2004

Frank Amyx v. Players Vacation Club, Inc. and John Does one through ten whose true names are unknown : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FRANK AMYX, Plaintiff-Appellant, vs. PLAYERS VACATION CLUB, INC. and JOHN DOES one through ten whose true names are unknown, Defendants-Appellees.	Appeal No. 20040252-CA District Court No. 030401320 Priority No. 15

APPELLEE'S OPENING BRIEF ON APPEAL

Appeal from the Memorandum Decision of The Honorable Royal I. Hansen,
Third District Court in and for Salt Lake County, Sandy Division

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LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. The plaintiff-appellant is Frank Amyx (referred to herein as "Plaintiff").

2. The defendant-appellee is Players Vacation Club, Inc. (referred to herein as "Defendant").

3. The Complaint below also named as defendants "John Does one through ten whose true names are unknown."

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STATEMENT OF JURISDICTION

Pursuant to Utah Code Ann. §78-2a-3(2)(j) and the Order from the Utah Supreme Court dated January 27, 2004, the Utah Court of Appeals has jurisdiction over this appeal from the district court's Memorandum Decision granting Defendant's Rule 12(b)(2) Motion to Dismiss for lack of personal jurisdiction and denying Plaintiff's Motion for Relief Under Rule 56(f).

ISSUES PRESENTED FOR REVIEW

Defendant offers the following statement of issues in lieu of that contained on pages 1-2 of the Appellant's Opening Brief on Appeal ("Plaintiff's Brief"). This formulation of the issues more accurately captures the arguments presented to the district court and the bases for the district court's Memorandum Decision:

ISSUE NO. 1: Did the district court correctly determine that it could not exercise personal jurisdiction over Defendant, whose sole known contact with Utah was the sending of a lone email to a resident of this State, where there is no evidence that Defendant actively, knowingly or purposefully targeted the residents of this State, and no evidence that Defendant had any other contact, significant or otherwise, with Utah?

Sub-Issue No. 1(a): Did the now repealed Utah Unsolicited Commercial and Sexually Explicit Email Act, §§13-36-101 *et. seq.* (repealed effective May 3, 2004) confer the Utah courts with personal jurisdiction over anyone who might violate its regulatory provisions?

Sub-Issue No. 1(b): Does Utah's long-arm statute, particularly its provisions relating to "transacting business within the state" and committing

tortious "injury" within the state, apply to confer the Utah courts with personal jurisdiction over Defendant?

Issue No. 1(c): Would the exercise of jurisdiction over Defendant under the circumstances of this case violate its rights to due process under the Fourteenth Amendment of the United States Constitution?

Legal conclusions are reviewed for correctness, "according the trial court no particular deference." *Wilson Supply Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 11, 54 P.3d 1177, 1181 (quoting *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998)). Its findings of fact are reviewed for clear error, however, and should be reversed only when they are against the clear weight of the evidence or this Court reaches a firm conviction that a mistake has been made. *See Covey v. Covey*, 2003 UT App 380, ¶ 17, 80 P.3d 553, 558.

Questions of statutory interpretation are questions of law reviewed "for correctness, giving no deference to the district court's interpretation." *Board of Ed. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 1, 194 P.3d 234, 235.

ISSUE NO. 2: Did the district court err in concluding that Rule 56(f) of the Utah Rules of Civil Procedure applies only to motions for summary judgment actually brought or determined under Rule 56, and not to motions brought and decided under Rule 12(b)(2)? Alternatively, did the district court abuse its discretion in denying Plaintiff's Motion for Relief Under Rule 56(f) where neither Plaintiff nor his attorneys filed a timely supporting affidavit setting forth the discovery he sought to obtain, the reasons why such

discovery was necessary, or the reasons why he could not adequately respond to Defendant's Motion to Dismiss without such discovery?

Questions of statutory interpretation are questions of law which are reviewed "for correctness, giving no deference to the district court's interpretation." *Board of Ed.*, 2004 UT 37 at ¶ 1.

A district court's ruling on a motion for continuance under Rule 56(f) of the Utah Rules of Civil Procedure is reviewed "for abuse of discretion." *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 56, 70 P.3d 1, 14. Under this standard, this district court's decision shall not be reversed unless it "'exceeds the limits of reasonability.'" *See Campbell, Maack & Sessions v. Debry*, 2001 UT App. 397, ¶ 6, 38 P.3d 984, 988 (quoting *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994)).

APPLICABLE STATUTES, RULES AND REGULATIONS

The following statutes and rules are relevant to the issues raised on appeal:

1. Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann. §§13-36-101 *et. seq.* (repealed effective May 3, 2004);

2. Utah Code Ann. §§ 78-27-24(1) & (3);

3. Rule 12(b)(2) of the Utah Rules of Civil Procedure; and

4. Rule 56(f) of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Contrary to Plaintiff's contentions, this appeal is not about the merits of his claim that Defendant sent him an email in violation of the Unsolicited Commercial and

Sexually Explicit Email Act, §§13-36-101 *et. seq.* (repealed effective May 3, 2004) ("Email Act"). The question is whether the Utah courts can assert personal jurisdiction over Defendant, a Nevada corporation with its principal place of business in California based on the receipt of a lone email by a resident of this State, where there is no evidence that Defendant actively, knowingly or purposefully targeted the residents of this State or had any other contact, significant or otherwise, with Utah or its residents. This case also raises issues regarding the applicability of Rule 56(f) to Rule 12(b)(2) proceedings, and whether it is fundamentally fair to subject a defendant to timely and expensive discovery when there has been no *prima facie* showing to support personal jurisdiction.

Although Plaintiff is correct that these are issues of first impression for this Court, such reference significantly overstates the actual importance of this case. The Email Act was repealed by the Utah Legislature effective May 3, 2004. Any decision in this case will therefore have minimal application and will not significantly impact Utah law.

II. PROCEDURAL HISTORY

1. Plaintiff filed his Complaint in the Third District Court in and for Salt Lake County, Sandy Division, on or about January 21, 2003, alleging that Defendant sent or caused to be sent to Plaintiff an "unsolicited commercial email" in violation of the Email Act, asserting the Email Act itself as the sole basis for jurisdiction. *See* Complaint, Record at 1-4 (courtesy copy attached hereto as Addendum 1).

2. Although the Complaint asserts that "Plaintiff is a Utah resident," it contains no allegation that Defendant (i) knew of Plaintiff's residency prior to sending the allegedly offending email, (ii) knowingly or intentionally targeted the residents of

Utah with its allegedly offending email advertisement, (iii) actively solicited or engaged in business in Utah, or (iv) had any other contact, significant or otherwise, with Utah. *See id.*

3. On or about May 27, 2003, without answering the Complaint, Defendant filed a Motion to Dismiss and supporting memorandum, asserting that the district court lacked personal jurisdiction over Defendant. *See id.* at 5-19. This motion was supported by the Affidavit of Robert Gautereaux, Defendant's president. *See id.* at 20-22 (courtesy copy attached hereto as Addendum 2).

4. On or about June 9, 2003, Plaintiff filed his Opposition to Defendant's Motion to Dismiss. *See id.* at 23-39. Appended thereto was the Affidavit of Frank Amyx. *See id.* at 37-39 (courtesy copy attached hereto as Addendum 3). Like the Complaint, while this affidavit alleges that Plaintiff was "in [his] home in Utah when [he] received the offending spam," it contains no allegation that Defendant (i) knew of Plaintiff's residency prior to sending the allegedly offending email, (ii) knowingly or intentionally targeted Utah residents with its allegedly offending email advertisement, (iii) actively solicited or engaged in business in Utah, or (iv) had any other contact, significant or otherwise, with Utah. *See id.*

5. Defendant filed its Reply Memorandum in Support of Defendant Players Vacation Club, Inc.'s Motion to Dismiss on or about June 18, 2003. *See id.* at 40-50.

6. On or about June 19, 2003, ***ten days after*** Plaintiff filed his memorandum opposing the motion to dismiss, and one day after Defendant filed its reply memorandum, Plaintiff filed a Motion for Relief Under Rule 56(f). *See id.* at 54-55. This motion was

not accompanied by any affidavits, as expressly required by Rule 56(f), and neither the motion nor the simultaneously filed memorandum in support contained any explanation regarding the type of discovery sought, how such discovery might impact Defendant's motion to dismiss, or why Plaintiff could not adequately respond to Defendant's jurisdictional claims without discovery. *See id.* at 54-59.

7. Defendant filed a Memorandum in Opposition to Plaintiff's Motion for Relief Under Rule 56(f) on or about June 30, 2003, asserting that Rule 56(f) did not apply to motions to dismiss for lack of personal jurisdiction brought under Rule 12(b)(2), and highlighting Plaintiff's failure, in any event, to comply with the requirements of Rule 56(f). *See id.* at 63-67.

8. On or about July 10, 2003, Plaintiff filed a Reply Memorandum in Further Support of Motion for Relief Under Rule 56(f). *See id.* at 68-70. Although this memorandum asserts that "[d]iscovery is required" and that "the reasons have been previously set forth in the motions," the reply memorandum again fails to provide any information regarding the type of discovery sought, how such discovery might impact Defendant's Motion to Dismiss, or why Plaintiff could not adequately respond to Defendant's motion without such discovery. *See id.*

9. Accompanying the reply memorandum was the Affidavit of Denver C. Snuffer, Jr., counsel to Plaintiff, purportedly submitted "pursuant to Rule 56(f)." *See id.* at 71-73 (courtesy copy attached hereto as Addendum 4). Although this affidavit indicated a desire to take the deposition of Mr. Gautereaux, Defendant's president, it made clear that Plaintiff sought only to explore (i) Mr. Gautereaux's assertions that

Defendant sent emails only to those who had given their express permission to receive such emails (a defense to liability under the Email Act), and (ii) the methods by which Defendant acquired and gathered alleged mailing lists. *See id.* These issues go entirely to the underlying merits of Plaintiff's Email Act claim, and are not relevant to Defendant's motion to dismiss for lack of personal jurisdiction.

10. On or about March 10, 2004, the Honorable Judge Royal I. Hansen issued a Memorandum Decision granting Defendant's Motion to Dismiss and denying Plaintiff's Motion for Relief Under Rule 56(f), *see id. at* 89-98:[1]

a. With respect to Defendant's Motion to Dismiss, the district court specifically concluded that neither the Email Act nor Utah's long-arm statute "confer personal jurisdiction over Defendant" and that "[w]ithout more, the single email contact between Plaintiff and Defendant [is] inadequate to create personal jurisdiction." *Id.* at 97. In so holding, the district court specifically stated that it was "not persuaded that a violation of [the Email Act's] regulatory requirement raises to a level of a tort within the meaning of Utah's long arm statute." *Id.*

b. With respect to Plaintiff's Motion for Relief Under Rule 56(f), the district court concluded that the relief requested "does not apply to a Rule 12(b) motion

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[1] The Memorandum Decision issued in this case is entirely consistent with the ruling previously issued by the Honorable Judge Denise Posse Lindberg *Craig Hughes v. Cosmo.com, Inc.*, Case No. 020411292 (3rd Dist., Sandy Dept. Apr. 4, 2003), a courtesy copy of which is attached hereto as Addendum 5. Plaintiff's counsel did not appeal the *Cosmo.com* decision.

to dismiss," and that in any event, "the information Plaintiff claims it would question Defendant about does not relate to personal jurisdiction of Defendant." *Id.* at 96-97.

