The John Marshall Journal of Information Technology & Privacy Law

Volume 22
Issue 1 *Journal of Computer & Information Law - Fall 2003*

Article 12

Fall 2003

2003 John Marshall International Moot Court Competition in Information Technology and Privacy Law: Bench Memorandum, 22 J. Marshall J. Computer & Info. L. 247 (2003)

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2003 MOOT COURT COMPETITION

BENCH MEMORANDUM

TERRY FERNBACH*

IN THE SUPREME COURT OF THE STATE OF MARSHALL

ALEXANDER TEKHEAD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 03-SC-0035
	)	
ALLAN DOSPAM,	)	
	)	
Defendant-Appellee.	)	

I. INTRODUCTION

This case is an appeal by Plaintiff-Appellant Alexander Tekhead ("Tekhead") and a cross-appeal by Defendant-Appellee Allan Dospam ("Dospam") from the order of the First District Court of Appeals affirming the decision of the Farbrook County Circuit Court granting Dospam's Motion for Summary Judgment in case number 02-CV-6245.[1]

The Circuit Court denied Dospam's jurisdiction claim, but awarded summary judgment on the ground that Tekhead had failed to state a claim for false light invasion of privacy or intrusion upon seclusion. In its ruling on appeal, the First District addressed assignments of error related to these three issues. As to jurisdiction, the First District held that

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1. *See* Record ("R") at 2, 11.

Dospam was subject to the jurisdiction of the State of Marshall pursuant to MARSHALL REVISED CODE, 735 MRC 25-302.[2] On the issue of false light invasion of privacy, the First District held that the false light was not made publicly, and thus, was not actionable.[3] Finally, on the issue of intrusion upon seclusion, the First District found that while the intrusion by Dospam was unauthorized, the information gathered was not private, and the intrusion claim was not actionable.[4] On these bases, the First District affirmed on all three issues.[5]

II. STATEMENT OF THE CASE

The undisputed facts follow. Beginning in 2000, Tekhead was employed at Distress Technologies ("Distress"), a software manufacturer in Digital, Marshall, as a Customer Support Representative.[6] Distress terminated Tekhead in 2002 for violation of Distress' Employee Handbook, among other reasons.[7]

A. DISTRESS TECHNOLOGIES, INC. EMPLOYEE HANDBOOK

Upon hiring a new employee, Distress provides each new employee with the Employee Handbook ("Handbook").[8] The Handbook delineates Distress' policies with respect to the workplace. Among these policies, the Handbook presents the established guidelines for employee computer use. The relevant guidelines to this action provide that an employee may not (1) use Distress' computers for any personal use; (2) use Distress' computers to retrieve, store, or view offensive, obscene or threatening content; or (3) use any equipment in a manner that is excessive, loud or disturbing to other employees.[9] While the Handbook makes clear that Distress will not actively monitor the use of computers by employees, it also provides that Distress will respond appropriately in such circumstances where it becomes aware of conduct violating computer use guidelines. However, the Handbook specifically states that the use of any of Distress' computers to retrieve, store, or view obscene material can result in immediate termination.[10]

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2. *See* R. at 8-9.
3. *See* R. at 9-10.
4. *See* R. at 10.
5. *See* R. at 11.
6. *See* R. at 2.
7. *See* R. at 2, 5.
8. *See* R. at 3.
9. *See id.*
10. *See* Exhibit A (Distress Technologies, Inc. Electronic Information Systems Policy), ¶4(A)(5).

B. TEKHEAD'S EMPLOYMENT AT DISTRESS

On June 20, 2000, Distress hired Tekhead. On December 6, 2000, Tekhead received his initial performance review. Even though comments from his supervisors stated Tekhead was a bit of a slacker and prankster, his supervisors did note Tekhead has a high level of skill and good potential if appropriately directed.[11] However, in a June 2001 performance review, Tekhead's supervisors noted a regression in Tekhead's performance, and Tekhead explained that his shoddy work performance was the result of interference of non-work related problems, which had since been eliminated.[12]

After his June 2001 review, Tekhead became an exemplary employee. Tekhead excelled at his job, gained positive reviews from his supervisors, and received a recommendation for an "Employee of the Month" award in April 2002.[13]

1. *The Incident Giving Rise to Contested Claims- the June 13, 2002 E-mail*

On June 13, 2002, one week before his upcoming performance review, Tekhead received an e-mail message ("June 13 E-mail") with the subject line "Documents Relating to Upcoming Review."[14] Since the June 13 E-mail identified a member of Distress' senior management as its sender, Tekhead opened the e-mail, believing it related to his upcoming performance review.[15]

After Tekhead opened the June 13 E-mail, an animated image of a nude George and Jane Jetson dancing the fandango appeared on his computer screen. In addition, his computer began to repeat the phrase "ALERT! STOP VIEWING PORN! CLOSE YOUR BROWSER IMMEDIATELY!" at maximum volume through the external speakers attached to his computer.[16] While Tekhead unsuccessfully attempted to close the June 13 E-mail, Tekhead's co-workers began to converge around his computer, including Tekhead's supervisor.[17] After unsuccessfully shutting down the audible and visual display with the computer's keyboard, Tekhead's supervisor resorted to terminating the computer's power supply to end the display.[18] Tekhead's supervisor thereafter directed Tekhead to leave for the remainder of the day, and on the following day,

11. *See* R. at 3, 4.
12. *See* R. at 4.
13. *See id.*
14. *See id.*
15. *See id.*
16. *See* R. at 5.
17. *See id.*
18. *See id.*

June 14, 2002, Distress' general counsel telephoned Tekhead and informed him that he had been discharged.[19]

2. *The Employment Action*

Tekhead filed a lawsuit against Distress for wrongful termination, alleging that he had not willfully violated Distress' Employee Handbook.[20] Tekhead also filed a motion to preserve the electronic evidence in Distress' possession, namely Tekhead's computer, Distress' e-mail server, and all backup tapes for June 13, 2002, which the trial court granted.[21] During the exploration of the preserved electronic evidence, Tekhead discovered the June 13 E-mail originated with Dospam and had been routed through a third-party server in Korea.[22] Tekhead then filed claims against Dospam alleging intrusion upon seclusion and publicly placing him in a false light.

C. DOSPAM'S BACKGROUND

Dospam is a resident and citizen of a neighboring state, the State of Potter, but grew up in Johnstonville, a small town in downstate Marshall, where his parents still reside.[23] Dospam also submitted a resume to Distress Technologies in June 1996, before accepting a position with a software company in the State of Potter.[24]

Since 2001, Dospam has operated http://www.webgags.com, a commercial online joke service, although Dospam claims the Web site has yet to turn a profit.[25] The domain name is registered through an ICANN-accredited domain name registrar in the Cayman Islands, has contact information located in the Cayman Islands, and uses a web hosting service located in Monaco.[26]

1. *Webgags' E-mails and Spiders*

Unlike most online joke services that merely allow subscribers to receive digital humor via electronic mail, Webgags allows its customers, for a fee, to play digital practical jokes on other, unsuspecting individuals.[27] Webgags offers a selection of practical joke computer programs that can be sent to individuals via electronic mail, which include making a com-

19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See* R. at 6.
24. *See id.*
25. *See id.*
26. *See id.* Dospam noted in his affidavit that he set the Web site up in this manner to avoid nuisance lawsuits.
27. *See id.*

puter screen appear as if files are being deleted, playing loud noises, and playing distracting songs.[28] A customer chooses one of the programs sent to a specific individual electronic mail address, which will be sent in a targeted electronic mail message ("Target E-mail"). When the unsuspecting victim of a Webgags joke opens the Target E-mail, the chosen program temporarily takes control of the target's computer acting as the customer had directed.[29]

In order to promote Webgags' Web site, Dospam employed "spiders," software programs that search the World Wide Web looking for electronic mail addresses published on Web sites. The spiders collect the electronic mail addresses found.[30] Dospam compiles these addresses and then sends unsolicited e-mail messages to the compiled addresses. One of Dospam's spiders collected electronic mail addresses from the Distress' Web site from one page that lists all its employees, including Tekhead, and their respective electronic mail addresses.[31]

