

1 Timothy J. Walton, Esq. (State Bar No. 184292)  
2 407 South California Avenue  
3 Suite 8  
4 Palo Alto, CA 94306  
5  
6 Phone (650) 566-8500  
7 Fax: (650) 618-8687  
8 Email: silverstein-experienced.internet@netatty.com  
9  
10 Attorney for Plaintiff William Silverstein

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE DIVISION)**

WILLIAM SILVERSTEIN, an individual,	)	Case No.: C 05-00160 PVT
	)	
Plaintiff,	)	<b>PLAINTIFF'S OPPOSITION TO</b>
	)	<b>MOTION TO DISMISS</b>
vs.	)	
	)	<b>Date: April 5, 2005</b>
EXPERIENCED INTERNET.COM, INC., a	)	<b>Time: 20:00 a.m.</b>
Florida corporation,	)	<b>Courtroom: 5</b>
PATRICIA QUESADA, an individual,	)	
SYLVIA BEDOYA, an individual, and	)	
DOES 1-50,	)	
	)	
Defendants.	)	
	)	

**I. INTRODUCTION**

20 Defendants seek to dismiss Plaintiff's action on the alleged grounds that the Court lacks  
21 jurisdiction, Plaintiff's complaint is indefinite, and venue is more appropriate elsewhere. In fact,  
22 this Court is precisely where the matter should be heard, and Plaintiff's complaint provides a  
23 short and plain statement of the claims.

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

## II. STATEMENT OF FACTS

On a motion to dismiss, allegations of material fact are taken as true and are construed in the light most favorable to the nonmoving party. (*Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002) (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)).) "Review is limited to the complaint." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." (*Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990).) However, under Federal Rule of Evidence Rule 201, a court may take judicial notice of "matters of public record." (*Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).)

The Internet is an international network of interconnected computers. (*Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997).) Unsolicited commercial email messages sent over the Internet are known as "spam." (*Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1348 (2003) (citing *Ferguson v. Friendfinders, Inc.*, 94 Cal.App.4th 1255, 1267 (2002)).) Federal law regulates unsolicited commercial email messages. (15 U.S.C § 7701 et seq. ("CAN-SPAM").)

Plaintiff conducts business as an Internet Service Provider. (Complaint For Damages and Injunctive Relief ("Complaint") at 1:24-2:13.) Plaintiff received unlawful email messages consisting of lewd advertisements for web sites belonging to Defendants. (*Id.* at 5:20-6:21.) Plaintiff's counsel sent a letter by certified mail to the moving Defendants, seeking an agreement to stop sending unlawful email. (*Id.* at 7:3-4.) Defendants did not accede to the request. (*Id.* at 5-7.) Defendants' servers are hosted by a California company. (*See* Plaintiff's Request for Judicial Notice 2:7-13.) Defendants admit to doing business in California. (*See* Plaintiff's Request for

1 Judicial Notice 2:17-21.) Defendants admit to operating an affiliate program. (See Plaintiff's  
2 Request for Judicial Notice 2:15-16.)  
3

### 4 **III. SUMMARY OR ARGUMENT**

5  
6 Defendants rely upon extrinsic evidence (in the form of self-serving declarations) as the  
7 basis for their motion to dismiss. Defendants are mistaken about three crucial matters of law.  
8 First, the exercise of jurisdiction is appropriate in this venue because Defendants caused an effect  
9 in California by their failure to include "SEXUALLY-EXPLICIT" as required by law, and a  
10 significant portion of the harm occurred in the Northern District of California. Second, extrinsic  
11 evidence may not serve as the basis for dismissal. Finally, the federal CAN-SPAM Act  
12 specifically contemplates state law claims in certain circumstances.  
13

### 14 **IV. DISCUSSION**

#### 15 **A. This Court Has Jurisdiction Over The Moving Parties**

16  
17  
18 Under federal law, a court may exercise jurisdiction if there have been "minimum  
19 contacts" between a non-resident defendant and the state of California and so long as the exercise  
20 of personal jurisdiction does not offend "traditional notions of fair play and substantial justice."  
21 (*International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945).) There are two different  
22 types of personal jurisdiction: general jurisdiction, which permits a non-resident to be sued on  
23 any cause of action, and specific jurisdiction, which permits suit only on claims relating to  
24 defendants' contacts with the forum. (See, e.g., *Helicopteros Nacionales de Columbia v. Hall*, 466  
25

1 U.S. 408, 414, fns. 8 and 9, and 418, fn. 12 (1984).) This Court has both general and specific  
2 personal jurisdiction over the moving parties.  
3

4 "In order to sustain a claim of personal jurisdiction over a nonresident defendant on  
5 defendant's motion to dismiss for lack of personal jurisdiction, a plaintiff need only establish a  
6 *prima facie* case for jurisdiction." (*Edias Software International, L.L.C. v. Basis International*  
7 *Ltd.*, 947 F.Supp. 413, 416-17 (1996).) Defendant must then "present a compelling case" that the  
8 exercise of jurisdiction would be unreasonable. (*Bridgestone Corp. v. Superior Court (T & T*  
9 *Truck & Crane Service, Inc.)*, 99 Cal.App.4th 767 (2002) (citing *Burger King Corp. v.*  
10 *Rudzewicz, supra*, 471 U.S. at p. 477, 105 S.Ct. 2174).)  
11

