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10 Patricia Quesada, and Sylvia Bedoya

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

14 WILLIAM SILVERSTEIN, an
15 individual,

16 Plaintiff,

17 vs.

18 EXPERIENCED INTERNET.COM,
19 INC., a Florida corporation, PATRICIA
20 QUESADA, an individual, SYLVIA
21 BEDOYA, an individual, and DOES 1
22 through 50, inclusive,

23 Defendants.

Case No. C05-00160

(Assigned to Hon. Patricia V. Trumbell)

DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS

Date: April 5, 2005

Time: 10:00 a.m.

Courtroom: 5

24 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that Defendants Experienced Internet.Com, Inc., Patricia
26 Quesada and Sylvia Bedoya will and hereby do move to: (a) dismiss the Claims in
27 the Complaint pursuant to FRCP 12(b)(2), (3) and (6); (b) transfer the matter to a
28 proper venue pursuant to 28 USC § 1406; and (c) move for an undertaking. Said
motion to be heard on Tuesday, April 5, 2005 at 10:00 a.m. in Courtroom 5, located

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at 280 South First Street, San Jose, California 95113. Said Motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declarations of Patricia Quesada and Sylvia Bedoya, oral argument, the pleadings in this action, and all other matters as may properly be considered.

DATED: February 25, 2005

LAW OFFICES OF GARY JAY KAUFMAN, INC.

By: _____
GARY JAY KAUFMAN
Attorney for Defendants Experienced Internet.Com,
Inc., Patricia Quesada and Sylvia Bedoya

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND STATEMENT OF FACTS

3 Defendant Experienced Internet.Com, Inc. (“EIC”) is a Florida corporation
4 with its principal place of business in Miami, Florida. Defendant Patricia Quesada
5 (“Quesada”), a resident of Miami, Florida, is its Director and President. Defendant
6 Sylvia Bedoya (“Bedoya”), a resident of Miami, Florida, is its Vice President. EIC
7 is in the business of facilitating credit card processing, and does not engage in any
8 advertising whatsoever other than experiencedinternet.com and does not maintain
9 any affiliate program. EIC does not have a single customer located in California.
10 Quesada decl., ¶¶1-2, 10, 17-18; Bedoya decl., ¶¶1-2. In addition:

- 11 (1) Defendants are all Florida residents.
- 12 (2) Their only business address is located at Miami, Florida.
- 13 (3) No Defendant owns, uses or possesses any real estate or other property
14 in California.
- 15 (4) No Defendant pays taxes in California.
- 16 (5) No Defendant has an office or other place of business in California.
- 17 (6) No Defendant has any investments in California and or maintains an
18 account with a California bank.
- 19 (7) No Defendant is licensed or regulated by any California governmental
20 agency.
- 21 (8) No Defendant has a mailing address, post office box or telephone
22 directory listing in California.
- 23 (9) No Defendant has ever submitted to jurisdiction in any action in a
24 California state or federal court.
- 25 (10) EIC is a properly-incorporated and maintained Florida corporation,
26 with Quesada as its President and Bedoya as its Vice President.
27 Quesada decl., ¶¶1-20; Bedoya decl., ¶¶1-10.

1 Plaintiff, a resident of Los Angeles, California, claims to be an Internet
2 Service Provider (“ISP”) for purposes of the CAN-SPAM Act, 15 USC § 7701 et
3 seq. Plaintiff claims that he hosts email for third parties, one of which lives in this
4 District. Plaintiff further alleges that Defendants caused to be sent certain emails
5 that violate CAN-SPAM and CA Business and Professions Code § 17529.5.
6 Plaintiff further alleges that at least one such email was routed through his computer
7 server in Los Angeles to that one individual in this District. Plaintiff has no
8 evidence that any of these emails were sent by Defendants, or at the direction of
9 Defendants, or with the knowledge of Defendants.

10 In reality, the emails were sent by a third party. This party was not retained
11 by, affiliated with, or compensated by Defendants. Quesada decl., ¶19. Defendants
12 have no knowledge of these emails separate and apart from this lawsuit. Quesada
13 decl., ¶20; Bedoya decl., ¶10.