2. *The June 13, 2002 E-mail, and Tekhead's Address Book*

Dospam's unsolicited e-mail messages contained the subject line "Documents Relating to Upcoming Review." The message also included a program attached to it that would (1) open an animated image file of two cartoon characters dancing in the nude; (2) increase the target computer's speaker volume to the maximum level possible; (3) locate the user name associated with the target computer from the individual settings on the computer; (4) audibly announce "ALERT! STOP VIEWING PORN! CLOSE YOUR BROWSER IMMEDIATELY!"; (5) repeat the message; and (6) preclude any keyboard control of the computer.[32] At the same time, the program locates and transmits the contents of the target computer's Microsoft Outlook address book to Dospam.[33] This was the programming contained in the June 13, 2002 E-mail message received and opened by Tekhead.[34]

Dospam published Tekhead's Outlook address book on Webgags.com Web site after receiving service of process for Tekhead's suit against Dospam.[35] The web page upon which all the electronic mail addresses in the Outlook address book appeared included a statement that read, "Mr. Tekhead filed suit against me, obviously he can't take a joke. Here's his

28. *See id.*
29. *See* R. at 7.
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See* R. at 5, 7.
35. *See* R. at 7.

address book. Make him pay for his lack of humor."[36] In addition to work related electronic mail contacts, the Outlook address book also included the electronic mail addresses of several personal contacts, some of whom began to receive spam after their e-mail addresses were published on the Webgags Web site.[37]

Tekhead filed a two-count lawsuit against Dospam based on the above-listed events. The Farbrook County Circuit Court concluded that jurisdiction existed over Dospam. However, the Circuit Court granted Dospam's motion as to false light and intrusion upon seclusion. The First Court of Appeals affirmed the Circuit Court's decision. This appeal followed.

III. ISSUES PRESENTED FOR REVIEW

Three issues have been raised on appeal: (1) whether the Court of Appeals erred in holding that the trial court has proper jurisdiction over Dospam; (2) whether the Court of Appeals erred in holding that no genuine issue of material fact existed to evidence a theory of false light invasion of privacy; and (3) whether the Court of Appeals erred in holding that no genuine issue of material fact existed to establish the requisite elements to evidence of theory of intrusion upon seclusion.

IV. ANALYSIS

A. JURISDICTION

A court may exercise jurisdiction over an out-of-state defendant where authorized to do so by a long-arm statute[38] based upon specific jurisdiction arising from conduct connected to the suit, or by finding general jurisdiction supported by the defendant's persistent but unrelated contacts with the forum state.[39] General jurisdiction must be based upon "continuous and systematic" activities in the state,[40] a standard that clearly is not met in this case. To determine whether specific jurisdiction exists, we apply the three-pronged test set forth in *International Shoe*

36. *See* R. at 7-8.

37. *See* R. at 8.

38. The reach of Marshall's long-arm statute is coextensive with that permitted by the Due process Clause of the Fourteenth Amendment. The relevant of the long-arm statute is as follows:

> A tribunal of the State may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person: (1) transacting any business in this State. . . *Marshall Revised Code*, 735 MRC 25-302.

39. *See ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 715 (4th Cir. 2002).

40. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

Co. v. Washington,[41]: (1) the defendant must have sufficient "minimum contacts" with the forum state ("purposeful availment of the privileges of conducting activities within the forum state"); (2) the claim asserted against the defendant must arise out of those contacts; and (3) the exercise of jurisdiction must be reasonable (there must be a "substantial enough connection" between the defendant and the forum state).[42]

In regards to the Internet, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[43] utilized a sliding scale in determining whether personal jurisdiction exists over a defendant. Whether jurisdiction exists depends upon the level of interactivity on the Web site, as well as the commercial nature of the exchange of information on the Web site as predominant factors.[44] This sliding scale grants personal jurisdiction to active Web sites, which exchanges information with users, while passive Web sites, which just places information on a web page for others to view at their leisure, are not subject to personal jurisdiction.

As to the first element, a defendant purposefully avails himself when the defendant's contacts with the forum state "proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state."[45] These actions must be deliberate, and can not be random, fortuitous or attenuated.[46]

As to the second element, the claim asserted must arise out of the defendant's forum related activities. If the defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts.[47]

The final element in the personal jurisdiction analysis states the defendant's actions with the forum state must be enough to make the exercise of personal jurisdiction over the defendant constitutionally reasonable.[48] To be reasonable, jurisdiction "must comport with 'fair play and substantial justice.'"[49] Once a court finds "the first two elements of a prima facie case—purposeful availment and a cause of action arising from the defendant's contacts with the forum state—then an in-

41. 326 U.S. 310 (1945).

42. *Intl. Shoe Co.*, 326 U.S. at 316; *see also Young v. New Haven Advoc.*, 315 F.3d 256, 261 (4th Cir. 2002), *Verizon Online Serv. v. Ralsky*, 203 F. Supp. 2d 601, 611 (E.D. Va. 2002).

43. 952 F. Supp. 1119 (W.D. Pa. 1997).

44. 952 F. Supp. at 1124.

45. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citing *McGee v. Intl. Life Insurance Co.*, 355 U.S. 220, 223); *see also CompuServe Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir 1996).

46. *Burger King*, 471 U.S. at 475.

47. *CompuServe*, 89 F.3d at 1267 (citing *Reynolds v. Intl. Amateur Athletic Fedn.*, 23 F.3d 1110, 1119 (6th Cir. 1994).

48. *Verizon*, 203 F. Supp. 2d at 621.

49. *Burger King*, 471 U.S. at 476 (citing *Intl. Shoe Co.*, 326 U.S. at 320).

ference arises that this third factor is present."[50]

1. *Potential Arguments*

In this case, Tekhead may argue that Dospam purposefully availed himself of the privileges of doing business in Marshall by actively soliciting business through his practical joke e-mails. These e-mails were designed for the sole purpose of generating business at Dospam's Web site, www.webgags.com. From these e-mails, Dospam reasonably should have expected to be haled into court in Marshall for any injuries that would result from his own actions.[51]

Dospam may counter the purposeful availment element with two arguments. First, Dospam may state his actions are the result of random actions brought about by the "spiders," for Dospam had no control over what e-mail addresses the "spiders" brought back. Second, Dospam may argue that his e-mails are analogous to the "stream of commerce" cases,[52] since Dospam did not know exactly where his e-mails would eventually go because his programs determined what e-mail addresses would be retrieved for Dospam's e-mails.

Dospam may also contend that he has not made a profit from the Web site at issue here, and therefore, no commercial activity has occurred. However, available case law goes against this premise. In *Maritz v. Cybergold*,[53] the defendant had put up a Web site as a promotion for an upcoming Internet service, forwarded advertisements to users interested in the service, and encouraged users to add their e-mail addresses to a mailing list to receive updates about the service.[54] Even though the defendant had yet to engage in any sales, the court held that the e-mails were active solicitations designed to promote business, and also rejected the notion that the defendant operated a passive Web site.[55]

Dospam's actions in the State of Marshall are related to the operative facts of the controversy. Dospam sent out an e-mail to Tekhead that contained offensive material. Dospam's e-mail led to Tekhead's termination at Distress. Dospam's e-mail placed Tekhead in a false light at his workplace, and his privacy was invaded through the acquisition of his

50. *Verizon*, 203 F. Supp. 2d at 621 (quoting *CompuServe*, 89 F.3d at 1268).

51. *See generally Verizon*, 203 F. Supp. at 616 (allowing personal jurisdiction against out-of-state spammers).

52. *See generally World-Wide Volkswagen Corp. v. Wood*, 444 U.S. 286 (1980) (Supreme Court held that automobile passing through Oklahoma did not constitute minimum contacts with Oklahoma so as to permit Oklahoma courts to exercise personal jurisdiction over nonresident defendant auto-maker).