III. STATEMENT OF RELEVANT FACTS

The following facts are established in the record, are undisputed, and are relevant on appeal:[2]

1. Plaintiff is a Utah Resident. *See* Complaint at 1, ¶ 1, Record at 1.

2. Defendant is a Nevada corporation with its principal place of business in California. *See* Affidavit of Robert L. Gautereaux at 1, ¶ 3, Record at 20 ("Gautereaux Aff.")

3. Defendant owns a website by the name of MyComputerClub.com, a passive website which merely makes information available to those who are interested in the information. *See id* at 2, ¶ 5, Record at 21.

4. Defendant does not maintain a registered agent in Utah. *See id* at ¶ 6.

5. Defendant does not own, lease or control any property, real or personal, in Utah. *See id* at ¶ 7.

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[2] All of the "facts" set forth in Plaintiff's Brief go entirely to the substantive merits of his claim that Defendant sent an email in violation of the Email Act. None of those facts are relevant to the question of personal jurisdiction. For purposes of preserving its record, however, and based on the Affidavit of Mr. Gautereaux, Defendant denies those facts asserted in paragraphs 1, 3, 6, and 10-13 on pages 5-6 of Plaintiff's Brief. Defendant further rejects Plaintiff's suggestions in paragraphs 7-9 that there were multiple emails sent to Utah residents, in violation of the Email Act, as there are no facts in the record to support such allegations.

6. Defendant has no employees, does not recruit employees in Utah or any other state, and does not maintain any employees, offices or agents in Utah. *See id* at ¶¶ 8 & 14.

7. Defendant is a closely held corporation and has no shareholders who reside in Utah. *See id* at ¶ 91.

8. Defendant has no phone or facsimile listings within Utah. *See id* at ¶ 10.

9. Defendant does not actively market or advertise in Utah, and does not particularly solicit Utah residents to view its website or purchase its products. *See id* at ¶ 11.

10. Defendant does not send agents into Utah to conduct business, sell products or services, or visit customers. *See id* at ¶ 12.

11. Defendant does not pay taxes in Utah. *See id* at ¶ 13.

12. Defendant maintains no bank accounts or other financial arrangements in Utah. *See id* at 2-3, ¶¶ 8 & 15, Record at 21-22.

13. Defendant uses a Florida (as opposed to Utah) based server to host its website. *See id* at 3, ¶ 17, Record at 22; *see also* Memorandum Supporting Defendant Players Vacation Club, Inc.'s Motion to Dismiss at 4, ¶ 19, Record at 11.

14. Defendant did not itself send emails like the one in question, but engaged a third-party vendor, Venture Worldwide, Inc. ("Venture"), to send emails on its behalf. *See* Gautereaux Aff. at 3, ¶ 16, Record at 22.

SUMMARY OF ARGUMENTS

To avoid dismissal, a plaintiff must make out a *prima facie* case of personal jurisdiction. Although the well-pled allegations in the complaint are generally accepted as true, mere conclusory statements are not enough, and the factual allegations of the complaint must be disregarded where they are contradicted by an affidavit from the defendant.

Plaintiff failed to meet his burden in this case. His Complaint alleges only that he is a resident of Utah and received an email from Defendant in alleged violation of the Email Act. His Complaint makes the conclusory assertion that the Email Act itself provides for jurisdiction. It does not cite Utah's long-arm statute, however, and contains no well-pled allegations that Defendant knew of Plaintiff's place of residence at the time the email was sent, or otherwise targeted its solicitation at the residents of this State. The absence of such allegations renders the Complaint deficient as a matter of law for purposes of establishing personal jurisdiction.

Moreover, Defendant's own affidavit, uncontested by Plaintiff in all relevant respects, directly controverts any claim of personal jurisdiction. Indeed, the ***only*** piece of evidence Plaintiff has to support his claim of jurisdiction is a lone email advertising Defendant's passive website, an email which apparently made its way across the vast expanses of the Internet and into the email account of Plaintiff, who just so happened to be a Utah resident. This, without more, cannot make out a *prima facie* case.

The District Court Correctly Concluded that it Could Not Assert Personal Jurisdiction over Defendant.

Personal jurisdiction may be found only if it is granted by Utah statute and comports with the due process requirements of the Fourteenth Amendment of the United States Constitution.

There is No Statutory Grant of Jurisdiction in this Case.

Contrary to Plaintiff's assertions, neither the Email Act nor Utah's long arm statute confer personal jurisdiction in this case. Plaintiff relies primarily on Section 13-36-105 of the Email Act stating, in relevant part, that a civil enforcement action may be brought by any "person who received the unsolicited commercial email." This section confers standing, not jurisdiction. It does not give the courts power to hear any case against any defendant, or provide that any defendant who allegedly violates the Email Act becomes subject to personal jurisdiction in this State. The fact that a private cause of action exists under Utah law does not mean that it may always be pursued in a Utah forum. Such a standard would eviscerate the very protections afforded by the Fourteenth Amendment and the personal jurisdiction doctrine.

Plaintiff next argues that Defendant transacted business within this State for purposes of Utah's long-arm statute. In this regard, Plaintiff asserts that because a lone e-mail, arguably commercial in nature, made its way across the vast expanses of the Internet and into the email account of Plaintiff, a Utah resident, Defendant has necessarily transacted business in this State. Plaintiff cites no case law in support of his position, however, and, even considering the liberal and expansive construction

traditionally applied to this section of Utah's long-arm statute, his assertions stretch the bounds of reasonableness.

Finally, Plaintiff argues that by allegedly violating the Email Act, Defendant caused tortious "injury" within this State, another basis for invoking jurisdiction under the long-arm statute. The Email Act is a pure regulatory statute, however, and does not establish any claim in tort. Moreover, while the statute provides for civil penalties as a mechanism and incentive for civil enforcement, it does not recognize the existence of any actual injury to the recipient of the email. Finally, while Plaintiff may have suffered damage or harm in Utah, the wrongful act, and thus the injury, actually occurred in the state from which the email was sent.

Exercising Personal Jurisdiction Would Violate Due Process.

To satisfy the constraints of due process, which requires a defendant to have "minimum contacts" with the forum state, Plaintiff must establish two things: (1) that the Defendant purposefully availed itself of the privilege of conducting activities in this State, and (2) that the exercise of jurisdiction would be fair and reasonable. Plaintiff contends that minimum contacts can be established by the mere transmission of an email to the email account of a Utah resident, regardless of whether Defendant actually intended to target Utah residents or develop a business relationship within Utah, and despite the lack of evidence that Defendant had any contacts with Utah or any significant commercial relationship with any Utah resident. Defendant urges this Court to take a more reasonable and practical approach, and to affirm the district court's ruling that

Defendant's lone email to Plaintiff does not subject it to personal jurisdiction in this State.

To establish minimum contacts, Plaintiff must establish that the defendant engaged in activity that was expressly aimed or intentionally directed at Utah residents. Plaintiff argues that this burden has been met because the email Plaintiff received from Defendant was a solicitation to do business. What Plaintiff does not and cannot establish, however, is that Defendant knew or had any reason to know that the recipient was a Utah resident, or actively and purposefully targeted the subject email or any of its business activities to the residents of this State. Indeed, the most Plaintiff can establish is that defendant sent a single email to golfyx@delaware.com, and that this email address happened to belong to a Utah resident. This is the very type of random and fortuitous connection to Utah that the courts have routinely rejected.

In any event, it would be unreasonable and offend traditional notions of fair play and substantial justice if Defendant was required to appear in this suit. This case alleges a single violation of the Email Act, carrying a maximum statutory penalty of $10.00. Plaintiff's potential recovery in this case is therefore nominal, particularly in comparison to the expense Defendant would incur litigating this case in Utah. Any interest Utah may have had in adjudicating disputes under the Email Act has been significantly diminished by the repeal of the Email Act in May 2004. The interests of Plaintiff and Utah in litigating this case in this forum are therefore significantly outweighed by the burden on Defendant.

The Trial Court Correctly Denied Plaintiff's Motion for Relief Under Rule 56(f).

The district court correctly concluded that Rule 56(f) applies only to motions for summary judgment, and not to motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2). Alternatively, Plaintiff failed to make out a case for relief under Rule 56(f). Utah law is clear that a motion filed pursuant to Rule 56(f) must be accompanied by an affidavit setting forth the type of discovery actually sought, how such discovery might impact Defendant's Motion to Dismiss, and why Plaintiff could not adequately respond to Defendant's motion without such discovery. Plaintiff's counsel made clear in his own affidavit that discovery was necessary only to question Defendant about its email solicitation practices. These issues may be relevant to his substantive claims under the Email Act, but are entirely irrelevant to the question of personal jurisdiction. As such, the district court did not abuse its discretion in denying Plaintiff's motion for relief under Rule 56(f).

ARGUMENT

I. PLAINTIFF FAILED TO MAKE OUT A *PRIMA FACIE* CASE IN SUPPORT OF ITS CLAIMS FOR JURISDICTION

Plaintiff has the burden of establishing the existence of personal jurisdiction over Defendant. *See Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir 1999). Where, as here, the jurisdictional determination is made solely on the pleadings and accompanying affidavits, a plaintiff must make out at least a *prima facie* case in support of its claims of jurisdiction. *Anderson v. American Soc'y of Plastic & Reconstructive Surgeons*, 807 P.2d 825, 827 (Utah 1990). Although the well-pled

allegations in the plaintiff's complaint are generally accepted as true, *see Anderson*, 807 P.2d at 827, mere conclusory statements are not enough, s*ee Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1320 (D. Utah 1998), and the factual allegations of the Complaint must be disregarded where they are "specifically contradict[ed]" by an "affidavit [from the] defendant." *Roskelly & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1308 (Utah 1980).