14 15 II. LEGAL ANALYSIS

16 A. There Are No Grounds for Personal Jurisdiction over These
17 Defendants.

18 When a defendant properly files a motion to dismiss due to lack of personal
19 jurisdiction, the plaintiff bears the burden of proving by a preponderance of the
20 evidence the prima facie facts entitling the court to assume jurisdiction. Flynt
21 Distrib. Co., Inc. v. Harvey, 734 F.2d 1389, 1392 (9th Cir. 1986).

22 The starting point for an analysis of personal jurisdiction is the forum state's
23 long arm statute. California Code of Civil Procedure § 410.10 sets forth this state's
24 long arm statute and provides that, “a court of this state may exercise jurisdiction on
25 any basis not inconsistent with the Constitution of this state or of the United States.”
26 California recognizes two methods in which the minimum contacts requirement may
27 be satisfied -- general and specific.

28

1 A nonresident defendant may be subject to the general jurisdiction of the
2 forum if his or her contacts in the forum state are "substantial ... continuous and
3 systematic." In such a case, "it is not necessary that the specific cause of action
4 alleged be connected with the defendant's business relationship to the forum." Such
5 a defendant's contacts with the forum are so wide-ranging that they take the place of
6 physical presence in the forum as a basis for jurisdiction.

7
8 A court may exercise specific jurisdiction over a nonresident defendant only
9 if: (1) "the defendant has purposefully availed himself or herself of forum benefits";
10 (2) "the 'controversy is related to or "arises out of" [the] defendant's contacts with
11 the forum"; and (3) "the assertion of personal jurisdiction would comport with "fair
12 play and substantial justice." Pavlovich v. Superior Court, 29 Cal.4th 262, 269
13 (2002) (citations omitted and emphasis added).

14
15 1. Each Defendant's Contacts Must be Judged Alone.

16 EIC's contacts must be judged alone and can't be imputed to its employees.
17 Though the President and Vice President of EIC, Quesada and Bedoya's contacts
18 must be judged separately; the court may not impute those of any other defendant,
19 including EIC. For jurisdictional purposes, the acts of corporate officers and
20 directors in their official capacities are the acts of the corporation exclusively and
21 are thus not material for purposes of establishing minimum contacts as to the
22 individuals. Shearer v. Superior Court, 70 Cal.App.3d 424, 430, 138 Cal.Rptr. 824
23 (1977). Implicit in this principle is the consideration that corporations are separate
24 legal entities that cannot act on their own but must do so through their appointed
25 representatives. Mihlon v. Superior Court, 169 Cal.App.3d 703, 713, 215 Cal.Rptr.
26 442 (1985). Accordingly, acts performed by these individuals, in their official
27 capacities, cannot reasonably be attributed to them as individual acts creating
28 personal jurisdiction. Colt Studio, Inc. v. Badpuppy Enterprises, 75 F.Supp.2d

1 1104, 1119 (CD Cal. 1999) (personal jurisdiction over corporation conducting
2 copyright infringement over Internet not imputed to officers). A mere recitation of
3 the term “Agency,” which is inherent in every corporation, does not change this
4 analysis.

5
6 2. General Jurisdiction is Not Warranted.

7 Plaintiff has failed to allege any connection between Defendants and
8 California, other than his bare allegations that someone (whom he incorrectly
9 alleges to be Defendants) sent emails to at least one California resident through his
10 computer servers in California, thus violating the CAN-SPAM Act and California
11 law. Cmpt. ¶¶17 and 21.

12 As set forth above, there are NO relevant contacts to be considered. Thus,
13 there is no evidence that any Defendant has conducted such continuous or
14 systematic business with California such that the exercise of jurisdiction is proper.

15
16 3. Specific Jurisdiction is Not Warranted.

17 Plaintiff must prove that both EIC and the individual Defendants each
18 specifically availed themselves of the forum’s benefits with regard to the alleged
19 misdeeds at issue that created some “effect” in California through some act
20 committed elsewhere. But as shown in the Declarations, other than
21 experienceinternet.com, Defendants neither advertise, nor “outsource” any
22 advertising, whether in the form of Spam or otherwise. Quesada decl., ¶17.
23 Defendants have never had a single customer located in California. Quesada decl.,
24 ¶18. Defendants have no connection to the sample email provided by Plaintiff.
25 Quesada decl., ¶20; Bedoya decl., ¶10. Therefore, there are no grounds for specific
26 jurisdiction either.

