taken, Plaintiff’s “Evidence” is Irrelevant.**

5 Most of Plaintiff’s “facts” are completely irrelevant. First, it doesn’t matter whether
6 experiencedinternet.com is hosted by a California company, since that website is not at
7 issue. This fact cannot support either an exercise of general jurisdiction or specific
8 jurisdiction due to its lack of relation to the allegations in the Complaint.

9 Similarly, since ipowerweb.com is not suing EIC, the choice of venue and law
10 provisions in that adhesion contract have nothing to do with this matter. Plaintiff is not a
11 third-party beneficiary of that agreement.

12 **3. Plaintiff Cannot Resort to Calder v. Jones.**

13 Plaintiff is thus left with a *Calder v. Jones* effects argument based on emails sent by
14 a third-party. This cannot possibly constitute a basis for personal jurisdiction over these
15 three named Defendants. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105
16 S.Ct. 2174 (1985) (disregarding random, fortuitous or attenuated contacts, or contacts
17 based upon the unilateral activities of third parties). Plaintiff is free to sue the spammer,
18 but cannot take a shortcut and drag innocent parties to California because they are easier to
19 find. Each Defendants’ contacts are to be judged alone.

20 Pavlovich v. Superior Court is decisive here. In that case, the court refused to apply
21 an effects test to an individual who posted encryption-defeating software on the Internet, as
22 it was not foreseeable that California entertainment businesses, specifically, would be
23 harmed. 29 Cal.4th 262 (2002). Even if, *arguendo*, Defendants *had* sent the emails at
24 issue, there is no showing that they were specifically aimed at California.

25 None of Plaintiff’s citations involve jurisdiction based solely on email sent
26 throughout the United States, but happening to be received by a California resident with no
27 ties to the defendant. Rather, the specific state where the harm would be felt was known to
28 the tortfeasor. Unlike here, those cases were not brought by a random plaintiff seeking a

1 windfall judgment. Without more, it is manifestly unreasonable to exercise jurisdiction
2 over these Defendants.

3
4 **II. THIS VENUE IS IMPROPER**

5 Plaintiff concedes that the only reason to keep this matter in the Northern District is
6 that *witnesses* are located there. Witnesses may be deposed near their residences without
7 maintaining this action here. The alleged harm *to the Plaintiff* is in Los Angeles, not the
8 Northern District; moreover, he has articulated absolutely zero damage to him in this
9 district. There is no justification for keeping it here and venue is *improper*, not merely
10 inconvenient.

11
12 **III. THE CALIFORNIA STATUTE IS PRE-EMPTED AS APPLIED**

13 Plaintiff clearly seeks to invoke the California law because CAN-SPAM does not
14 provide individuals with standing. This was a decision made by Congress after a great
15 amount of discussion. Kaufman decl., ¶3 and Exh. B. Plaintiff’s discussion of Congress’
16 intention to have the FTC (not the California legislature) regulate the form of subject
17 headers proves Defendants’ point – this is an area of Federal oversight. It is precisely
18 because of this that preemption is appropriate to the instant matter -- California simply
19 may not override this decision of Congress.

20 CAN-SPAM includes a narrow exception for laws regulating “falsity or deception.”
21 15 USC § 7707(b)(1). Thus the pre-emption clause is triggered unless “falsity or
22 deception” is truly involved. Defendants contend that Plaintiff, by over-pleading in order
23 to tie Defendants to salacious allegations, plead himself outside of this exception.

24 Plaintiff argues that the emails violated California law by not including
25 “SEXUALLY-EXPLICIT” in the subject line. This requirement, however, is explicitly
26 covered by 15 USC §7704(d). It is therefore pre-empted. See Exhibit B, page 174.

27 Regardless, to the extent that Plaintiff has to fall back on the “falsity or deception”
28 aspects of the specifically-identified emails, they clearly involve sexually-explicit material.

1 They are neither false nor deceptive under even the more stringent summary judgment
2 standards. There is no false or deceptive nature to those descriptions set forth in the
3 Complaint, undermining the argument. They merely fail to use the identifier. And, as
4 explained above, that's treading on Federal territory.

5

6 **IV. PLAINTIFF SHOULD BE REQUIRED TO POST A BOND BEFORE BEING**
7 **ALLOWED TO AMEND THE COMPLAINT**

8 Unless Plaintiff can come forth with competent evidence of activity by these three
9 Defendants, and not the spammer, the Court should protect them with a sizeable bond.
10 Moreover, Plaintiff should not be allowed to hide behind the litigation privilege to defame
11 these three defendants with new allegations of emotional child abuse without guaranteeing
12 to the Court that Plaintiff has some evidence of wrongdoing by Defendants, specifically,
13 and not just third parties.

14

15 **V. CONCLUSION**

16 For the foregoing reasons, Defendants respectfully request that the Court grant the
17 Motion.

18 DATED: March 22, 2005

19

20 Respectfully submitted,

21

22 By: /s/ Gary Jay Kaufman
23 Gary Jay Kaufman
24 Attorney for specially appearing Defendants
25 Experienced Internet.Com, Inc.,
26 Patricia Quesada, and Sylvia Bedoya

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Declaration of Gary Jay Kaufman

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I, Gary Jay Kaufman, do hereby declare:

1. I am an attorney at law duly licensed to practice in the State of California and before this Court. I am the attorney of record for the Defendants herein. I make this declaration of my own personal knowledge and could and would testify thereto under oath.

2. I viewed the website Godaddy.com referenced in the Opposition. A true and correct copy of excerpts from the website are attached hereto as Exhibit A.

3. A true and correct copy of excerpts from the law review article, W. Parker Baxter, *Has Spam Been Canned? Consumers, Marketers and the Making of the CAN-SPAM Act of 2003*, 8 N.Y.U. J. Legis. & Pub. Pol'y 163 (2004)) are attached hereto as Exhibit B.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on March 22, 2005, in Los Angeles, California.

/s/ Gary Jay Kaufman
Gary Jay Kaufman