The district court correctly concluded that Plaintiff failed to make out the required *prima facie* case of personal jurisdiction against Defendant in this case. To begin with, Plaintiff's Complaint alleges only that Plaintiff is a resident of Utah who received an email from Defendant that allegedly violated the Email Act, and makes the conclusory assertion that jurisdiction is therefore provided by the Email Act. The Complaint contains no well-pled allegations, on information and belief or otherwise, that Defendant (i) knew of Plaintiff's residency prior to sending the allegedly offending email, (ii) knowingly or intentionally targeted Utah residents with its allegedly offending email advertisement, (iii) actively solicited or engaged in business in Utah, or (iv) had any other contact, significant or otherwise, with Utah. The absence of such allegations renders the Complaint deficient as a matter of law for purposes of establishing personal jurisdiction, and this alone is sufficient to affirm the district court's ruling.[3]

Moreover, Defendant's own affidavit, uncontested by Plaintiff in all relevant respects, directly controverts any claims of jurisdiction, establishing that Defendant (i) is

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[3] Although Plaintiff attempts to rely on Utah's long-arm statute to support the exercise of personal jurisdiction, the statute is not even cited in the Complaint.

not a resident of Utah, (ii) maintains no registered agent in Utah, (iii) owns no property in Utah, (iv) has no employees, offices or agents in Utah, (v) has no shareholders who reside in Utah, (vi) maintains no phone or facsimile listings within Utah, (vii) does not actively market or advertise in Utah or actively solicit Utah residents, (viii) does not send sales or customer service agents into Utah, (ix) does not pay taxes in Utah, (x) maintains no bank accounts or other financial arrangements in Utah, (xi) does not use a Utah based server to support its passive website, and (xii) does not otherwise engage in business in or seek the protection of the laws of Utah. The ***only*** piece of evidence that Plaintiff relies upon to support his claim of jurisdiction is a lone email advertising Defendant's website, an email which apparently made its way across the vast expanses of the Internet and into the email account of Plaintiff, a Utah resident. This, without more, can not make out a *prima facie* case for personal jurisdiction. *See SII Megadiamond, Inc. v. American Superabrasives Corp.*, 969 P.2d 430, 436 (Utah 1998) (emphasizing that personal jurisdiction is not found on "isolated or occasional transactions"); *Soma Med.*, 196 F. 3d at 1299 (fact that plaintiff resides in jurisdiction is "of no consequence" where there is no indication that "Utah had anything but a fortuitous role" in the parties' relationship).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT COULD NOT ASSERT PERSONAL JURISDICTION AGAINST DEFENDANT.

It is undisputed that the test set forth in *State ex rel. W.A.*, 2002 UT 127, 63 P.2d 607, controls this case, and that personal jurisdiction may be found only if it is granted by Utah statute and comports with the due process requirements of the Fourteenth

Amendment of the United States Constitution. *See id.* at ¶ 14. Neither of these requirements have been met in this case.

A. There is No Statutory Basis to Assert Personal Jurisdiction Against Defendant in this Case.

Plaintiff asserts that personal jurisdiction is authorized by both the Email Act and Utah's long-arm statute. He is wrong in both respects.

1. The Email Act Confers Standing, Not Jurisdiction.

In support of his contention that the Email Act confers personal jurisdiction, Plaintiff relies entirely upon Section 13-36-105, which states, in relevant part, that a civil enforcement action may be brought by any "person who received the unsolicited commercial email." Plaintiff argues that for there to be an action, there must also be jurisdiction. This argument distorts basic principles of American jurisprudence.

Section 13-36-105 does one thing and one thing only: confer standing to sue upon any person who receives an offending email. It does not give the courts of this State the power to hear any case against any defendant, or provide that any defendant who violates the Email Act's regulatory provisions automatically subjects itself to personal jurisdiction in this State. Like many substantive statutes, the Email Act is completely silent on the issue of jurisdiction. The logical inference from such silence is that the statue is limited to establishing a cause of action against those who violate the substantive requirements, but only insofar as the court can properly exercise personal jurisdiction over the defendant.

Contrary to Plaintiff's assertions, the fact that a private cause of action exists under Utah law does not mean that it may always be pursued in a Utah forum. Such a standard would eviscerate the very protections afforded by the Fourteenth Amendment and the personal jurisdiction doctrine. This does not hinder the enforcement of the statute, as Plaintiff would suggest. *See* Plaintiff's Brief at 17 ("If neither the spam statute nor the state's long-arm statute provide jurisdiction, there is simply no possibility of enforcing the legislature's remedy for the spam problem."). A Utah resident receiving an offending email can sue under the Email Act in any court that actually has personal jurisdiction over the defendant. In this case, for instance, Plaintiff could potentially file suit against Defendant in Nevada (its place of incorporation) or California (its principal place of business).[4] The fact that this may not be the most convenient forum for Plaintiff does not provide a basis to read a personal jurisdiction provision into the Email Act.

2. Utah's Long Arm Statute Does Not Apply.

Plaintiff asserts that Defendant is subject to personal jurisdiction in this State under Utah's long arm statute, Utah Code Ann. § 78-24-24, because it transacted business and/or caused tortious "injury" within this State. *See* Plaintiff's Brief at 9. Neither of these provisions apply.

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[4] As evidenced by the fact that Plaintiff's counsel has brought more than 1200 cases under the Email Act, only a handful of which have been dismissed for lack of jurisdiction, claims may also be brought in Utah against any defendant actually subject to personal jurisdiction in this State.

a. Defendant Did Not Transact Business Within this State.

Plaintiff argues that Defendant transacted business within Utah, for purposes of Utah's long-arm statute, because a lone e-mail, arguably commercial in nature, made its way across the vast expanses of the Internet and into the e-mail account of a Utah resident. *See* Plaintiff's Brief at 9-10. Plaintiff cites no case law in support of his position. Even considering the liberal and expansive construction traditionally granted Section 78-27-24(1), *see Synergenics v. Marathon Racing Co.*, 701 P.2d 1106, 1110 (Utah 1985), his assertions stretch the bounds of reasonableness and threaten to vastly expand the scope and reach of Utah's long-arm statute.

Plaintiff's arguments are based largely on the assumption that Defendant had some way of knowing the residency of the holder of the email address, or sent the email with the specific intent to target Utah residents or initiate business within this State. *See* Plaintiff's Brief at 10. There is absolutely no evidence of such intentional conduct on the record, however, either in Plaintiff's Complaint or his affidavit. There is likewise no allegation that the email in question, or any similar email, actually resulted in any business or contractual relationship between Plaintiff and Defendant, or between Defendant and any other Utah resident. *Compare Nova Mud Corp. v. Fletcher*, 648 F. Supp. 1123, 1126 (D. Utah 1986) (defendant transacted business within the state for purposes of the Utah long-arm statute when he "telephoned [the plaintiff in Utah] and personally contracted for" the plaintiff to provide future services to him in Nevada).

To the contrary, Defendant specifically denies having any business association in Utah or with any Utah resident. The uncontested affidavit of Defendant makes clear that

it does not advertise in Utah, does not particularly solicit Utah residents to view its website, does not send agents into Utah to conduct business, sell products or services, or visit customers, and does not otherwise engage in business within this State. Even accepting all of the facts alleged in the Complaint and Plaintiff's affidavit as true for purposes of this motion, the ***most*** that can be established is that Defendant, through the services of a third-party, used the medium of email to advertise and promote its passive website, and that a lone email happened to make its way to the email address of a Utah resident. Such isolated and fortuitous conduct, without more, does not constitute the transaction of business within this State for purposes of Utah's long-arm statute.

b. No Tortious Injury Occurred Within this State.

As a threshold matter, the Email Act is a regulatory statute; it does not establish a claim in tort. *Cf. Prince v. Bear River Mut. Ins.*, 2002 UT 68, ¶ 47, 56 P.3d 524 ("Where a statute provides a specific legal remedy to redress an injury in violation of the statute, a tort action for violation of the public policy embodied in the statute will not lie."). As such, Section 78-27-24(3) has no application in this case. Moreover, the Email Act does not recognize the existence of any actual "injury" to the recipient of the email. It simply requires the initiator to comply with the statutory requirements or face civil penalties. These civil penalties are not provided to redress an actual injury to the recipient, but to provide a mechanism and incentive for civil enforcement. For these reasons, this prong of the long-arm statute does not apply to confer personal jurisdiction over Defendant in this case.

B. Exercising Personal Jurisdiction over Defendant Would Violate its Rights to Due Process.

To satisfy the constraints of due process, Plaintiff must establish that Defendant has "'minimum contacts with [Utah] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Starways, Inc. v. Curry*, 1999 UT 5, ¶ 8, 980 P.2d 204, 206 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (further quotations omitted)). The analysis is two-pronged. The first requires a showing that the "defendant corporation has '***purposefully availed***' itself of the privilege of conducting activities in the forum state" such that "[it] should reasonably anticipate being haled into court there." *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 662 (Utah 1989) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hansen v. Denckla*, 357 U.S. 235, 253 (1958)) (emphasis added). The second requires a showing that the exercise of jurisdiction would be fair and reasonable under the particular circumstances involved, balancing "'the convenience of the parties' and weigh[ing] the forum's interest in asserting jurisdiction." *Anderson*, 807 P.2d at 828 (quoting *Mallory Eng'g, Inc. v. Ted R. Brown & Assoc.*, 618 P.2d 1004, 1008 (Utah 1980)).

Plaintiff contends that minimum contacts can be established by the mere fortuitous transmission of an email to the email account of a Utah resident, regardless of whether Defendant actually intended to target Utah residents or develop a business relationship within Utah, and despite the lack of evidence that Defendant had any contacts with Utah or any significant commercial relationship with any other Utah resident. Defendant urges

this Court to take a more reasonable and practical approach, and to affirm the district court's ruling that Defendant's lone email to Plaintiff does not subject it to personal jurisdiction in this State. *Cf. Mallory*, 618 P.2d at 1007 (state may not "make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations").

1. Defendant Does Not Have Sufficient Minimum Contacts with Utah to Have Purposefully Availed Itself of the Privilege of Conducting Activities in this State.

"To determine whether a nonresident defendant had sufficient minimum contacts with the forum state to justify the imposition of personal jurisdiction over him or her, [the court] must look to 'the relationship of the defendant, the forum, and the litigation to each other . . . .'" *Starways*, 980 P.2d at 207 (quoting *Parry*, 779 P.2d at 662). "Purposeful availment requires actions by the defendant which 'create a substantial connection with the forum state.'" *Omi Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1092 (10th Cir. 1998).[5] "'[A] defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts.'" *iAccess, Inc. v. Webcard Tech., Inc.*, 182 F. Supp. 2d 1183, 1186 (D. Utah 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). In other words, a plaintiff must establish that the defendant "engaged in activity that [was] 'expressly aimed' or 'intentionally directed' at Utah residents." *Id.* (quoting *Asahi Metals Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 112 (1987)).

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[5] In determining whether the exercise of personal jurisdiction comports with the due process requirements of the Fourteenth Amendment to the United States Constitution, the Utah courts apply federal law. *See State ex rel. W.A.*, 2002 UT 127 at ¶ 19.