53. 947 F. Supp. 1328 (E.D. Mo. 1996).

54. *Maritz*, 947 F. Supp. 1328, 1330.

55. *Id.* at 1335-36.

Outlook address book. But for Dospam's transmission of the June 13, 2002 E-mail, Tekhead would not have received an injury.

In determining whether Dospam's contacts with the State of Marshall are substantial enough to make jurisdiction reasonable, a court is likely to consider that the burdens on Dospam in this case are relatively low, and that Tekhead's interests in obtaining convenient and effective judgment in Marshall are high.[56] Dospam lived in Marshall, attended school in Marshall, and lives in Potter, an adjacent state. Meanwhile, Tekhead suffered the incidents while working and living in Marshall, and is currently engaged in another suit with Distress for the same incident. The most efficient resolution of these controversies and the shared interests of the States in furthering fundamental substantive social policies indicate that jurisdiction is proper in Marshall. Also, Dospam placed his Web site's contacts in foreign jurisdictions (Monaco and the Cayman Islands) as a way to avoid lawsuits, possibly indicating a desire on Dospam's part to avoid otherwise actionable activities.

Dospam may counter this by arguing that since he is focusing on sales throughout the United States, and not necessarily focusing upon and targeting Marshall, he is not subject to Marshall's jurisdiction.[57] Dospam offers a service that is available to any customer in the entire United States, and the world, and cannot be held liable to any and all jurisdictions.

Finally, Dospam may also argue that jurisdiction does not exist over him in placing Tekhead's Outlook address book on his Web site. This is because the placement of the address book was on a passive web page, did not promote any commercial interest and was not directed at any particular state. Courts have held that passive information on a Web site that has commercial interactivity is not subject to personal jurisdiction.[58] The presence of Internet banner advertisements on the Web site does not alter this analysis.[59] As long as the site is passive, specific personal jurisdiction does not exist.[60]

B. False Light

To be liable for false light invasion of privacy, a plaintiff must show (1) that the defendant placed the plaintiff in a false light before the public; (2) that the false light would be highly offensive to a reasonable per-

56. *See Am. Info. Corp. v. Am. Infometrics, Inc.*, 139 F. Supp. 2d 696, 700-701 (D. Md. 2001) (citing *Pitt. Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987)).

57. *Am. Info. Corp.*, 139 F. Supp. at 700 (citing *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997)).

58. *Id.*

59. *Id.* at n. 8.

60. *See generally Zippo*, 952 F. Supp. 1119.

son; and, (3) the defendant acted with knowledge of or reckless disregard for the falsity of the statements at issue.[61]

Some courts have noted that the heart of this tort lies in the publicity.[62] As to the first element, a matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.[63] Despite the heart of this tort being the matter of publicity, the Restatement does not contain a substantial definition of "publicity" for use in a false light claim.[64] As a result, many courts have adopted the definition of "publicity" contained in § 652(d), Comment (a) of the Restatement of Torts.[65] Under § 652(d), Comment (a), publicity is defined as ". . . the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[66] However, some courts have also held that the publication requirement is met when the publicity is made to a group of persons with which the plaintiff has a special relationship.[67]

As to the second element, the highly offensive standard requires proof that a reasonable person would be seriously offended by the publication.[68] While interpreting this section, courts have generally held that something is highly offensive if it would cause emotional distress or embarrassment to a reasonable person.

In applying the reasonable person standard, courts have held that acts that would offend a hypersensitive person are not actionable.[69] Courts have also held that the highly offensive standard must be narrowly construed with any applicable First Amendment rights of free speech.[70]

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61. RESTATEMENT (SECOND) OF TORTS § 652(E); *see also Forbose v. Am. Sav. and Loan Assn. of Danville*, 152 F.3d 602, 617 (7th Cir. 1998) (citing *Kolegas v. Heftel Broad. Corp.* 607 N.E.2d 201, 209-10 (Ill. 1992)).

62. *Forbose*, 152 F.3d at 617 (citing *Lovgren v. Citizens First Natl. Bank of Princeton*, 534 N.E.2d 987, 989 (Ill. 1989)).

63. RESTATEMENT (SECOND) OF TORTS § 652(E), CMT. (A).

64. RESTATEMENT (SECOND) OF TORTS § 652(E), Comment (a) indicates only that Restatement § 652(c), Comment (a) is applicable as what constitutes publicity and the publicity of application of a simple disclosure. However, this comment states that "[t]he interest protected by the rule. . . is the interest of the individual in the exclusive use of his own identity. . . in so far as the use may be of benefit to him or others." § 652(c) concerns appropriation of a name or likeness.

65. *Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987).

66. § 652(d) concerns publicity given to private life.

67. *Miller v. Motorola*, 560 N.E.2d 900, 903 (Ill. App. 1st Dist. 1990).

68. RESTATEMENT (SECOND) OF TORTS § 652(E), cmt. c.

69. *Lovgren*, 534 N.E.2d at 990.

70. *See Faloona v. Hustler Magazine*, 799 F.2d 1000, 1007 (5th Cir. 1986) (Non-offensive photographs in "manifestly offensive" magazine not actionable as false light claim).

As to the third element of the false light test, a plaintiff must prove the actor had knowledge of or acted with reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed.[71] In evaluating such a standard, courts have held that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication, and that publishing with such doubts shows reckless disregard for the truth or falsity of the statement and constitutes actual malice.[72] The United States Supreme Court has explained the actual malice standard as:

> [T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. . . Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice. . . .Actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' we have made clear that the defendant must have made the false publication with a 'high degree of awareness of. . . probable falsity,' or must have 'entertained serious doubts as to the truth of his publication.'[73]

1. *Potential Arguments*

In arguing that Dospam is liable for false light, Tekhead will probably state that some courts have adopted a looser definition of "publicity" in false light cases where there is a special relationship between the plaintiff and the "particular public."[74] Here, Tekhead will assert he had a special relationship with those few people who viewed Dospam's e-mail: they were Tekhead's co-workers, and had been for two years. Tekhead would argue that as a result of such a long time in a co-worker relationship, the viewers of Dospam's e-mail were in a close and special relationship with Tekhead, and therefore would qualify for the purposes of publicity.

Dospam may counter Tekhead's argument by stating the publicity requirement is not met because this e-mail was not viewed by the general public. Dospam may also state that Tekhead's co-workers do not qualify as a "special relationship" for they are not close relatives or close friends. While Tekhead does work with these people, there is no evidence that Tekhead shares any particular close bond with anybody at Distress.

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71. RESTATEMENT (SECOND) OF TORTS § 652(E).

72. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

73. *Solano v. Playgirl*, 292 F.3d 1078, 1084-85 (9th Cir. 2002) (citing *Harte-Hanks Commun., Inc. v. Connaughton*, 491 U.S. 657, 666-67 (1989)).

74. *Miller v. Motorola*, 560 N.E.2d at 903; *see also Dietz v. Finlay Fine Jewelry*, 754 N.E.2d 958, 966 (Ind. App. 2001) (citing *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 692 (Ind. 1997)).

Dospam may also argue that Tekhead's own past interactions among his co-workers at Distress may have caused Tekhead to be a bit of a pariah. Because Tekhead has not established that a special relationship exists with his co-workers, the proper standard to use is the widespread publicity standard, which is not met by the few people at Distress who saw the practical joke.

Tekhead will argue that the e-mail was highly offensive to a reasonable person. Dospam's e-mail made it seem like Tekhead was viewing pornography while at work and set off an alarm while doing so. Dospam's e-mail also made it seem like Tekhead was reverting back to his previous ways where he was seen as a bit of slacker by his supervisors, except now there was also an added element of deviance on Tekhead's part. Tekhead would argue that this image which Dospam's e-mail has given to Tekhead is clearly within the realm of highly offensive to a reasonable person.