27 Even if an effect of Defendants’ alleged conduct were somehow established,
28 “[t]he mere causing of an ‘effect’ in the forum is not sufficient without more to

1 afford a constitutional basis for jurisdiction.” Kaiser Aetna v. I.C. Deal, 86
2 Cal.App.3d 896, 902, 150 Cal.Rptr. 615 (1978). “Jurisdiction may be invoked only
3 where the actor committed an out-of-state act intending to cause effects in California
4 or reasonably expecting that effects in California would result.” Goehring v.
5 Superior Court, 62 Cal.App.4th 894, 909, 73 Cal.Rptr.2d 105 (1998).

6 There are simply no minimum contacts that could support specific
7 jurisdiction. Moreover, there are no grounds for jurisdictional discovery in this
8 matter. Defendants intentionally provided the Court with declarations setting forth
9 their complete lack of California contacts, including sales and advertising history so
10 as to avoid further needless expense.

11
12 B. Plaintiff filed in an improper venue.

13 Pursuant to 18 USC § 1391(b)(1), an action may be brought in any judicial
14 district “in which a substantial part of the events or omissions giving rise to the
15 claim occurred, or a substantial part of property that is the subject of the action is
16 situated.” The burden is on Plaintiff to justify venue in this District. Airola v. King,
17 505 F. Supp. 30, 31 (D. Az. 1980).

18 Defendants are located in Miami, Florida. Plaintiff (and presumably his
19 computer servers) are located in Los Angeles, California. Any significant injury
20 therefore was sustained in Los Angeles.

21 Plaintiff attempts to bring this lawsuit in Northern California, the location of
22 his counsel, because a single email was received by one of his customers in this
23 district. This is not a cognizable “injury,” however, as individuals do not have
24 standing under CAN-SPAM; only ISPs and governmental agencies do. The location
25 of the customers is irrelevant, as they were not damaged.

26 This action should either be dismissed pursuant to FRCP 12(b)(3) for
27 improper venue, or transferred to Los Angeles via 28 USC § 1406(a). There is
28 absolutely no logical reason why the case should remain in this District, as Plaintiff

1 will be deposited in Los Angeles, and all California-based evidence, including his
2 servers, will be examined here.

3
4 C. The Second Claim is Pre-empted.

5 Plaintiff brings its second claim under Cal. Business and Professions Code
6 section 17529.5, California's Spam legislation. Pursuant to 15 USC § 7707(b)(1),
7 the CAN-SPAM Act:

8 This chapter supersedes any statute, regulation, or rule of a State or political
9 subdivision of a State that expressly regulates the use of electronic mail to send
10 commercial messages, except to the extent that any such statute, regulation, or rule
11 prohibits falsity or deception in any portion of a commercial electronic mail
12 message or information attached thereto. 15 USC § 7707(b)(1). In other words,
13 CAN-SPAM expressly preempts the California Spam statute to the extent that it
14 does not fall within this exception.

15 Plaintiff attempts to creatively plead itself around this issue, alleging:
16 Defendants sent commercial electronic mail to California mail addresses, including
17 addresses owned or operated by Plaintiff, containing or accompanied by falsified,
18 misrepresented, obscured, or forged header information. Defendants' commercial
19 electronic mail contained subject lines intended to and likely to mislead recipients,
20 acting reasonably under the circumstances, about a material fact regarding the
21 contents or subject matter of the message." Complaint, ¶¶37-38.

22 Plaintiff fails to escape the fact that his claim is not about fraud, as no one
23 was defrauded (or injured, it would appear). Plaintiff's claim is that the emails at
24 issue violated California's version of the same proscriptions (i.e., false header
25 information) set forth in CAN-SPAM. The allegations in paragraph 37 make this
26 overlap indisputable.

27 As for the second paragraph, Plaintiff identifies the actual subject lines in
28 paragraph 18 of the Complaint. None of them constitute fraud under California law.

1 They clearly offered and involved some sort of sex-related content. Therefore, the
2 act is completely preempted as applied herein.