Plaintiff argues that this burden has been met in this case because the email Plaintiff received from Defendant was an "obvious solicitation[] to do business." Plaintiff's Brief at 12. What Plaintiff does not and cannot establish, however, is that Defendant knew or had any reason to know that the recipient was a Utah resident, or actively and purposefully targeted the subject email or any of its other business activities to the residents of this State. Plaintiff likewise fails to establish that Defendant actively solicited other Utah residents, via the disputed email or otherwise,[6] or took any other affirmative action to form a "substantial" business relationship or presence within the state. Indeed, the most Plaintiff can establish is that defendant sent a single email to golfyx@delaware.com, and that this email address happened to belong to a Utah resident. This is the very type of random and fortuitous connection to Utah that the courts have routinely rejected. *See iAccess,* 182 F. Supp. 2d at 1186; *Romney v. St. John Virgin Grand Villas Assocs.*, 734 F. Supp. 957 (D. Utah 1990).

iAccess, 182 F. Supp. 2d 1183, is particularly instructive. There, iAccess, a Utah corporation, sued WEBcard, a California corporation, to have one of WEBcard's patents declared invalid. In responding to WEBcard's motion to dismiss for lack of personal jurisdiction, iAccess asserted that WEBcard "purposefully directed activity at Utah

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[6] Throughout his opening brief, Plaintiff refers to "emails" and "solicitations," using the plural form of these words to suggest that Defendant sent multiple email messages to residents of this State. The record contains only one email, however, and there is no evidence to suggest that any Utah resident other than Plaintiff received the allegedly offending email. Although the Complaint hints at a class action, *see* Complaint at 2, ¶ 6, Record at 2, no class allegations were actually made, and no class certification was ever sought. Plaintiff likewise makes no allegation of multiple emails in his affidavit.

residents by constructing and operating an interactive website" that allowed "users to email WEBcard or to subscribe to mailing lists." *Id.* at 186-87. The court granted WEBcard's motion to dismiss, focusing on the fact that WEBcard's connection to Utah were insubstantial, infrequent and, at best, fortuitous:

> For this court to exercise personal jurisdiction, WEBcard must have ***purposefully directed activities at Utah***. WEBcard did maintain a website that allowed interaction with users, but mere interactivity will not support jurisdiction. Rather, iAccess must allege a nexus between WEBcard's website and Utah residents. iAccess offers only that WEBcard made one $20.00 sale to a Utah resident. No evidence exists, however, that links this one sale to a Utah resident to the website. Moreover, no evidence exists that a single Utah resident has visited the website. ***Here WEBcard "has 'consummated no transaction' and has made 'no deliberate and repeated' contacts with Utah through its Web site [sic]. . . . Without such proof, this court may not exercise personal jurisdiction.***

Id. at 1189 (emphasis added).

As in *iAccess*, there is absolutely no evidence (or even allegation) that Defendant actively and purposefully targeted its email solicitation at Utah residents, no evidence (or even allegation) that the subject email resulted in any actual business transaction within this State, and no evidence (or even allegation) that Defendant has made a "deliberate and repeated" effort to contact or solicit Utah residents. The mere receipt of one e-mail by Plaintiff within this State, without more, does not demonstrate the type of "substantial connection" required under the Fourteenth Amendment, and is not sufficient to subject Defendant to litigation in this forum.

Plaintiff's reliance on *Asahi*, 480 U.S. 102, is intriguing because that case actually support's Defendant's claim that no personal jurisdiction exists.[7] *Asahi* held that placing a product into the stream of interstate commerce, without more, does not establish minimum contacts with the state where that product ends up. *Id.* at 107; *see also Parry,* 779 P.2d at 667 (mere possibility that a product placed into the stream of commerce might make its way to Utah is insufficient to subject defendant to personal jurisdiction). Put another way, *Asahi* stands for the proposition that personal jurisdiction will not lie where a defendant places a product into the stream of interstate commerce and that product, without any knowing, intentional or purposeful conduct by the defendant, happens to make its way into the forum state.

Defendant's act of placing an email into the vast expanses of the Internet is akin to placing a product in the stream of interstate commerce. *See iAccess*, 182 F. Supp. 2d at 1187 (quoting *Bensusan Rest. Corp. v. King*, 37 F. Supp. 2d 295, 301 (S.D.N.Y. 1996) *aff'd* 126 F.3d 25 (2nd Cir. 1997)) ("'Creating a [passive] site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, is not an act purposefully directed toward the forum state.'"). Without some evidence that Defendant knowingly, intentionally or purposefully targeted the email at

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[7] Plaintiff relies upon *Asahi* for the proposition that an advertisement in the forum state may support a finding of minimum contacts. *See* Plaintiff's Brief at 12-13. *Asahi* specifically held, however, that this is but one factor the court can consider in the overall analysis. 480 U.S. at 107. Indeed, courts have long recognized that a single advertisement unwittingly sent into the jurisdiction is insufficient to sustain a claim of personal jurisdiction. *See, e.g., Lee v. Frank's Garage & Used Cars*, 2004 UT App 260, ¶11, 505 Utah Adv. Rep. 17, 18 (recognizing that minimum contacts is not established by "an advertisement placed in a national. . . . magazine").

residents of Utah, personal jurisdiction should not be found. *Compare with Romney*, 734 F. Supp. at 962 (emphasis added) (personal jurisdiction found where defendant "***intentionally*** contracted [a Utah resident] ***knowing*** breach of the contract would injure [plaintiff] in Utah. . . .").

The only case cited by Plaintiff that even potentially supports his claim of jurisdiction is *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773 (S.D. Miss. 2001). While this case apparently holds that the sending of a lone email might be enough to establish minimum contacts, it does so without any substantive analysis, on a bold theory of sender beware.[8] *See* Plaintiff's Brief at 15 (citing *Internet Doorway*, 138 F. Supp. at 779-80). This theory is ***not*** supported by any other known case law, however, and is not consistent with long standing principles of minimum contacts. *See, e.g., iAccess* 182 F. Supp. 2d at 1187 (fact that conduct "may be felt nationwide—or even worldwide" not sufficient to sustain finding of personal jurisdiction); *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1078 (10th Cir. 1995) (mere foreseeability not enough to establish personal jurisdiction). The adoption of such a theory would eviscerate the long standing requirement that a defendant engage in some type of purposeful conduct to knowingly reach into the state and thereby avail itself of the benefits and protections of its laws. *See, e.g. Mallory*, 618 P.2d at 1008 n. 15 (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)); *Far West II*, 46 F.3d at 1075. This Court should therefore reject

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[8] There is at least some suggestion that the sender of the email in *Internet Doorway* had knowledge of the states to which the email was sent, *see* 138 F.Supp 2d at 775, a critical distinction from this case

the holding of *Internet Doorways*, stand behind its long recognized principles of minimum contacts, and hold that unintentional and unknowing transmission of an isolated email to an address which fortuitously belongs to a Utah resident, standing alone, will not give rise to personal jurisdiction.[9]

In sum, Defendant's contacts with Utah consist of one isolated email unknowingly sent to an email address that just so happened to belong to a Utah resident. Such an isolated and fortuitous contact does not evidence that Defendant "purposefully availed" itself of the protections and benefits of the laws of this State, and does not establish sufficient minimum contacts to support the constitutional exercise of personal jurisdiction.

2. It Would Offend Traditional Notions of Fair Play and Substantial Justice to Subject Defendant to Suit in Utah.

Regardless of whether Defendant established minimum contacts in Utah, it would be unreasonable and offend traditional notions of fair play and substantial justice to

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[9] The other cases cited by Plaintiff are distinguishable and do not support personal jurisdiction. *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-67 (6th Cir. 1996) (exercising personal jurisdiction where Texas-based defendant not only communicated with the plaintiff's computer system via e-mail, but affirmatively entered into contracts with the Ohio-based plaintiff and actively and repeatedly used its Ohio-based server to affirmatively market its software products to residents in Ohio and elsewhere); *American Eyewear, Inc. v. Peeper's Sunglassess & Accessories, Inc.*, 106 F. Supp. 2d 895, 902-03 (N.D. Tex. 2000) (exercising personal jurisdiction where non-resident defendant admitted that it was attempting to "reach every person, including Texans" and used its website to "regularly sell products to Texas customers" and thereby establish "a retail presence in Texas"); *Starmedia Network, Inc. v. Star Media, Inc.*, Case No. 00 CIV 4647(DLC), 2001 WL 417118 at *1, 4 (S.D.N.Y. 2001) (emphasis added) (exercising personal jurisdiction where non-resident defendant admitted that one of the purposes behind its website was to "attract new customers, including customers from New York," and defendant had "additional contacts with New York").

require Defendant to appear in this suit. In analyzing this prong of the analysis courts are required to balance "'the convenience of the parties' and forum's interest in jurisdiction.'" *Anderson*, 807 P.2d at 828 (quoting *Mallory*, 618 P.2d at 1008). "While not dispositive, the burden on the defendant of litigating the case in a foreign forum is of primary concern . . . , because [this factor] serves to prevent the filing of vexatious claims in a distant forum where the burden of appearing is onerous." *Id.* This factor becomes particularly important where the "plaintiff's claim is relatively small" and defendant may therefore be "financially compelled to default." *See Nova*, 648 F. Supp. at 1127. *See also Mallory*, 618 P.2d at 1009 ("[T]he inconvenience to the nonresident must be viewed in relation to the importance of the conflict litigated, which, in a commercial setting, is evidenced by the amount in controversy. If the amount is trivial in comparison to the expense of litigating in the foreign forum and the possibility of the defendant defaulting reaches sufficient proportions, the demands of fair play and substantial justice dictate the reservation of the state's jurisdictional power.").

This case alleges a single violation of the Email Act, carrying a maximum statutory penalty of $10.00. Plaintiff's potential damages in this case are therefore nominal, particularly in comparison to the obvious expense Defendant would incur litigating this case in this State. As a result, Defendant would likely be compelled to either default, confess judgment or enter into an outrageous and unfair settlement. Plaintiff's interest in relief is therefore significantly outweighed by the potential burden on Defendant, and this factor weighs heavily against the exercise of personal jurisdiction in this case.

Plaintiff nonetheless asserts that Utah has a strong interest in "adjudicating disputes" arising under the Email Act, and that this interest outweighs any burden on Defendant. *See* Plaintiff's Brief at 17. Any interest Utah may have had in adjudicating disputes under the Email Act, however, has been significantly diminished by the repeal of the Email Act in May 2004. This factor should therefore carry little if any weight in the overall analysis, and does not outweigh the significant burden on Defendant.

In sum, the burden on Defendant of litigating this case in this State is significant and outweighs not only the Plaintiff's minimal claims, but also this State's minimal interest in enforcing the now repealed Email Act. On balance, even if minimum contacts can somehow be established, the exercise of personal jurisdiction over Defendant would be inconsistent with "traditional notions of fair play and substantial justice," and violate Defendant's due process rights under the Fourteenth Amendment of the United States Constitution.

III. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(F).

The district court concluded that the relief afforded by Rule 56(f) applies ***only*** to motions for summary judgment brought or decided under Rule 56, and has no application to motions to dismiss for lack of personal jurisdiction brought and decided under Rule 12(b)(2). *See* Mem. Decision at 6, R. 96. This conclusion is entirely consistent with Utah law. *See Wheeler v. McPherson*, 2002 UT 16, ¶ 20 (Rule 56(f) not applicable to

motions to dismiss brought pursuant to Rule 12(b)(1)-(5)).[10] On this basis alone, the district court's ruling should be affirmed.