Meanwhile, Dospam will argue that the e-mail is not offensive for a few reasons. First, the e-mail clearly states that this is a practical joke; the e-mail contains a message giving the source of the e-mail as a practical joke service, and e-mails like this can be sent to others. This makes it clear that Tekhead was not viewing pornography, even though the audio message stated otherwise. Second, Dospam may argue that the e-mail is not pornography, for it does not meet the standards of pornography and obscenity.[75] The image Dospam created and that appeared on Tekhead's computer was that of two cartoon characters dancing nude. No sexual acts of any sort were displayed in this e-mail. Dospam may argue that this e-mail did not appeal to a prurient interest, and, as such, is not offensive as obscenity or pornography. Dospam may also argue that Tekhead is a hypersensitive plaintiff, and, under *Lovgren*, Dospam's e-mail should not be seen as liable for false light.

Finally, Tekhead will state that Dospam acted with reckless disregard. Dospam created an e-mail practical joke making the recipient of the joke to appear as if they had just been "outed" for viewing pornography. Dospam made no effort to see if any recipient of this e-mail actually had been or ever was viewing pornography. Dospam made this e-mail as a way to benefit commercially by promoting his practical joke Web site, and did not care about any consequences of his e-mails. Tekhead may also use the premise stated by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, which states that individual states can decide to

75. *See generally Miller v. California*, 413 U.S. 15 (1973). Gives test for obscenity as (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 39.

use a negligence standard for the actual malice requirement in cases where the plaintiff is a private citizen.[76] In stating this case, Tekhead may also argue for a lower standard to be applied here, much like in the publicity requirement.

Dospam may argue that the false light test does not apply in this case, for the e-mail was not made about Tekhead. There were no statements of or concerning Tekhead in Dospam's e-mail. The e-mail instead stated this was a practical joke, and made no mention of Tekhead in any way. The audio message did not mention Tekhead by name, and instead gave a generic message without any names. However, Tekhead may counter this by stating that the context of the e-mail on his computer, with the audio message blaring out so that many people at his workplace could hear constitutes that the joke would qualify as being of and concerning Tekhead.

C. Intrusion Upon Seclusion

To be liable for intrusion upon seclusion, a plaintiff must show: (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion must be offensive or objectionable to a reasonable person; (3) the matter on which the intrusion occurs must be private; and (4) the intrusion causes anguish and suffering.[77] The Restatement also states that the intrusion upon seclusion does not need to be of the physical variety, and can also be sensory, just as long as an individual's private concerns have been impinged upon.[78] Finally, courts have held that a plaintiff must show that ". . .the defendant penetrated some zone of. . . privacy surrounding, or obtained unwanted access or data about, the plaintiff."[79]

1. *Potential Arguments*

Tekhead may argue that Dospam is liable for intrusion upon seclusion for two separate acts: (1) having an e-mail joke take over control of Tekhead's computer, and (2) creating an e-mail program that sent Tekhead's Outlook Address book to Tekhead.

First, in taking over Tekhead's computer, Dospam intruded into Tekhead's seclusion. Dospam created a program that took over all functions of Tekhead's computer, and alerted everyone in the general vicinity of Tekhead that he was viewing pornography, causing others to huddle around Tekhead's computer. Dospam violated Tekhead's privacy by ob-

76. 418 U.S. 323, 347 (1974).
77. Restatement (Second) of Torts § 652B.
78. *Id.*
79. *Shulman v. Group W. Prod.*, 955 P.2d 469, 490 (Cal. 1998).

taining unwarranted access to Tekhead's information through temporarily taking over Tekhead's computer.

Second, and the stronger argument of the two, Tekhead may argue that by acquiring Tekhead's Outlook Address book, Dospam is now liable for intrusion upon seclusion. Here, it is important to note that in determining the degree on intrusion, the court needs to evaluate the context, conduct and circumstances surrounding the intrusion, including the intruder's motive, the setting, and the privacy expectation of the person whose privacy was invaded.[80] Here, Dospam acquired Tekhead's E-mail address book, primarily for the purpose of using it to send out more spam e-mails promoting his Web site. Also, Dospam later published Tekhead's E-mail address book online, and advocated others to send spam e-mails and/or hate e-mails to Tekhead and Tekhead's friends. Tekhead would argue that Dospam's actions in acquiring the address book are clearly outrageous, involve a private matter, and have caused anguish and suffering as a result.

Dospam's counter argument may rest upon an important premise, that being Tekhead has no privacy interest to protect in this matter. Tekhead's employer, Distress Technologies, implemented an Electronic Information Systems Policy which clearly states that employees do not have a privacy interest while using Distress' electronic information systems, e-mails and all data created or stored on Distress' computers.[81] Such policies have been upheld by courts, and these types of policies have been outlined by courts as ways to diminish an employee's expectations of privacy in the workplace.[82] Because Tekhead has no real expectation of privacy at Distress, there has been no intrusion upon seclusion here. While the intrusion may be considered outrageous, there is nothing private in the matter; Tekhead's address book was stored on a system that Tekhead knew, or had reason to know, would be monitored on a regular basis. Tekhead also knew, or had reason to know, that he had no expectation of privacy while at Distress due to the explicit provision in Distress' Electronic Information Systems Policy. Here, there is nothing private that has been infringed upon as a result of Dospam's actions.

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80. *People for the Ethical Treatment of Animals v. Berosini, Ltd.*, 895 P.2d 1269, 1282 (Nev. 1995) (citing *Miller v. Natl. Broad. Co.*, 232 Cal. Rptr. 668, 679 (App. 2d Dist. 1986)).

81. *See* Exhibit A (Electronic Information Systems Policy), ¶3.

82. *TBG Ins. Servs. Corp. v. Super. Ct. of L.A. County*, 117 Cal. Rptr. 2d 155, 162 (App. 2d Dist. 2002).

BRIEF FOR THE PETITIONER

No. 03-SC-0035

IN THE
SUPREME COURT OF THE
STATE OF MARSHALL

ALEXANDER TEKHEAD,
Plaintiff – Appellant,

v.

ALLAN DOSPAM,
Defendant – Appellee.

ON APPEAL FROM THE FIRST DISTRICT
COURT OF APPEALS
FOR THE STATE OF MARSHALL

BRIEF FOR PLAINTIFF – APPELLANT

Abby K. Lill
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QUESTIONS PRESENTED

I. WHETHER THE FIRST DISTRICT COURT OF APPEALS FOR THE STATE OF MARSHALL WAS CORRECT IN AFFIRMING THE DECISION THAT THE STATE OF MARSHALL MAY PROPERLY EXERCISE JURISDICTION OVER ALLAN DOSPAM.

II. WHETHER THE FIRST DISTRICT COURT OF APPEALS FOR THE STATE OF MARSHALL ERRED IN AFFIRMING THE DECISION THAT ALEXANDER TEKHEAD FAILED TO ESTABLISH A CAUSE OF ACTION FOR TORTIOUS INVASION OF PRIVACY.

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OPINIONS AND JUDGMENTS BELOW

The Opinion and Order of the Farbrook County Circuit Court granting in part and denying in part Dospam's Motion for Summary Judgment is unreported. Judge E.D. Sronik held that the Farbrook County Circuit Court had jurisdiction over Dospam but that there were no genu-

ine issues of material fact as to Tekhead's claims of being placed in a false light and intrusion upon seclusion. The Opinion and Order of the First District Court of Appeals of the State of Marshall, affirming the Circuit Court's opinion on all claims is also unreported and contained in the Record on Appeal at 1 – 11.

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to §1020(2) of the Rules for the Twenty-Second Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

STATUTORY AND RESTATEMENT PROVISIONS

The text of various provisions of the RESTATEMENT (SECOND) OF TORTS, which are relevant to the determination of this case, are set forth in Appendix A.

STATEMENT OF THE CASE

I. SUMMARY OF FACTS

This suit arises from invasion of privacy claims brought by Plaintiff-Appellant, Alexander Tekhead (hereinafter "Tekhead") against Defendant-Appellee Allan Dospam (hereinafter "Dospam") as a result of a June 13, 2002 e-mail sent to Tekhead from Dospam and Dospam's subsequent actions.