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D. Plaintiff should be required to post a bond.

Pursuant to Section 7706(g)(4) of the CAN-SPAM Act, the Court may require an undertaking to cover Defendants' costs and fees. Defendants submit that Plaintiff is so unlikely to find any conduct by Defendants that violate the statutes that Defendants are going to be seeking costs and fees upon conclusion of this frivolous hunt for a windfall. Therefore, Plaintiff should be required to post a bond.

IV. CONCLUSION

Based upon the foregoing, it is respectfully requested that Defendants' Motion be granted.

DATED: February 25, 2005

LAW OFFICES OF GARY JAY KAUFMAN, INC.

By: _____
GARY JAY KAUFMAN
Attorney for Defendants Experienced Internet.Com,
Inc., Patricia Quesada and Sylvia Bedoya

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DECLARATION OF PATRICIA QUESADA

PATRICIA QUESADA declares and states as follows:

1. I am the President of Experienced Internet.Com, Inc. (“EIC”) and a Defendant in this action. I make this declaration in support of Defendants’ Motion to Dismiss. The facts set out below are known to me personally, and if called on I could testify to those facts, under oath.

2. I am a resident of Miami, Florida. My only place of business is located in Miami, Florida.

3. I do not own, use or possess any real property in California, do not pay any taxes in California, and do not maintain an account with a California bank.

4. I am not registered to do business in California, and am not licensed or regulated by any government agency in California.

5. I have had no employees in California.

6. I have no mailing address, post office box or telephone directory listing in California.

7. I have never made a general appearance in an action in any state or federal court in California.

8. I do not advertise anywhere.

9. I have never personally done business in California, or, to the best of my knowledge, with any California resident. I was not personally involved in the acts complained of in the Complaint.

10. EIC is a Florida corporation with its principal place of business in Florida. EIC is in the business of facilitating credit card processing.

11. EIC is properly incorporated, and all corporate formalities are followed. I have never used its financial accounts for my personal purposes.

1 12. EIC does not own, use or possess any real property in California,
2 does not pay any taxes in California, and does not maintain an account with a
3 California bank.

4 13. EIC is not registered to do business in California, and is not
5 licensed or regulated by any government agency in California.

6 14. EIC has no employees in California.

7 15. EIC has no office, mailing address, post office box or telephone
8 directory listing in California.

9 16. EIC has never made a general appearance in an action in any
10 state or federal court in California.

11 17. EIC does not direct any advertising or marketing efforts towards
12 California. EIC only advertises thru the minimally-interactive
13 experienceinternet.com website.

14 18. EIC has never had a single customer in California.

15 19. Neither EIC, nor anyone working for EIC in any capacity,
16 including employees, independent contractors, agents, or affiliates, has ever caused
17 the emails at issue to be sent.

18 20. I have no personal knowledge regarding the sending of the Spam
19 at issue to Plaintiff or anyone else.

20 I declare under penalty of perjury under the laws of the State of
21 California and the United States that the foregoing is true and correct and that this
22 declaration was executed on February 25, 2005, in Miami, Florida.

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PATRICIA QUESADA

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DECLARATION OF SYLVIA BEDOYA

SYLVIA BEDOYA declares and states as follows:

1. I am the Vice President of Experienced Internet.Com, Inc. (“EIC”) and a Defendant in this action. I make this declaration in support of Defendants’ Motion to Dismiss. The facts set out below are known to me personally, and if called on I could testify to those facts, under oath.

2. I am a resident of Miami, Florida. My only place of business is located in Miami, Florida.

3. I do not own, use or possess any real property in California, do not pay any taxes in California, and do not maintain an account with a California bank.

4. I am not registered to do business in California, and am not licensed or regulated by any government agency in California.

5. I have had no employees in California.

6. I have no mailing address, post office box or telephone directory listing in California.

7. I have never made a general appearance in an action in any state or federal court in California.

8. I do not advertise anywhere.

9. I have never personally done business in California, or, to the best of my knowledge, with any California resident. I was not personally involved in the acts complained of in the Complaint.

10. I have no personal knowledge regarding the sending of the Spam at issue to Plaintiff or anyone else.

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 February 25, 2005, in Miami, Florida.

SYLVIA BEDOYA