In any event, the district court properly concluded that Plaintiff failed to establish a sufficient need for discovery in this case. Utah law is clear that a motion filed pursuant to Rule 56(f) must be accompanied by an affidavit setting forth (i) the type of discovery sought, (ii) how such discovery might impact the pending motion, and (iii) why the movant cannot adequately respond to the motion without further discovery. *See Sandy City v. Salt Lake County*, 794 P.2d 482, 488 (Utah Ct. App. 1990), *rev'd in part on other grounds*, 827 P.2d 212 (Utah 1992); *Campbell, Maack & Sessions v. Debry,* 2001 UT App. 397, ¶ 14, 38 P.3d 984, 990. Where no such showing is made, the district court properly exercises its discretion in denying the motion. *See, e.g., Campbell*, 2001 UT App. at ¶¶ 11 & 14, 38 P.3d at 989-90.[11]

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[10] Plaintiff does not even challenge this ruling on appeal. Instead, he attempts to characterize Defendant's motion as a motion for summary judgment actually decided under Rule 56. *See* Plaintiff's Brief at 18-19 (setting forth the standards for granting or denying a motion for summary judgment under Rule 56(c)). Plaintiff apparently believes that because the district court considered the affidavit of Mr. Gautereaux in granting Defendant's motion to dismiss, the Defendant's motion must have been converted to a motion for summary judgment. Utah law is clear, however, that trial courts may properly consider affidavits in ruling on 12(b)(2) motions to dismiss, *see Anderson*, 807 P.2d at 827 (trial court "may determine jurisdiction on affidavits alone"), and that such affidavits do ***not*** convert the motion to dismiss into a motion for summary judgment. *See Wheeler*, 2002 UT 16 at ¶ 20 (rule converting motion to dismiss for failure to state a claim into motions for summary judgment under Rule 56 does not apply to motions to dismiss brought under Rule 12(b)(1)-(5), even where affidavits or other evidence is admitted and considered).

[11] Defendant recognizes that regardless of whether Rule 56(f) applies, a district court has the discretion to allow a plaintiff limited discovery where it has reason to believe that such discovery is necessary to determine the jurisdictional issues. *See Anderson*, 807

Neither the pleadings filed in support of Plaintiff's Motion for Relief Under Rule 56(f) nor the untimely affidavit of Plaintiff's counsel provides the required information.[12] Plaintiff's counsel made it clear in his own affidavit that discovery was sought not to challenge Mr. Gautereaux assertions that Defendant did not have any contacts with or conduct any business within the State of Utah, but to examine Mr. Gautereaux about his statements that Defendant only authorized the sending of emails to those who had given express permission or had a preexisting business relationship with Defendant or its affiliates, to further explore Defendant's email solicitation practices, and to "find out the source of the email lists used by Defendant." Affidavit of Denver C. Snuffer, Jr. at 2, ¶¶ 5-8, Record at 72. While all of these issues are arguably relevant to the underlying merits of Plaintiff's Email Act claim,[13] the district court properly concluded that this information "does not relate to [the] personal jurisdiction of Defendant." Mem. Decision

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P.2d at 827 (trial court "may . . . permit discovery or hold an evidentiary hearing"). Such discovery is appropriate, however, only where the plaintiff first makes out a *prima facie* case of jurisdiction, and establishes, via affidavit or otherwise, that the discovery sought will actually assist it in responding to the defendant's motion to dismiss. Plaintiff neither made out a *prima facie* case, *see supra* Section I, nor established how the requested discovery would materially assist it in responding to Defendant's motion to dismiss. As such, even if Plaintiff's Motion for Relief Under Rule 56(f) could somehow be construed as a motion for an order allowing limited discovery under Rule 12(b)(2), the district court properly exercised its discretion in refusing to allow such discovery in this case.

[12] Plaintiff's Opposition to Defendant's Motion to Dismiss likewise fails to adequately explain the type of discovery sought or how that discovery will actually help to defeat Defendant's motion. *See* R. 33-39.

[13] The giving of permission to receive an email or the existence of a preexisting business relationship between the sender and the recipient of an email are complete defenses to liability under the Email Act.

at 7, R. 97. The district court therefore properly exercised its discretion in denying Plaintiff's Motion for Relief Under Rule 56(f), and this Court should affirm.

CONCLUSION

There is no basis for the courts of this State to exercise personal jurisdiction against Defendant in the case. As a threshold matter, neither the Email Act itself nor Utah's long-arm statute grants personal jurisdiction. Even if a statutory basis exists, however, an exercise of jurisdiction would violate Defendant's due process rights under the Fourteenth Amendment to the United States Constitution.

The district court correctly concluded that Rule 56(f) simply does not apply to motions to dismiss brought and decided under Rule 12(b)(2). In any event, the district court properly exercised its discretion in concluding that Plaintiff failed to establish (i) what discovery was actually needed in this case, (ii) how that discovery was necessary to defending against Defendant's Motion to Dismiss, or (iii) why it could not adequately respond to Plaintiff's motion without such discovery, and in denying Plaintiff's Motion for Relief under Rule 56(f).

For all of the reasons set forth herein, the district court's Memorandum Decision granting Defendant's Motion to Dismiss for lack of personal jurisdiction and denying Plaintiff's Motion for Relief Under Rule 56(f) should be affirmed.

DATED this 30th day of August, 2004.

RANDY L. DRYER
MICHAEL P. PETROGEORGE
PARSONS BEHLE & LATIMER
Attorneys for Celebrity Cruises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2004, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **APPELLEE'S OPENING BRIEF ON APPEAL**, to:

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 South State
Sandy, Utah 84070

Jesse L. Riddle
RIDDLE & ASSOCIATES
11778 South Election Drive, Suite 240
Draper, Utah 84020

APPELLEE'S ADDENDUM

1. Complaint, dated January 21, 2003.

2. Affidavit of Robert L. Gautereaux, dated May 23, 2003.

3. Affidavit of Frank Amyx, dated June 8, 2003.

4. Affidavit of Denver C. Snuffer, Jr., dated July 10, 2003.

5. Decision and Order Granting Defendant's Motion to Dismiss on Jurisdictional Grounds, *Hughes v. Cosmo.com, Inc.*, Case No. 020411292 (3rd Dist., Sandy Dept. Apr. 4, 2003) (Judge Denise Posse Lindberg).

6. *Starmedia Network, Inc. v. Star Media, Inc.*, Case No. 00 CIV 4647 (DLC), 2001 WL 417118 (S.D.N.Y. 2001).

DEFENDANT'S ADDENDUM NO. 1

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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

SANDY DEPARTMENT, STATE OF UTAH

FRANK AMYX, Plaintiff, vs. PLAYERS VACATION CLUB, INC. and JOHN DOES one through ten whose true names are unknown Defendants	**COMPLAINT** Civil No. 030401320 Judge Denise Lindberg

Plaintiff, for cause of action against defendant, complain and allege as follows:

STATUTORY AUTHORITY, JURISDICTION and VENUE

1. Plaintiff is a resident of the State of Utah.
2. Defendant(s) sends, or causes to be sent, unsolicited e-mails into the State of Utah.
3. John Does one (1) through ten (10) sent, or caused to be sent, unsolicited emails into the State of Utah.
4. This action is brought, and this court has jurisdiction, pursuant to the statutory authority of U.C.A. §13-36-101, et. seq., "Unsolicited Commercial Email Act".

5. Venue is proper in Salt Lake County, State of Utah.

6. As will be set out in Plaintiff's Motion for Class Certification, if plaintiff seeks to certify a class for others similarly situated, this suit meets all elements of Rule 23.

FIRST CAUSE OF ACTION--VIOLATION OF U.C.A. §13-36-101 et. seq.

7. Defendant(s) sent, or caused to be sent, to plaintiff an unsolicited e-mail as defined in U.C.A. §13-36-102(3), and attached hereto as "Exhibit A".

8. Said email is a "commercial email" as defined in U.C.A. §13-36-102(1).

9. Said email was "unsolicited" as defined in U.C.A. §13-36-102(8)(a) & (b).

10. Defendant(s) failed to comply the "Requirements" set out U.C.A. §13-36-103.

11. Plaintiff is entitled to the greater of actual damages or $10 per email as set out in U.C.A. §13-36-105(2)(a)(ii)(A), plus costs and reasonable attorney fees.

THEREFORE, plaintiff, seeks judgment against defendant(s):

12. For the sum of the greater of actual damages or $10.00 for each email sent;

13. Reasonable attorney's fees and costs of court as set out in U.C.A. §13-36-105(2)(b).

14. If a class is certified, plaintiff reserves the right to amend this prayer for relief.

DATED January 21, 2003.

RIDDLE & ASSOCIATES, P.C.

Jesse L. Riddle
Attorneys for Plaintiff

EXHIBIT A

Zoo Million no.

Jesse Riddle Laptop

From: Frank or Aaron Amyx [golfyx@delwave.com]
Sent: Wednesday, October 02, 2002 1:23 PM
To: spam@recovery-usa.com
Subject: Fw: Need New Things? Guaranteed $5,000 Credit Line for all Life's Needs

----- Original Message -----
From: Great Specials
To: Friend
Sent: Wednesday, October 02, 2002 6:56 AM
Subject: Need New Things? Guaranteed $5,000 Credit Line for all Life's Needs

DEFENDANT'S ADDENDUM NO. 2

RANDY L. DRYER (0924)
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Attorneys for Defendant

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
SANDY DEPARTMENT, STATE OF UTAH

FRANK AMYX, Plaintiff, vs. PLAYERS VACATION CLUB, INC., Defendant.	**AFFIDAVIT OF ROBERT L. GAUTEREAUX** Case No. 030401320 Judge Denise Lindberg

I, Robert L. Gautereaux, being first duly sworn, depose and state as follows:

1. I am a resident of the state of California and am over eighteen years of age. I make this affidavit based on my personal knowledge.

2. I am the president of Players Vacation Club, Inc., which is a Defendant in the above-entitled action.

3. Players Vacation Club, Inc. is a Nevada corporation with its principal place of business in California. Players Vacation Club is a membership club which provides credit financing for vacations.

4. Players Vacation club also does business as My Computer Club, which is a membership club which provides credit financing for the purchase of computers.

5. Players Vacation Club, Inc. is the owner of a website by the name of MyComputerClub.com. This website is a passive website which merely makes information available to those who are interested in the information.

6. Players Vacation Club, Inc. does not maintain a registered agent in Utah.

7. Players Vacation Club, Inc. does not own, lease, or control any property, either real or personal, in the State of Utah.

8. Players Vacation Club, Inc. does not maintain any employees, offices, agents, or bank accounts in the State of Utah.

9. Players Vacation Club, Inc. is a closely held corporation and has no shareholders who reside in Utah.

10. Players Vacation Club, Inc. has no phone or facsimile listings within the State of Utah.

11. Players Vacation Club, Inc. does not market or advertise in Utah and does not particularly solicit Utah residents to view its website.