Since June 20, 2000, Tekhead was a permanent employee with Distress Technologies, Inc. (hereinafter "Distress"), a software manufacturer located in Digital, Marshall. (R. at 2 - 4.) Like all new hires, Tekhead received a copy of Distress' Employee Handbook which contains an Electronic Information Systems Policy (hereinafter the "Policy"). (R. at 3, Exhibit A.) The Policy sets forth guidelines for employee computer use and states that misuse of Distress' information systems may result in disciplinary action, including termination. (Exhibit A.)

Despite exhibiting motivational problems early in his career, Tekhead became an exemplary employee who was recommended by his supervisor for "Employee of the Month." (R. at 4.) In his final performance review, Tekhead was described as "professional" and "a great team player." (Exhibit B.) He displayed a professional attitude, worked efficiently and was recommended for "a new position with more responsibility." (Exhibit C.)

On June 13, 2002, one week prior to his final performance review, Tekhead was working diligently when he received an e-mail entitled "Documents for Review" that appeared to originate from a senior manager at Distress. (R. at 4.) Upon opening the e-mail, an image of nude

figures appeared on his screen and his computer warned "ALERT! STOP VIEWING PORN! CLOSE YOUR BROWSER IMMEDIATELY!" which was broadcast at maximum volume. (R. at 5.) The e-mail also included a hyperlink directing Tekhead to the Web site "webgags.com" (hereinafter "Webgags"). (R. at 7.) Hurriedly, Tekhead tried to close the e-mail as laughing co-workers began crowding around his computer to view the image. (R. at 5.) As the audible message kept repeating itself, a flustered Tekhead was met by his supervisor, who also attempted to shut down the garish display that was quickly causing a scene. (R. at 5.) Tekhead's supervisor's efforts also failed as the keyboard appeared to offer no remedy for the situation. (R. at 5.) In a last ditch effort to stop the calamity, Tekhead's supervisor yanked the computer cord from the outlet, causing the system to shut down immediately. (R. at 5.)

Angered over the disturbance, Tekhead's supervisor ordered him to leave for the day. (R. at 5.) The following afternoon, Distress' general counsel telephoned Tekhead and informed him that he had been terminated for willful violation of the Employee Handbook. (R. at 5.) Tekhead then filed suit against Distress for wrongful termination. (R. at 5.) It is widely known within Distress that there are strict company policies regarding Internet and e-mail use. (R. at 3, Exhibit A.) Employees may not send or receive personal e-mail, or otherwise use their computer in a loud or distracting manner. Tekhead understood and followed these policies.

Discovery for his wrongful termination action revealed that the offensive e-mail originated with Allan Dospam, a resident of the neighboring state of Potter and also the creator and operator of Webgags. (R. at 5 – 6.) Webgags is registered in the Cayman Islands and is hosted by a service in Monaco, which also provides e-mail service. (R. at 6.) Webgags is operated in this manner in order to avoid lawsuits. (R. at 6.)

Webgags provides subscribers with interactive humor through digital practical jokes that can be played on any unsuspecting person. (R. at 6.) The pranks include making a computer screen appear as if files are being deleted, playing loud noises, and playing distracting songs. (R. at 6.) To promote his Web site, Dospam utilizes "spiders" that search the World Wide Web looking for e-mail addresses located on Web sites. (R. at 7.) Dospam then targets these individuals and sends them unsolicited e-mails, often in the form of a "webgag." (R. at 7.) This is the type of e-mail that was targeted at Tekhead.

The promotional webgags include computer program that displays a nude image, increases the computer's speaker volume to its maximum, audibly warns the user to stop looking at pornography, and precludes any keyboard control. (R. at 8.) The program accesses and steals the contents of each recipient's e-mail address book, which are transmitted

to Dospam to generate new, unsuspecting individuals for the promotional campaign. (R. at 7.)

After Tekhead filed suit against Dospam for intrusion upon seclusion and publicly placing him in a false light, Dospam published the entire contents of Tekhead's address book on the webgags site. (R. at 7.) Dospam also posted a statement admonishing Tekhead for his lack of humor and encouraging viewers to "make him pay." (R. at 7 – 8.) Since the posting Tekhead has received numerous complaints from family and friends regarding a deluge of harassing "spam." (R. at 8.)

II. Summary of the Proceedings

Tekhead filed suit against Dospam in the Farbrook County Circuit Court alleging tortious intrusion upon seclusion and publicity placing him in a false light. Dospam filed a Motion for Summary Judgment as to both claims. (R. at 1.) Dospam also filed a Motion for Summary Judgment alleging that the State of Marshall did not have personal jurisdiction over him. (R. .at 1.)

The trial court denied Dospam's motion regarding personal jurisdiction and went on to consider his motion for summary judgment on the substantive claims. (R. at 1.) The court granted Dospam's Motion for Summary Judgment on the intrusion and false light claims. (R. at 1.) Tekhead appealed the judgment on the substantive claims and Dospam cross-appealed on the issue of personal jurisdiction. (R. at 1.)

The First District Court of Appeals affirmed the decision of the lower court on both the jurisdiction and substantive issues. (R. at 2.) Finding that there were no genuine issues of material fact the District Court affirmed the Circuit Court's decision that Dospam was entitled to judgment as a matter of law on both the intrusion and false light claims. (R. at 1 – 2.) This Court has granted Tekhead and Dospam leave to appeal to determine whether the First District Court of Appeals erroneously affirmed the decision of the Farbrook Circuit Court. (R. at 12.)

SUMMARY OF THE ARGUMENT

I. Jurisdiction

The lower courts correctly denied Dospam's Motion for Summary Judgment on the issue of personal jurisdiction because the record fails to demonstrate that Marshall's exercise of personal jurisdiction over Dospam is not authorized under Marshall's long-arm statute or that it does not comport with Fourteenth Amendment due process. Marshall's long-arm statute is coextensive with the Due Process Clause regarding non-resident defendants transacting business in this state, and Dospam's operation and promotion of Webgags is a "business" activity. The normal two-step jurisdictional inquiry therefore collapses into a single inquiry as

to whether Marshall's exercise of personal jurisdiction over Dospam comports with Fourteenth Amendment due process.

Marshall's exercise of personal jurisdiction over Dospam comports with Fourteenth Amendment due process because Dospam purposefully availed himself of Marshall, because Tekhead's invasion of privacy claims arose out of Dospam's contacts with Marshall, and because Marshall's exercise of jurisdiction is reasonable. Dospam purposefully availed himself of Marshall by purposefully directing his operation and promotion of Webgags toward Marshall. Further, Dospam's conduct caused harm, the brunt of which was suffered and which Dospam knew was likely to be suffered in Marshall. Tekhead's invasion of privacy claims arose out of Dospam's contacts with Marshall because Tekhead would not have been publicly been placed in a false light, nor would he have experienced any unauthorized intrusion upon his seclusion if not for Dospam's operation and promotion of Webgags. Moreover, Tekhead's claims bear a substantial connection to Dospam's operation and promotion of Webgags. Finally, Dospam failed demonstrate that Marhsall's exercise of jurisdiction would be unreasonable.

This Court should affirm the lower court's denial of Dospam's Motion for Summary Judgment on the issue of personal jurisdiction because Dospam purposefully availed himself of Marshall, Tekhead's claims arose out of Dospam's contacts with Marshall, and Marshall's exercise of jurisdiction over Dospam comports with the Due Process Clause.

II. Invasion of Privacy

The Court of Appeals erred in upholding the decision to grant Dospam's Motion for Summary Judgment on Tekhead's claim of intrusion upon seclusion and false light invasion of privacy. Genuine issues of material fact as to Tekhead's intrusion claim abound. Tekhead's use of a password protected e-mail account and his reliance upon Distress' Computer Policy, which implies a privacy expectation against third-parties, manifested a subjective expectation that the e-mail address book was private. Tekhead's expectation of privacy was objectively reasonable because e-mail is regarded as private and because it is analogous to telephone conversations and the U.S. Mail. Moreover, Distress's Computer Policy clearly contemplates an employee's expectation that e-mail accounts are private. Dospam's access and use of Tekhead's e-mail address book was a tortious intrusion upon Tekhead's right to seclusion because Dospam's conduct is legally recognized as an intrusion and because it was not authorized.