### 12 **1. California Courts May Exercise General Jurisdiction In This Case.**

13 In order to establish general jurisdiction, Plaintiff must show that Defendants' "activities  
14 within a state are 'substantial' or 'continuous and systematic'." (*Data Disc, Inc. v. Systems Tech.*  
15 *Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); *Perkins v. Benguet Consol. Mining Co.*, 342  
16 U.S. 437, 446-47 (1952).) Plaintiff's Complaint demonstrates that the Defendants have directed  
17 commercial advertising at California repeatedly. (*See* Complaint at 3:20-24, 5:20-23, 7:5-7, 5:13-  
18 24, 8:6-16, 9:12-14.) Plaintiff's Request for Judicial Notice shows multiple instances of verifiable  
19 facts demonstrating that Defendants conduct business in California. (Plaintiff's Request for  
20 Judicial Notice at 2:1-14, 2:17-21.) Plaintiff and his customers have received many unlawful  
21 email messages, each message requesting (in one form or another) that Plaintiff take some action  
22 that would result in commercial benefit to the Defendants. Defendants systematically targeted  
23 their commercial advertising to multiple California resident and thereby voluntarily submitted to  
24  
25

1 jurisdiction in California. By sending email to California, Defendants are making sales, soliciting  
2 business in the forum, and serving California's markets. (*See Gator.Com Corp. v. L.L. Bean, Inc.*  
3 341 F.3d 1072, 1078 (9th Cir. 2003) *Rehearing en banc granted*, 366 F.3d 789 (9th Cir. 2004).)

4 The exercise of general jurisdiction is appropriate where the "contacts are part of a consistent,  
5 ongoing, and sophisticated sales effort that has included California for a number of years." (*Id.*)

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

1                   **2. California May Exercise Specific Jurisdiction Over Those Who Intentionally**

2                   **Direct Email Advertising To California Residents.**

3  
4                   Even if this Court declines to exercise general jurisdiction over Defendants, "specific  
5 jurisdiction may exist over a defendant who has no physical presence in the forum state." (*Edias*  
6 *Software, supra*, 947 F. Supp. At 417 (citing *Burger King, supra*, 471 U.S. at 476).)

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

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

16                   The first requirement, that of purposeful availment, is the most critical. (*Cybersell v.*  
17 *Cybersell*, 139 F.3d 414, 416-417 (9th Cir. 1997).) "The purposeful availment requirement  
18 ensures that a nonresident defendant will not be haled into court based upon 'random, fortuitous  
19 or attenuated' contacts with the forum state." (*Panavision International, L.P. v. Toepen*, 141 F.3d  
20 1316, 1320 (9th Cir. 1998) (quoting *Burger King, supra*, 471 U.S. at 475).) Defendants have  
21 purposefully availed themselves of the benefits of California by directing misleading commercial  
22 solicitations at California residents in the hope of pecuniary gain.

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

1  
2 **3. The "Effects Test" Satisfies The Purposeful Availment Prong**

3 The "effects test" established in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79  
4 L.Ed.2d 804 (1994) allows the exercise of personal jurisdiction based upon "(1) intentional  
5 actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered -  
6 and which the defendant knows is likely to be suffered - in the forum state." (*Core-Vent Corp. v.*  
7 *Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).)

8 Email messages can serve as the basis for the exercise of jurisdiction on this basis. (*Edias*  
9 *Software, supra*, 947 F.Supp. at 420.) "Allowing Defendant to escape personal jurisdiction in a  
10 forum they exploited for pecuniary gain while causing a tort to a ... resident would constitute a  
11 manifest unfairness". (*Verizon, supra*, 203 F.Supp.2d at 604.)  
12

13  
14 **4. Plaintiff's Cause of Action Arises From Defendants' Contacts With The Forum**

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

24 //

25 //



1 the email ads sent during 2004. Instead, they argue that other, unknown persons sent email  
2 advertising that inured directly to the Defendants' benefit. Defendants have not set out their  
3 advertising history - they have denied that one exists. Such denial should be in the form of an  
4 answer, not a motion to dismiss.  
5

6  
7 **B. Venue Is Appropriate In The Northern District Of California**

8 The United States Supreme Court has set forth the factors pertinent to the evaluation of a  
9 request to transfer. The factors include:

- 10 1. convenience of the parties;
- 11 2. convenience of witnesses;
- 12 3. locus of operative facts;
- 13 4. location of documents;
- 14 5. availability of process to compel attendance of unwilling witnesses;
- 15 6. forum's familiarity with governing law;
- 16 7. relative docket congestion; and
- 17 8. judicial economy.

18  
19 *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S.Ct. 805, 809, 11 L.Ed.2d 945 (1964).