12. Players Vacation Club, Inc. does not send agents into Utah to conduct business, sell products, or visit customers.

13. Players Vacation Club, Inc. does not pay taxes in Utah.

14. Players Vacation Club, Inc. has no employees, and does not recruit employees in Utah or any other state.

15. Players Vacation Club, Inc. maintains no bank accounts or other financial arrangements in the State of Utah.

16. Players Vacation Club, Inc. engaged Venture Worldwide, Inc. to send out emails like the one attached to Plaintiff's Complaint to those recipients who had given permission to receive commercial email. Venture Worldwide, Inc. represented to Players Vacation Club that it would send email advertisements only to those who had given permission.

17. Players Vacation Club, Inc. does not use a Utah Server to host its website, Rather, Chris Rochell, Inc. uses an internet based server to host its website.

18. Players Vacation Club, Inc. only sends emails to those persons who have given permission to receive emails or otherwise have a pre-existing business or personal relationship with Players Vacation Club, Inc.

DATED this 23rd day of May, 2003.

ROBERT L. GAUTEREAUX

STATE OF CALIFORNIA)
: ss.
COUNTY OF SAN DIEGO)

On the 23rd day of May, 2003, personally appeared before me Robert L. Gautereaux, the signer of the foregoing Affidavit, and duly acknowledged to me that he read the same, that he understands the contents thereof; and that he signed the same of his own free act.

OFFICIAL SEAL
SAMANTHA RIVERA
NOTARY PUBLIC-CALIFORNIA
COMM. NO. 1369606
SAN DIEGO COUNTY
MY COMM. EXP. AUG. 12, 2006

NOTARY PUBLIC

My Commission Expires: 08-12-06

Residing at: San Diego, CA. 92101

DEFENDANT'S ADDENDUM NO. 3

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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH
SANDY DEPARTMENT

FRANK AMYX, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

PLAYERS VACATION CLUB, INC., and JOHN DOES 1 through 10.

Defendants.

AFFIDAVIT OF FRANK AMYX

Case No. 030401320

Judge Denise Lindberg

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

COME NOW Frank Amyx and upon his oath deposes and says as follows:

1. I am personally acquainted with all the facts set forth in this affidavit and, if called upon to testify, can support these allegations.

2. I am the plaintiff in the above entitled matter.

3. I was in my home in Utah when I received the offending spam.

4. I received the email spam solicitation attached to the Complaint and designated as Exhibit A.

5. A true and accurate copy of the unsolicited instant spam is attached to the Complaint.

6. The spam email was commercial in nature and was unsolicited.

7. The Affidavit of Robert Gautereaux contains many inaccuracies. For example, paragraph 18 states: "Players Vacation Club, Inc. only sends emails to those persons who have given permission to receive emails or otherwise have a pre-existing business or personal relationship with Players Vacation Club, Inc." I did not give my permission nor did I have a pre-existing business or personal relationship with Players Vacation Club, Inc.

8. Paragraph 17 of the Affidavit of Robert Gautereaux states: "Chris Rochelle, Inc. uses an internet based server to host its website." The Defendant in this matter is not Chris Rochelle, Inc. nor is it claimed to be an affiliate of the Defendant. It appears to be a mistake as the Affidavit of Robert Gautereaux is a boiler plate affidavit that

has not been completely cleaned up from the last time it was used. Thus, the incorrect naming of Defendant.

9. I have never had any business or personal relationship with Players Vacation Club, Inc., My Computer Club, or Venture Worldwide, Inc. nor do I want one.

10. I did not register my personal information on Defendant's website, or request or consent to receive commercial offers and solicitations or give my permission to Defendant or any other third parties.

11. I did not "opt-in" or affirmatively consent to receive information regarding Defendant's products and services.

12. On the date I received the unsolicited email I did not have a pre-exisiting business or personal relationship with Defendant nor its marketing partners, affliates and advertisers.

13. I did not request nor consent to receive promotional offers/messages via email at any time from the Defendant or its affiliates; nor did I at anytime give permission to receive commercial email at any time.

14. I do not opt-in to receive third party spam emails for product and service advertisements.

15. In fact, I go to great lengths to avoid receiving unsolicited emails.

FURTHER, AFFIANT SAYETH NAUGHT.

DATED this 9 day of June, 2003.

Frank B. Amyx

Frank Amyx

On this 9th day of June, 2003, personally appeared affiant before me, a Notary Public in and for said County and State, who acknowledged that he executed the above instrument.

Notary Public
Sandra J. Berryhill
10885 South State
Sandy, Utah 84070
My Commission Expires
September 30, 2004
State of Utah

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Nelson, Snuffer, Dahle & Poulsen, P.C. and that I caused to either be placed in the United States mail, first class, postage prepaid; faxed; and/or hand-delivered; a true and correct copy of the foregoing to the following:

Randy Dryer
PARSONS, BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145-1234

Se
nt via:
X Mail
____ Facsimile
____ Hand-delivery

DATED this 9th day of June, 2003.

DEFENDANT'S ADDENDUM NO. 4

Denver C. Snuffer, Jr. (#3032)
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960

Jesse L. Riddle (#6640)
RIDDLE & ASSOCIATES, P.C.
11778 South Election Drive, Suite 240
Draper, Utah 84020-6808
Telephone: (801) 569-3100
Facsimile: (801) 569-8700
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH
SANDY DEPARTMENT

FRANK AMYX, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

PLAYERS VACATION CLUB, INC., and John Does 1 through 10.

Defendants.

AFFIDAVIT OF DENVER C. SNUFFER, JR.

Case No. 030401320

Judge Denise Lindberg

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

COME NOW Denver C. Snuffer, Jr. and upon his oath deposes and says as follows:

1. I am personally acquainted with all the facts set forth in this affidavit and, if called upon to testify, can support these allegations.

2. I am counsel of record in the above entitled matter.

3. I am submitting this affidavit pursuant to U.R.C.P. 56 (f).

4. Defendant has supplied an affidavit by Robert Gautereaux which statements have been disputed by Plaintiff.

5. Robert Gautereaux's deposition is needed to further question his statements made concerning "..to those recipients who had given permission to receive commercial email." This statement has been directly refuted by Plaintiff.

6. Robert Gautereaux's deposition is needed to further question his statement made concerning: "...only sends emails to those persons who have given permission to receive emails or otherwise have a pre-existing business or personal relationship with Players Vacation Club, Inc." Again, Plaintiff disputes these allegations and oral testimony is required.

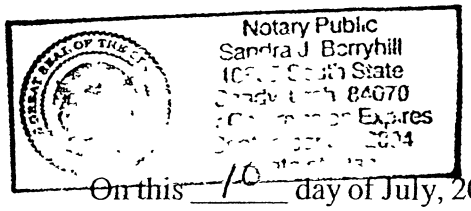
7. Robert Gautereaux's deposition is needed to further question his statements concerning his solicitation via email practices. The Mr. Rochelle does not deny having ever sent unsolicited email into the state of Utah.

8. Further discovery is also needed to find out the source of the email lists used by Defendant and the means to which the names and addresses were gathered or acquired.

9. For the above mentioned reasons, additional discovery is needed to oppose Defendant's Motion for Summary Judgment.

FURTHER, AFFIANT SAYETH NAUGHT.

DATED this 10 day of July, 2003.



Denver C. Snuffer, Jr.

On this 10 day of July, 2003, personally appeared affiant before me, a Notary Public in and for said County and State, who acknowledged that he executed the above instrument.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Nelson, Snuffer, Dahle & Poulsen, P.C. and that I caused to either be placed in the United States mail, first class, postage prepaid; faxed; and/or hand-delivered; a true and correct copy of the foregoing to the following:

Randy Dryer
PARSONS, BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145-0898

Sent via:
X Mail
____ Facsimile
____ Hand-delivery

DATED this 10th day of July, 2003.

DEFENDANT'S ADDENDUM NO. 5

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SANDY DEPARTMENT

CRAIG HUGHES, Plaintiff,	:	
vs.	:	DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS ON JURISDICTIONAL GROUNDS
COSMO.COM, INC., and JOHN DOES one through ten whose true names are unknown, Defendants.	:	Case No. 020411292 Judge Denise Posse Lindberg

¶1 This matter is before the Court on Defendant Cosmo.Com, Inc. ("Cosmo")'s Motion to Dismiss filed January 28, 2003. Defendant brings its Motion under Utah R. Civ. Pro. 12(b)(2) asserting lack of personal jurisdiction over Defendant. Defendant's Motion is supported by affidavit filed by Charles "Cosmo" Wilson, President of Defendant Cosmo ("Wilson"). Plaintiff filed his Opposition on February 10, 2003. The Opposition memorandum is not supported by affidavit. Defendant replied on February 24, 2003. A Notice to Submit was filed February 26,2003.

¶2 At the time it filed its Motion Defendant requested oral argument pursuant to Utah R. Jud. Admin. 4-501(3)(B). Plaintiff's Opposition did not request argument. Having thoroughly reviewed the parties' memoranda the Court determines that oral argument is unnecessary in that the dispositive issues governing the granting of this Motion have been authoritatively decided. Accordingly, Defendant's request for oral argument is DENIED, but its Motion to Dismiss is GRANTED.

STATEMENT OF FACTS

¶3 Plaintiff is a Utah resident who has brought this action on behalf of himself and other allegedly similarly situated Utah residents, alleging that Cosmo has violated Utah's Unsolicited Commercial and Sexually Explicit Email Act, Utah Code §13-36-101 to -105 (2002) (the "Act").

¶4 Among other things the Act requires that "[e]ach person who sends or causes to be sent an unsolicited commercial email . . . to an email address held by a resident of the state shall" take

certain actions to identify itself and the advertising nature of the message sent. Specifically, the Act imposes certain requirements on unsolicited commercial email messages[1] and authorizes a civil cause of action for violation of the Act's requirements. §13-36-105.

¶5 Defendant Cosmo is a Florida S-Corporation. Cosmo.com is also the name of a website. Both the corporation and website are operated by Wilson.

¶6 Wilson's affidavit in support of the present Motion states that he established and maintains Cosmo's website The website is not advertised "through any paid or concerted advertising campaign in Utah or any other state." Affidavit of Charles "Cosmo" Wilson, ¶10 [hereinafter "Affidavit"]. Cosmo "does not send, and has not sent or caused to be sent, any unsolicited commercial emails into the personal email accounts of any person." *Id.* at ¶11. The affidavit affirms that the website is "advertised" only by word of mouth. *Id.* at ¶12. To defray the costs of the website Cosmo allows other companies to place ads on its website, and receives a fee from those entities. *Id.* at ¶¶13-16. Plaintiff has not filed a counter-affidavit challenging any of the facts provided by Wilson in his affidavit.