The Court of Appeals similarly erred in upholding the finding that there were no genuine issues of material fact as to Dospam's portrayal of Tekhead in a false light before the public. To sustain a false light claim,

fictitious circumstances must be represented to the public as being true. Dospam's e-mail made Tekhead appear to be viewing pornography on his office computer, when this is something he does not do. Even when it became clear that Tekhead was not viewing pornography, Tekhead was still depicted as engaging in disruptive and inefficient conduct, which is proscribed by Distress' Computer Policy. Both of these false depictions were reasonably understood by his employer to be the truth.

The publicity element of Tekhead's false light claim is established because a disclosure was made to a particular public with which Tekhead had a special relationship. Co-workers are considered to have a special relationship with one another because their knowledge of private facts may cause embarrassment and damage resulting from the dynamic and hierarchy of the workplace. The false portrayal of Tekhead as an inefficient and unprofessional employee caused him severe embarrassment and lasting damage, specifically the termination of his employment as a result of the incident. The number of individuals who witnessed the incident is irrelevant as their special relationship is dispositive of the publicity issue.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PERSONAL JURISDICTION OVER DOSPAM WAS PROPER BECAUSE THE EXERCISE OF SPECIFIC JURISDICTION COMPORTS WITH MARSHALL'S LONG ARM STATUTE AND STANDARDS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

This Court should affirm the denial of Dospam's Motion for Summary Judgment on the issue of personal jurisdiction because genuine issues of material fact exist as to whether Marshall may properly assert personal jurisdiction over Dospam. Dospam's Motion for Summary Judgment must be denied unless the record demonstrates the absence of any genuine issue of material fact as to whether Marshall may assert personal jurisdiction over Dospam and that Dospam is entitled to judgment as a matter of law. MARSHALL R. CIV. P. 56(C). Courts apply a two-step analysis for determining whether a state may properly exercise personal jurisdiction over a nonresident defendant. First, jurisdiction must be authorized by the forum State's long-arm statute. Second, jurisdiction must be consistent with the Due Process Clause of the Fourteenth Amendment. To prove that no genuine issues of material facts exist as to whether Marshall may assert jurisdiction over him, Dospam must demonstrate either that Marshall's exercise of personal jurisdiction is not authorized under Marshall's long-arm statute, or that it does not

comport with standards of due process under the Fourteenth Amendment. Dospam fails in both cases.

A. The State of Marshall Properly Asserted Personal Jurisdiction Over Dospam Under Its Long-Arm Statutes Because Tekhead's Claims Arose Out of Dospam's Business Activities in Marshall

Dospam failed to demonstrate that personal jurisdiction is not authorized under Marshall's long-arm statute. Marshall's long-arm statute provides, in pertinent part, that a State court "may exercise personal jurisdiction over a person . . . as to a cause of action or other matter arising from such person: (1) Transacting any business in this State . . . ." Marshall Revised Code, 735 MRC-302. Marshall courts have recognized that this provision renders the reach of the long-arm statute coextensive with that permitted by the Due Process Clause of the Fourteenth Amendment regarding nonresident defendants transacting business in this State. (R. at 8.)

Although Marshall's long-arm statute is coextensive with the Due Process Clause with respect to nonresident defendants transacting business in this state, issues of fact remain as to whether Dospam's operation and promotion of Webgags through targeted, unsolicited e-mails can be considered a "business" activity. As Marshall precedent is lacking as to the definition of "business" and other state and federal jurisdictions have focused on the issue of what it means to be "transacting business" with a particular forum State, rather than on "what is business," it is proper to rely on the plain meaning of the word "business." Business is defined as "a usually commercial or mercantile activity engaged in as a means of livelihood." *See*, Merriam-Webster Dictionary Online, *available at* http://www.m-w.com/cgi-bin/dictionary (accessed Aug. 29, 2003). A "commercial activity" is one that is viewed with regard to profit, designed for a large market, and/or supported by advertisers. *Id.* Although Dospam claims that Webgags has yet to turn a profit, he concedes that Webgags is operated as a commercial service and that the web site contains paid advertisements. (R. at 6.) Further, as a Web site posted on the World Wide Web, Webgags is clearly designed to reach a large market. It is unmistakable that Dospam's operation of Webgags constitutes a "business" activity. As the reach of Marshall's long-arm statute is coextensive with that permitted by the Due Process Clause regarding nonresident defendants transacting business in Marshall, the normal two-step jurisdictional inquiry collapses into a single-step due process inquiry. Consequently, the remaining elements of the long-arm statute, namely, whether the nature and extent of Dospam's business activity can be considered "transacting any business" in Marshall and whether Tekhead's

claims "arose out of" Dospam's transacting any business in Marshall so as to render him amenable to suit here, will be addressed under the rubric of a Fourteenth Amendment due process analysis.

B. Specific Personal Jurisdiction Over Dospam Comports With Standards of Due Process Because Dospam Purposefully Availed Himself of Marshall, Tekhead's Claim Arose Out of Dospam's Contacts With Marshall, and Jurisdiction Is Reasonable

Marshall may properly exercise personal jurisdiction over Dospam because the exercise of such jurisdiction comports with the Due Process requirements of the Fourteenth Amendment. Dospam's purposefully availed himself of the privilege of transacting business in Marshall through his operation of Webgags and his sending of promotional e-mail to Marshall residents. Dospam's forum-related conduct gave rise to Tekhead's invasion of privacy claims, and Dospam failed to prove that Marshall's exercise of jurisdiction would be unreasonable. Marshall's exercise of personal jurisdiction is therefore proper.

Marshall courts may assert personal jurisdiction over nonresident defendants transacting business in this State to the extent such jurisdiction comports with Fourteenth Amendment due process. Jurisdiction over a nonresident defendant comports with constitutional due process when a defendant has "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Intl. Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (*quoting*, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual . . . with which the state has no contacts, ties, or relations." *Intl. Shoe*, 326 U.S. at 319.

The application of the minimum contacts rule will vary based on the quality and nature of the defendant's contacts with the forum State, "but it is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The U.S. Supreme Court has repeatedly emphasized that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirements of contact with the forum State." *Id.; see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

For a state to assert jurisdiction over a nonresident defendant, due process requires something more than the defendant's awareness of his product's entry into the forum State through the stream of commerce. The act of placing a good into the stream of commerce does not become

"purposeful availment" simply because the defendant is conscious that the good may eventually end up in the forum State. *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.,* 480 U.S. 102, 112 (1987). Rather, the "'substantial' connection between the defendant and the forum State necessary for finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Courts in other jurisdictions have compared creating a Web site to placing a good into the stream of commerce, noting that merely creating and posting a Web site, without something more, is not an act purposefully directed toward the forum state. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (1996). The foreseeablity that the defendant's product may end up in the forum (and by analogy that the defendant's Web site may be viewed in the forum) alone is not sufficient to assert jurisdiction over a nonresident defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). Rather, "the foreseeability that is critical to due process is . . . the likelihood . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

Courts in Marshall and other jurisdictions apply a three-prong test to determine whether specific jurisdiction over a nonresident defendant is proper. *See e.g. Panavision Int'l., L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998); *Zippo Mfg Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997). First, the defendant must have purposefully availed himself of forum State benefits. That is, the nonresident defendant must have had sufficient minimum contacts with the forum State to justify the exercise of jurisdiction. Second, the claim asserted against the defendant must arise out of the defendant's forum-related contacts or activities.[1] Third, the exercise of jurisdiction by the forum State must comport with notions of fair play and substantial justice. That is, the assertion of jurisdiction must be reasonable. This Court should affirm the lower courts' denial of Dospam's Motion for Summary Judgment on the issue of personal jurisdiction because Dospam's operation and promotion of Webgags satisfies all three prongs of this test.