20 Defendants sent email advertising to California. Plaintiff did not choose to receive email  
21 messages advertising a Florida web site. Witnesses to the unlawful acts are in the Northern  
22 District. To transfer the litigation elsewhere would be a hardship on California residents and  
23 would serve to limit California's ability to exercise control over advertising within the state.  
24

1 Venue is appropriate in the Northern District of California because that is where  
2 substantial harm occurred as a result of the violations of law alleged in the complaint. (*See*  
3 *Complaint at 4:3-5 and 5:20-6:18.*)  
4

5 Requiring Plaintiff to travel to the Defendants' jurisdictions would be an injustice to  
6 Plaintiff, an injustice to other recipients of the Defendants' email messages, and an injustice to  
7 California as a whole. (*See West Corp., supra*, 116 Cal.App.4th at 1180 (California “has a  
8 ‘legitimate and compelling interest in preserving a business climate free of fraud and deceptive  
9 practices’ “) (quoting *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th  
10 1036, 1064).)

11 **C. California Law Is Not Pre-Empted By CAN-SPAM**

12 Defendants acknowledge that Plaintiff has pled facts supporting the enforcement of  
13 California law, as allowed by CAN-SPAM. (Defendants' Notice of Motion and Motion to  
14 Dismiss at 8:8-21.) They claim, however, that Plaintiff must specially plead fraud in order to  
15 show a violation of existing California law. (*Id.* at 8:22-23.) Defendants ignore the plain  
16 language of both the federal and state statutes: the prohibition of falsity and deception does not  
17 require reliance upon the misrepresentations, and as such does not rise to the level of requiring  
18 the specific pleading of fraud. CAN-SPAM specifically states,  
19

20 This Act supersedes any statute, regulation, or rule of a State or  
21 political subdivision of a State that expressly regulates the use of  
22 electronic mail to send commercial messages, except to the extent  
23 that any such statute, regulation, or rule prohibits falsity or  
24 deception in any portion of a commercial electronic mail message  
25 or information attached thereto. (15 U.S.C. § 7707(b).

Congress specifically approved of state laws prohibiting falsity or deception.

1 Defendants' argument that sexual content in the headers allows sufficient notice of sexual  
2 content in the body has no basis in logic, law or legislative history. Congress intended for the  
3 Federal Trade Commission to determine appropriate email headers for messages with  
4 advertising containing sexual content, and 16 C.F.R. 316.1 is the result. The point of standard  
5 labeling of email messages containing sexual content is so that Internet Service Providers such as  
6 Plaintiff may filter out sexually explicit communication. (*See* 47 U.S.C. 230 (stating "It is the  
7 policy of the United States... to encourage the development of technologies which maximize  
8 user control over what information is received by individuals, families, and schools who use the  
9 Internet and other interactive computer services"; *see also*  
10 <<http://www.ftc.gov/opa/2004/04/adultlabel.htm>> (stating "The purpose of the notice is to  
11 inform recipients that a spam message contains sexually oriented material and to make it easier  
12 to filter out messages they do not wish to receive".))

13  
14 Defendants' claim that no person was injured is an arrogant affront to the decree of  
15 Congress that children should not be subject to sexually explicit material in Internet email  
16 advertising. Defendants apparently feel free to inflict their pornography on anyone, since any  
17 individual recipients would not have standing under CAN-SPAM. (*See* Defendants' Notice of  
18 Motion and Motion to Dismiss at 7:23-24 and 22-23 (arguing that no one suffered injury as a  
19 result of the misleading headers or graphic sexual content of the unsolicited email messages  
20 advertising Defendants' web sites.)

21  
22 //

23  
24 //

1  
2 **D. Plaintiff Is Likely To Prevail In The Action.**

3 Defendants have offered no justification for failing to label pornographic email  
4 advertising. Indeed, their only asserted basis for the motion to dismiss is predicated on factual  
5 assertions more appropriately considered at the summary judgment stage of the litigation.

6 Moreover, as demonstrated in the Request For Judicial Notice, the indisputable  
7 evidence demonstrates that the Defendants are the advertisers for purposes of CAN-SPAM and  
8 California law. They are liable for the email advertising Plaintiff and his customers received.  
9 Plaintiff is the party entitled to the undertaking contemplated by 15 U.S.C. § 7706(g)(4).  
10

11  
12 **E. Plaintiff Could Amend The Complaint To Include Additional Detail**

13 Plaintiff believes that his pleading contains the short and plain statements required by  
14 the Federal Rules of Civil Procedure. However, should this Court disagree with that assessment,  
15 Plaintiff requests leave to amend the complaint. Specifically, Plaintiff could add detail regarding  
16 links to Defendants' pornographic web sites, sexually explicit material within the email messages  
17 or on pages linked from the messages, and the harm to Plaintiff and his customers in the  
18 Northern District of California (including allegations about the young child of the customer who  
19 was exposed to Defendants' raunchy email because of the failure to label the subject line).  
20

21  
22 //

23  
24 //

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

**V. CONCLUSION**

This Court should deny Defendants' requests in all respects.

DATED: March 15, 2004

INTERNET ATTORNEY

BY: /s/ Timothy J. Walton

TIMOTHY J. WALTON  
Attorney for the Plaintiff