¶7 Although Plaintiff's Complaint argues generally that Defendant "caused unsolicited commercial emails to be sent to and received by plaintiff, " Complaint, ¶5, and that the allegedly unsolicited email did not comport with statutory requirements, *Id.* at ¶20, Plaintiff does not specifically state he *received* an unsolicited commercial email from Cosmo. Rather, Plaintiff apparently alleges that a "pop-up" advertisement/coupon for a free Scrabble CD-ROM found on Cosmo's own website constitutes an "unsolicited commercial email" within the meaning of the Act. Notably, Plaintiff has not contradicted Wilson's assertion that the Scrabble ad/coupon was located in Defendant's website. Plaintiff also has not disputed Wilson's statement that to view the ad/coupon for the free Scrabble game, Plaintiff had to intentionally access the Cosmo website and, once there, download and/or print a copy of the ad.

¶8 In addition to the facts given in the affidavit concerning the Scrabble ad/coupon at issue in this case, the Affidavit also states that Cosmo (a) is not licensed to do business in Utah, (b) does not maintain a registered agent in Utah, (c) does not own, lease or control any property in Utah, (d) does not maintain any employees, offices, agents or bank accounts in Utah, (e) has no Utah shareholders, (f) has no phone or [fax] listings in Utah, (g) does not particularly solicit Utah residents to view its website, (h) does not conduct business, sell products or visit customers in Utah, (i) has no Utah shareholders, (j) does not pay taxes in Utah, (k) does not use a Utah server to host its website. Affidavit at ¶¶23-31, 37-40.

¶9 Finally, Wilson personally has only made four brief trips to Utah between 1997 and the present, none in connection with Cosmo but rather as a lighting designer for 3 or 4 concerts by

---

[1]For example, the Act requires that senders include certain truthful information in its email, prohibits the use of certain misleading practices, and requires the sender to provide a mechanism allowing recipients to "unsubscribe" with respect to future email messages. Utah Code §13-36-103.

touring rock groups who had brief stop-overs in Utah. Wilson has no family or close friends in Utah. Affidavit at ¶¶ 32-36, 41.

STANDARD OF REVIEW

¶10 Under Utah law, Plaintiff must make a *prima facie* case for assertion of jurisdiction over Defendant in order to proceed to trial on the merits. *Anderson v. American Soc'y of Plastic & Reconstructive Surgeons*, 807 P.2d 825 (Utah 1990). The Court may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. If, as here, the Court proceeds on documentary evidence alone, Plaintiff's factual allegations are accepted as true unless specifically controverted by the Defendant's affidavit. Any disputes in the documentary evidence are resolved in Plaintiff's favor, and the Court may not weigh the evidence. *Id.* at 827.

ANALYSIS

¶11 Here, Plaintiff has rested on the very general factual allegations made in his Complaint, unsupported by affidavit. "[O]nly the well pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations must be accepted as true." *PurCo Fleet Serv., Inc. v. Towers*, 38 F.Supp.2d 1320, 1323 (D. Utah 1999) (quoting *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995)(citations omitted). Moreover, "when jurisdiction is challenged, plaintiff cannot solely rely on allegations of jurisdiction in its complaint in the face of an affidavit by defendant which specifically contradicts those general allegations." *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307 (Utah 1980). Defendant has directly controverted Plaintiff's general allegations by way of affidavit. The Court has relied on Wilson's uncontroverted affidavit.

¶12 The Complaint's sole allegations with respect to jurisdiction are that "Defendant conducts a portion of its business by sending unsolicited emails into the State of Utah," Complaint, p.2, ¶2, and that because "Defendant has caused unsolicited commercial e-mails to be sent to and received by plaintiff. . .within the State of Utah, therefore, the courts of the State . . . have jurisdiction over this matter . . ."*Id.* at ¶5.

¶13 In Opposition to Defendant's present Motion, Plaintiff further alleges, without evidentiary support, that Defendant has transacted business within the State by:

> attempt[ing] to obtain new Utah customers. We believe that he already engages in sales within Utah . . . . Even if not already conducting business, Defendant has caused injury to the plaintiff, as evidenced by the violation of the [Act]. This should be enough to place him within the reach of the long-arm statute. Additionally, the placement of the offending email was entirely commercially driven and meant to transact business within the state. This, alternatively, should be enough to subject the defendant to personal jurisdiction within this state.

Opposition to Defendant's Motion to Dismiss, at p. 7.[2]

¶14 The Court agrees with Defendant that Plaintiff has failed to carry the minimal burden of establishing a *prima facie* case for personal jurisdiction. On this basis the Court concludes that Defendant's Motion to Dismiss for lack of personal jurisdiction must be granted. Alternatively, as explained below, the Court concludes that Utah law does not confer personal jurisdiction over Defendant, either under the Act or under Utah's long-arm statute, Utah Code §78-27-34. In the absence of authorizing Utah law granting specific personal jurisdiction, the Court need not reach the question whether attempting to assert such jurisdiction would violate fundamental due process guarantees.

¶15 The Utah Supreme Court recently clarified the law on assertion of specific personal jurisdiction over a nonresident defendant.[3] In determining whether such jurisdiction exists, this Court must first assess whether *Utah law* confers personal jurisdiction over the nonresident [D]efendant. If Utah law confers such personal jurisdiction, the Court must then determine whether the assertion of jurisdiction comports with constitutional due process requirements. *State ex rel. W.A.*, 2002 UT 127 ¶ 14 (emphasis in original).

¶16 The Court cannot agree with Plaintiff's contention that the Act provides for exercise of jurisdiction over nonresident defendants. Unlike other provisions of Utah law in which the legislature has expressly authorized the exercise of such jurisdiction, *see, e.g.*, Utah Code §78-3a-110(13), the Act is silent with respect to jurisdiction. The logical inference is that the Act is limited to establishing a cause of action against those who violate its substantive requirements, *but only to the extent that the Court can properly exercise personal jurisdiction* over such defendants.

¶17 Since the Act itself does not confer jurisdiction over nonresident defendants, the Court must look to Utah's long-arm statute to see if it reaches the conduct of which Plaintiff complains. Utah's long-arm statute, § 78-27-24, provides, in relevant part:

> Any person . . . whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits . . .to the jurisdiction of the courts of this state as to any claim *arising out of or related to:*

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[2]The Court notes that Plaintiff's Complaint, as well as his Opposition to the Motion to Dismiss, are virtually identical in most relevant respects to the pleadings which these same plaintiffs' counsel have filed in over 1200 other cases. It is evident that counsel have prepared and filed "one size fits all"-type pleadings with minimal tailoring suited to the specifics of this or any other case.

[3]Plaintiff *does not* claim that Defendant has conducted such substantial and continued local activity so as to be subject to *general* personal jurisdiction. Thus, the issue here is whether there is *specific* personal jurisdiction over Defendant. "Specific personal jurisdiction is the concept applicable to a long-arm statute . . ." *Abbott G M. Diesel v. Piper Aircraft*, 578 P.2d 850, 853 n.6 (Utah 1978) (quoting Strachan, *In Personam Jurisdiction in Utah*, 1977 Utah L. Rev. 235, 264). When specific personal jurisdiction is asserted, it must be founded on claims *arising out of* the specific activities provided for under the long-arm statute

(1) the transaction of any business within this state;

. . .

(3) the causing of any injury within this state whether tortious or by breach of warranty... (emphasis added).

¶18 On the facts of this case the Court concludes that Defendant's placement of passive ads for other companies' products/services on its own website, which was purposefully accessed by Plaintiff, does not meet either of the above-cited provisions of our long-arm statute. To the extent that Plaintiff's generic jurisdictional claims can be construed to suggest that Defendant transacted business in this state as a result of its website, the Court rejects that argument. In reaching this conclusion the Court applies the well-reasoned and widely-adopted analysis of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997).[4] Under the *Zippo* analysis, the facts of this case most closely resemble the second category described by that court. As such, it does not form the basis for personal jurisdiction over Defendant. The Court further concludes that the minimal contacts between Cosmo's principal and Utah, *supra* ¶9, are completely unrelated to Plaintiff's claim, and therefore do not form a basis for long-arm jurisdiction over Defendant.

¶19 As to Plaintiff's allegations that he's suffered "injury" because he viewed an unsolicited commercial email, the Act does not recognize any level of "injury" on the part of the recipient of an email; rather it merely requires the initiator of such an email comply with statutory requirements or face civil penalties.[5] The Court is not persuaded that a violation of this regulatory requirement rises to the level of a tort within the meaning of the long-arm statute. *Cf. Prince v. Bear River Mut. Ins.*, 2002 UT 68 ¶47 ("Where a statute provides a specific civil legal remedy to

---

[4]The *Zippo* court analyzed three general categories, or factual contexts, along a "sliding scale," as a means of evaluating jurisdiction based on Internet activity. The first category involves those circumstances when "a defendant clearly does business over the Internet," such as entering into contracts requiring the "knowing and repeated transmission of computer files over the Internet." 952 F. Supp. At 1123-24. At the opposite end of the scale is a category involving cases where the exercise of personal jurisdiction is not appropriate, because the Internet activity at issue involves "[a] passive Web site that does little more than make information available to those who are interested in it." *Id.* Under those circumstances "a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions." *Id.* Finally, the *Zippo* court identified a third, middle, category that encompasses "interactive Web sites where a user can exchange information with the host computer." *Id.* The court went on to conclude that determining whether the exercise of jurisdiction is appropriate depends upon "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.*

[5]Specifically, the statute requires those who "send[] or cause to be sent" unsolicited commercial emails to comply with the statutory requirements. Since the statute does not define the term "send" or "sender,"under standard rules of construction the Court looks to the usual and ordinary meaning of the word. According to Webster's New World Dictionary (2d Coll. ed.), relevant definitions include "to dispatch, convey or transmit; to arrange for the going of; to cause or force to move." The common thread of these definitions is that the "sender" is the one who exercises the initiative to communicate or transmit. In the present context, it would be the person who *initiated* the various electronic transfers. In fact, it could be argued that by going to, and downloading from, the Defendant's website the allegedly problematic pop-up ad, Plaintiff was the initiator in this case and could be liable under the same law he has tried to sue under.

redress an injury in violation of that statute, a tort action for violation of the public policy embodied in the statute will not lie"). Accordingly, the Court concludes that Plaintiff's bare allegations of "injury" are insufficient to assert long-arm jurisdiction over Defendant.

ORDER

¶20 Defendant's Motion to Dismiss for lack of personal jurisdiction is GRANTED.

So Ordered by the Court this 4th day of April, 2002.

Denise Posse Lindberg, Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SANDY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020411292 by the method and on the date specified.

METHOD	NAME
Mail	MARK L ANDERSON ATTORNEY PLA 50 SOUTH MAIN STREET SUITE 1500 SALT LAKE CITY, UT 84144
Mail	DENVER C SNUFFER ATTORNEY PLA 10885 SOUTH STATE STREET SANDY UT 84047

Dated this 4 day of April, 2003.

STATE OF UTAH THIRD DISTRICT COURT SANDY

L Short

Deputy Court Clerk

DEFENDANT'S ADDENDUM NO. 6

Motions, Pleadings and Filings

United States District Court, S.D. New York.