1. Courts recognize both general personal jurisdiction and specific personal jurisdiction. A state is said to assert "general" jurisdiction over the defendant when it exercises jurisdiction over a defendant on all clams against the defendant, whether or not such claims are related to the defendant's forum-related conduct. A state is said to assert "specific" jurisdiction when it exercises jurisdiction over a defendant only as regards claims "arising from" or "related to" the defendant's forum-related conduct. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L Rev. 1121, 1136-1163 (1966).

1. *Dospam purposefully availed himself of the privilege of transacting business in Marshall by operating and promoting "Webgags"*

The "constitutional touchstone" regarding the exercise of personal jurisdiction "remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp.*, 471 U.S. at 474. The purposeful availment prong "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person." *Id.* at 475. (*quoting Keeton v. Hustler Mag., Inc.* 465 U.S. 770, 774 (1984); *World-Wide Volkswagon,* 444 U.S. at 299; *Helicopteros Nacionales de Colombia*, 466 U.S. at 417). This requirement is satisfied when "the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction" based on such activities. *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 (1st Cir. 2001).

Through his operation and promotion of Webgags, Dospam purposefully availed himself of Marshall by purposefully directing his activities toward Marshall and toward Tekhead, a Marshall resident. In collecting Tekhead's e-mail address, Dospam accessed Distress' Web site, hosted on a server located in Marshall, through the use of "spider" software programs. (R. at 7.) Further, he sent the e-mail message that resulted in Tekhead's discharge directly to Tekhead at Tekhead's place of employment in Marshall. (R. at 4-5.) Dospam also utilized Distress' company computer server, located in Marshall, to deliver his targeted e-mail message straight to Tekhead's computer, also located in Marshall. (R. at 2, 4-5.) Dospam's e-mail temporarily "took over" Tekhead's computer. (R. at 7.) Moreover, a program attached to Dospam's e-mail infiltrated Tekhead's computer, located Tekhead's Microsoft Outlook address book and transmitted if from Marshall to the state of Potter. (R. at 7.) Finally, Dospam's e-mail solicited further contacts with Tekhead by displaying a hyperlink advertising the Webgags Web site and inviting Tekhead to "do business" with Dospam by visiting Webgags, a commercial Web site that generates revenue through paid advertisements. (R. at 7.) Based on these contacts, which were not random or fortuitous but were targeted and deliberate, Dospam purposefully availed himself of Marshall and thus knew or should have known that he would be subject to suit there.

a) Dospam's conduct satisfies the purposeful availment requirement under the Zippo test

While it is exceedingly clear that Dospam satisfied the purposeful availment requirement by directing his activities, that is, the operation and promotion of Webgags, toward Marshall, he also satisfied the pur-

poseful availment prong under the *Zippo* test.[2] The premise of the *Zippo* test is that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that the entity conducts over the Internet." *Zippo Mfg Co.*, 952 F. Supp. at 1124. *Zippo* envisions a "sliding scale" approach to Internet contacts:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents in a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site that is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. (citations omitted).

Dospam's operation and promotion of Webgags satisfies the *Zippo* test because Dospam clearly does business over the Internet. Webgags' business paradigm is to provide a free service ("digital practical jokes"), and then to generate revenue by advertising to those "customers" who either partake of Webgags' service or visit the Web site. Dospam's June 13, 2003 e-mail to Tekhead was effectively a "free sample" of his service as well as a solicitation to Tekhead to visit Webgags to do business. Because Dospam was doing business over the Internet with a Marshall resident, Marshall's assertion of personal jurisdiction over Dospam is proper.

Even if Dospam was not "doing business over the Internet" as contemplated by *Zippo*, Webgags occupies at least the middle ground of the *Zippo* spectrum. That is, Dospam clearly operates an interactive Web site. Webgags allows users to send computer "gags" to other individuals via e-mail. (R. at 6.) Users must exchange information with Webgags' host computer, including the address of the recipient and the type of gag

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2. According to Amanda Reid, federal courts of appeal have employed two primary tests for assessing personal jurisdiction in Internet-related cases, the *Zippo* test and the *Calder* effects test. Reid notes that out of fourteen cases between 1996 and 2002 involving personal jurisdiction based on Internet contacts, eight explicitly or implicitly used one of these two tests. The Fifth Circuit has expressly adopted the Zippo sliding scale test, while the Ninth Circuit has consistently applied the effects test. Amanda Reid, *Operationalizing the Law of Jurisdiction: Where in the World Can I Be Sued for Operating a World Wide Web Page?*, 8 Commun. L. & Pol'y 227, 240-41 (Spring 2003).

requested. (R. at 6.) Webgags also reaches out to potential customers by sending unsolicited targeted e-mails which direct the recipients to the Web site. (R. at 7.) "Traditionally when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper." *Zippo Mfg Co.*, 952 F. Supp. at 1124, *citing Burger King Corp.*, 471 U.S. at 475. Finally, Dospam admits that Webgags is a commercial venture and that Dospam is in business to make money. (R. at 6.) As Dospam operates a Web site that conducts business with Marshall residents, or at least is sufficiently interactive with forum residents and is commercial in nature, Dospam's Internet activity constitutes purposeful availment under the *Zippo* test.

Decisions in which courts have failed to find purposeful availment involve fact patterns that are very different from the instant case. In *Cybersell v. Cybersell*, 130 F.3d 414, 418-20 (9th Cir. 1997), the Ninth Circuit cited the *Zippo* test in holding that the defendant corporation, which offered Web page construction services over the Internet, did not purposefully avail itself of the forum state and thus was not subject to personal jurisdiction for the purpose of a trademark infringement action. In that case, the defendant conducted no commercial activity in the forum State, but merely posted a passive Web site using the name Cybersell, which the plaintiff was in process of registering as a federal trademark. *Id.* at 415, 419. Noting that the defendant had no sales in the forum and did nothing to encourage people in the forum to access its Web site, the court held that, without something more, a passive Internet advertisement alone is not sufficient to demonstrate purposeful availment. *Id.* at 419-20. *See also S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 541-42 (E.D. Pa. 1999) (holding that mere maintenance of Internet Web site does not create personal jurisdiction over a nonresident defendant consistent with due process where the plaintiff did not produce any evidence that the defendant actively sought out business in the forum through its Web site or any other means or that the Web site gave rise to significant levels of contact with forum users). In contrast, in the case at hand Dospam operated an interactive commercial Web site and directed an unsolicited promotional e-mail to Tekhead at his workplace in Marshall. This targeted e-mail contained a hyperlink inviting Tekhead to visit Dospam's Webgags Web site.

The instant case is more similar to *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), where the defendant posted a Web site promoting its upcoming Internet service. The promotions consisted of assigning personal e-mail boxes to users and then forwarding advertisements to those users that matched their interests. *Id.* at 1330. CyberGold planned to generate revenue by charging advertisers for the right to send advertisements to its users. *Id.* The issue was whether maintaining a Web site, which appeared to be maintained for the pur-

pose of and in anticipation of being accessed by all Internet users, including forum residents, amounted to active solicitation so as to demonstrate purposeful availment. *Id.* at 1332-33. The federal district court held that it did. *Id.* at 1333. Although CyberGold's service was not yet operational, CyberGold encouraged Internet users to add their addresses to its mailing list. *Id.* The court rejected CyberGold's contention that its Web site was passive, noting that CyberGold's conduct amounted to active solicitation for the purpose of developing a mailing list and that the CyberGold indiscriminately responded to every Internet user who accessed its site. *Id.* at 1333-34. *See also Nicosia v. DeRooy*, 72 F. Supp. 2d 1093, 1098-99 (N.D. Cal 1999) (noting that defendant's creation of a passive Web site by itself was not sufficient to subject her to jurisdiction in the forum, but that defendant's directing of e-mails to addresses in the forum inviting recipients to visit her Web site provided the "something more" necessary to demonstrate purposeful availment). Like CyberGold, Dospam sought to attract visitors to his Web site to generate advertising revenue. Dospam went further than CyberGold however, by actively targeting and soliciting customers, including Tekhead, a Marshall resident. As Dospam operated an interactive commercial Web site and actively solicited Marshall residents to visit his site, Dospam purposefully availed himself of Marshall.

b) Dospam's conduct constitutes purposeful availment under the Calder effects test

Even if this Court declines to adopt or apply the *Zippo* test, Dospam's tortious conduct satisfies the purposeful availment requirement under the *Calder* effects test. *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, a reporter in Florida for the National Enquirer, a national magazine, wrote a story about actress Shirley Jones, who lived and worked in California. *Id.* at 784-85. Jones sued the reporter and her editor for libel in California. *Id.* at 784. The Supreme Court held that California could assert jurisdiction over the nonresident defendants "based on the 'effects' of their Florida conduct in California," observing that jurisdiction was proper because the Florida defendants' intentional conduct in Florida was calculated to cause injury in California. *Id.* at 789, 791. The court noted that as the defendants knew that the brunt of the injury would be felt by plaintiff in California, they must reasonably have anticipated being haled into court in that jurisdiction. *Id.* at 789-90.