STARMEDIA NETWORK, INC., Plaintiff,
v.
STAR MEDIA INC., Defendant.

No. 00 CIV 4647(DLC).

April 23, 2001.

OPINION AND ORDER

COTE, J.

***1** Plaintiff Starmedia Network, Inc. filed this action on June 22, 2000, alleging that Star Media Inc.'s domain name and corporate name infringe the plaintiff's trademark rights. Defendant moved to dismiss the complaint for lack of personal jurisdiction. On October 13, 2000, the Court allowed plaintiff to conduct discovery on the issue of personal jurisdiction. For the reasons stated below, defendant's motion is denied.

BACKGROUND

Plaintiff is a Delaware corporation with its principal place of business in New York. Plaintiff provides an Internet "portal" in the Spanish and Portugese languages. Through its website, which is named "starmedia.com", plaintiff provides a variety of information and services. Defendant, a Washington company with its principal place of business in the state of Washington, is a wholesale seller of software that recently launched a website called "starmediausa.com." Plaintiff claims that defendant's domain name infringes plaintiff's federally registered "STARMEDIA" marks.

The defendant's website includes a chart of shipping costs by time zone that comprises the entire continental United States. The site is interactive: although customers cannot purchase products through the site, they can register with the site and use the site to send comments to defendant. A company that wishes to sell the defendant's software can download a dealer application from the website. In a password protected area for registered users, product and pricing information is available to existing customers. Defendant estimates that only one out of 20 or 30 customers obtain a password.

While the defendant has sold goods in several states, including New Jersey, it has not sold goods in New York. The defendant has only two employees, and approximately 200 customers.

At the time defendant filed the motion to dismiss, it was disputing, *inter alia,* that it could reasonably expect its actions to have consequences in New York and that it derived substantial revenue from interstate commerce. Defendant has since stipulated that it receives substantial revenue from interstate commerce. The defendant also admits that it solicits business nationwide via the website and one of the purposes of its website is to attract new customers, including customers from New York. When the defendant registered "starmediausa.com" in 1999, it discovered that plaintiff's website existed, but did not check to see what was available at starmedia.com.

DISCUSSION

In a diversity case or a case arising under a federal law that does not provide for service of process on a party outside the state, the issue of personal jurisdiction must be determined according to the law of the forum state. *See Omni Capital International v. Rudolf Wolf & Co.*, 484 U.S. 97, 105-10 (1987); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir.1997). "If the exercise of jurisdiction is appropriate under [the state's statutes], the court then must decide whether such exercise comports with the requisites of due process." *Bensusan*, 126 F.3d at 27.

***2** It is well established that on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, "the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir.1999). The nature of the plaintiff's obligation, however, "varies depending on the procedural posture of the litigation." *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.1990). Where, as here, no evidentiary hearing has been held but there has been discovery regarding personal jurisdiction, the plaintiff's burden

is to make a *prima facie* showing which includes an averment of the facts that, if given credit by the ultimate trier of fact, would be sufficient to establish jurisdiction over the defendant. Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir.1999).

A. Long-Arm Statute

Plaintiff argues that the Court has personal jurisdiction over defendant under Section 302(a)(3)(ii), N.Y. C.P.L.R. That section of New York's long-arm statute provides that the Court may exercise jurisdiction over a non-domiciliary who

> commits a tortious act without the state causing injury to person or property within the state ... if he ...
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

N.Y. C.P.L.R. § 302(a)(3) (McKinney 1990). Thus, in order to assert personal jurisdiction under New York's long-arm statute, plaintiff must make a *prima facie* showing that (1) defendant committed a tortious act outside of New York, (2) plaintiff suffered harm in New York, (3) defendant should have reasonably expected its actions to have consequences in New York, and (4) defendant derives substantial revenue from interstate commerce.

The principal issue in dispute regarding long-arm jurisdiction is whether the defendant should reasonably have expected its actions to have consequences in New York; the plaintiff has clearly met its burden on the other three factors. As noted, the defendant has stipulated that it derives substantial revenue from interstate commerce. Where an Internet site displays allegedly infringing marks, the tort is deemed to be committed where the website is created and/or maintained, which is Washington. *See Cable News Network, L.P., L.L.L.P. v. Gosms.com, Inc.*, No. 00 Civ. 4812(LMM), 2000 WL 1678039, at *3 (S.D.N.Y. Nov. 6, 2000) (collecting cases). Under New York law, injury "within the state" includes harm to a business in the New York market through lost sales or customers, as well as harm and threatened harm in the New York market resulting from the confusion and deception of New York computer users. *See* Citigroup Inc. v. City Holding Co., 97 F.Supp.2d 549, 568 (S.D.N.Y.2000); *American Network v. Access America/Connect Atlanta, Inc.*, 975 F.Supp. 494, 497 (S.D.N.Y.1997). Plaintiff's allegations of harm resulting from the potential for confusion and deception satisfy the requirement of an injury "within the state." *See* Cable News, 2000 WL 1678039, at *4; *Telebyte, Inc. v. Kendaco, Inc.*, 105 F.Supp.2d 131, 135-36 (E.D.N.Y.2000).

*3 Turning to the remaining factor, to establish a reasonable expectation of consequences in New York, the plaintiff must show an effort by the defendant to serve the New York market. "New York courts have asserted that the simple likelihood or foreseeability 'that a defendant's product will find its way into New York does not satisfy this element, and that purposeful availment of the benefits of the laws of New York such that the defendant may reasonably anticipate being haled into New York court is required." ' Kernan, 175 F.3d at 241 (citation omitted). Thus, the defendant must make " 'a discernable effort to directly or indirectly serve the New York market." ' *Id.* (citation omitted). Applying these principles to a claimed trademark infringement through a website, a court has recently observed that,

> [i]t is now well established that one does not subject himself to the jurisdiction of the courts in another state simply because he maintains a web site which residents of that state visit. However, one who uses a web site to make sales to customers in a distant state can thereby become subject to the jurisdiction of that state's courts.

National Football League v. Miller, No. 99 Civ. 11846(JSM), 2000 WL 335566, at *1 (S.D.N.Y. Mar. 30, 2000) (citing Bensusan, 126 F.3d 25).

The plaintiff has met its *prima facie* burden of showing that defendant made an effort to serve the New York market, Kernan, 175 F.3d at 242, and thus should have reasonably expected that its infringement of plaintiff's trademark would have consequences in New York. The defendant used its website to attract and service business across the nation, including in New York, and has received substantial revenue from those interstate sales. Thus, this case can be distinguished from Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir.1997), where the court refused to extend personal jurisdiction based on a slightly interactive webpage where the business was concentrated in one state except for personal contacts generated by one of the defendant's founders. The fact that the defendant has not yet made a sale in New York does not defeat jurisdiction under Section 302(a)(3). *Cf.* Kernan, 175 F.3d at 242 (foreign company attempted to serve New York market through distributor's contractual right to resell throughout the United States); American Network, 975 F.Supp. at 499 (offered services across the United States and had New York subscribers). *But see American Info. Corp. v. American Infometrics,*

Inc.,-- F.Supp.2d--, No. CIV. JFM-003288, 2001 WL 370109, at *4 (D.Md. Apr. 12, 2001).

B. Due Process

The federal due process jurisdictional inquiry has two parts, the "minimum contacts" inquiry and the "reasonableness" inquiry. *Metropolitan Life Ins. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996). The minimum contacts analysis is governed by the Supreme Court case, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. Under the minimum contact analysis, "[s]pecific jurisdiction exists when 'a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." ' *Metropolitan Life Ins.*, 84 F.3d at 567-68 (citation omitted).

***4** In cases involving Internet activity, courts have looked at the level and nature of the information exchange occurring over the Internet to determine the reasonableness of jurisdiction. *See Hsin Ten Enter. USA, Inc. v. Clark Enters.*, No. 00 Civ. 5878(SAS), 2000 WL 1886583, at *4-5 (S.D.N.Y. Dec. 29, 2000); *National Football League*, 2000 WL 335566, at *1. Using these criteria, Internet activity has been classified using three categories: (1) "passive" websites, which make information available to visitors but do not permit an exchange of information; (2) "interactive" websites, which permit the exchange of information between the defendant and website viewers, but do not involve the actual conduct of business; and (3) websites in which the defendant clearly does business over the Internet, *e.g.*, where a visitor may enter into a contract or purchase goods or services through the website. *See Citigroup*, 97 F.Supp.2d at 565; *Hsin Ten*, 2000 WL 1886583, at *4. It is generally agreed that jurisdiction is not properly exercised in the first category, but is properly exercised in the last category. When considering the middle category, that is, sites which are interactive but are not used to conduct business, courts look to the " 'level of interactivity and commercial nature of the exchange of information that occurs on the Website" ' to determine whether jurisdiction should be exercised. *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir.1999) (citation omitted); *Cybersell*, 130 F.3d at 418.

In this case, defendant's website belongs in the second category. As discussed above, the website is interactive rather than passive. Furthermore, it is entirely commercial in nature. The level of interactivity, however, is limited. The defendant contends that it does not take online orders or sell any products directly over the Internet. It does, however, provide customers with access to certain confidential information through a password system, and does support an exchange of information through electronic mail.

Even with claims of trademark infringement arising in the context of interactive commercial websites, however, there is a serious question as to whether it would be reasonable to allow, in essence, jurisdiction over an alleged infringer "wherever the plaintiff's principal place of business is located." *American Info.*, 2001 WL 370109, at *3. Thus, there are sound reasons to require some further connection between the defendant and the forum state. Here, the defendant has additional contacts with New York that make the exercise of personal jurisdiction appropriate. First, the defendant knew of plaintiff's domain name before it registered "starmediausa.com" as its domain name. Therefore, the defendant knew or should have known of plaintiff's place of business, and should have anticipated being haled into New York's courts to answer for the harm to a New York plaintiff caused by using a similar mark. *See Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.1998); *American Network*, 975 F.Supp. at 500. Coupled with this fact is the defendant's substantial income from interstate commerce and commercial use of the website to support its sales, including potentially to New York customers. In these circumstances, the plaintiff has shown *prima facie* evidence of "minimum contacts" with New York for purposes of specific jurisdiction under the Due Process Clause.

***5** The second part of the due process personal jurisdiction test is determining the reasonableness of the exercise of jurisdiction. In undertaking this reasonableness analysis, the Supreme Court has identified the following factors:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Kernan, 175 F.3d at 244. The only burden argued by defendant is the general inconvenience of litigating in New York. It has offered no evidence, however, to support an argument that this general burden presents any particular hardship to it. None of the other reasonableness considerations preclude the

exercise of personal jurisdiction over defendant.

CONCLUSION

For the reasons stated, defendant's motion to dismiss for lack of personal jurisdiction is denied.
SO ORDERED:

2001 WL 417118 (S.D.N.Y.), 64 U.S.P.Q.2d 1791

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