Under the resulting *Calder* effects test, personal jurisdiction can be based on (1) intentional actions, (2) expressly aimed at the forum State, (3) causing harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum State. *Panavision Int'l., L.P.*, 141 F.3d at 1321 (citing *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)); *see also Jewish Def. Org. v. Super. Ct. of L.A.*

County, 71 Cal. App. 4th 1045, 1057 (1999). In the Seventh Circuit, the state in which the injury occurred can always exercise jurisdiction over a nonresident defendant in the context of an intentional tort. *See, Pavlovich v. Super. Ct. of Santa Clara County*, 29 Cal. 4th 262, 270-72 (2002) (*citing*, *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997)). Other Circuits require intentional conduct expressly aimed at or targeting the forum State. *Pavlovich*, 29 Cal. 4th at 271.

Dospam's conduct satisfies the intent prong of the effects test. Dospam's sending of the June 13, 2002 e-mail that resulted in Tekhead's discharge was clearly intentional. Sending unsolicited e-mail pranks was a part of Dospam's strategy for promoting and drawing visitors to the Webgags Web site so that Dospam could attract paid advertisers. (R. at 7.) The specific contents of the e-mail were also intentional as the subject line deceptively stated that the e-mail contained "Documents for Review." (R. at 4.) In reality, the e-mail contained a program that took control of Tekhead's computer and engaged in a series of well planned and coordinated actions intended to shock, embarrass and frustrate the recipient as well as pilfer e-mail addresses to target in the future. (R. at 5.) As both the sending and the content of the e-mail were intentional, Dospam's conduct meets the first prong of the effects test.

Dospam's conduct also satisfies the requirement that the defendant's conduct be "expressly aimed" at the forum State. Dospam's conduct was in no way random. Rather, Dospam systemically targeted Dospam and others to receive e-mail promotions. Dospam employed software to trawl the World Wide Web searching for e-mail addresses. (R. at 7.) Once he located such addresses, he "targeted' their owners with unsolicited promotional e-mail messages. (R. at 7.) Dospam made no attempt to avoid collecting e-mail addresses registered or hosted in the State of Marshall. In fact, the Record refers to the recipients of his e-mails as "targets" and "target computers." (R. at 7.)

More importantly, Dospam expressly aimed his June 13, 2002 e-mail at Tekhead, a forum resident. Dospam inserted Tekhead's e-mail address as the e-mail's destination knowing that it would be routed through Distress' e-mail server, located in Marshall, and then onto Tekhead's computer, also located in Marshall. That Dospam's e-mail was aimed at Tekhead, or at least another employee of Distress, is confirmed by the fact that the e-mail identified a member of Distress' senior management as its sender. (R. at 4.) Dospam knew that by identifying the sender in such a way, Tekhead or another Distress employee would likely open the e-mail. Even assuming, *arguendo*, that Dospam himself did not "send the e-mail" because it originated at Webgags' e-mail server in Monaco or that the e-mail was routed through a third-party server in Korea, Dospam clearly caused the e-mail message to be delivered and therefore remains responsible. Because Dospam's e-mail was expressly

aimed at Tekhead, a Marshall resident, Dospam's conduct satisfies the second prong of the effects test.

Finally, Dospam's conduct satisfies the "harm" prong of the effects test. Dospam sent an e-mail message designed to shock and embarrass Tekhead caused harm in Marshall, and Dospam knew or should have known that this conduct was likely to have its planned effect. Dospam's e-mail caused tremendous harm to Tekhead by intruding upon his seclusion and generating publicity placing Tekhead in a false light, which ultimately resulted in his discharge from Distress. Dospam also knew or should have known that his conduct would cause harm in Marshall. Dospam knew that his e-mail would cause a disturbance because the promotional e-mail was created specifically for that purpose. He also knew that viewing and/or listening to obscene and/or offensive materials on work computers would likely get an employee in trouble. In fact, Dospam admits that he registered and arranged to have Webgags hosted in Grand Cayman and Monaco, respectively, to avoid lawsuits. (R. at 6.) The fact that Dospam contemplated that he might get sued for his conduct strongly indicates that he knew or at least suspected that his Internet activities could cause harm and lead to litigation. Dospam sent an e-mail message to Tekhead, a Marshall resident, at his place of employment in Marshall and caused harm in Marshall. Dospam knew or should have know that such harm would occur. As Dospam's conduct satisfies the third and final prong of the effects test Dospam purposefully availed himself of Marshall.

In *Jewish Defense Organization,* the plaintiff brought a defamation action against an organization and its founder based on statements about the plaintiff posted on organization's New York-based Web site. 72 Cal. App. 4th at 1051-52. The court held that the effects test was not satisfied where the plaintiff, who was not a forum resident and did not prove that he had any clients in the forum or that the alleged defamatory statements would impact a business interest or reputation in the forum, failed to establish that it was foreseeable that a risk of injury would arise in the forum state. *Id.* at 1059. Moreover, in *Pavlovich v. Super. Ct. of Santa Clara*, defendant Pavlovich operated a passive Web site that posted the source code of a program allowing users to decrypt data contained on DVDs. 29 Cal. 4th at 267. DVD CCA, a California resident, sued Pavlovich, alleging that he misappropriated DVD CCA's trade secrets by posting the decrypting program. *Id.* Pavlovich, a Texas resident, moved to quash service, arguing that California lacked jurisdiction over his person. *Id.* The California Supreme Court observed that DVD CCA's assertion that Pavlovich knew or should have known that his intentional acts would cause harm certain industries in the forum state was not sufficient to establish jurisdiction under the effects test. *Id.* at 270-271. Rather, in order to satisfy the effects test, DVD CCA had to

show that the Pavlovich expressly aimed his tortious conduct at the forum, which it failed to do. *Id.* at 273. The present case can be distinguished from both of the above cases because Dospam intentionally directed his activities towards Marshall and knew or should have known that his conduct would cause harm there.

The instant case is more similar to *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154 (C.D. Cal. 2000), where the plaintiff sued for trademark infringement. *Id.* at 1157. The district court held that the fact that the defendant derived advertising revenue by intentionally exploiting consumer confusion over its name supplied the "something more" necessary to demonstrate that that the defendant deliberately directed its activity toward the forum state. *Id.* at 1160. Further, the defendant should have known that the brunt of harm would be suffered in the forum state because that was where the plaintiff is based. *Id.* Similarly, Dospam should have known that the brunt of his conduct would be felt in Marshall because he directed his June 13, 2002 e-mail at Tekhead, a Marshall resident, at Distress, a Marshall-based company.

2. *Tekhead's false light and intrusion claims arose out of Dospam's transacting business in Marshall*

The record clearly demonstrates that Tekhead's claims for invasion of privacy arose out Dospam's operation and promotion of his Webgags Web site. The Supreme Court of the United States observed in *Helicopteros Nacionales de Colombia* that when a claim arises out of a defendant's contacts with the forum State, "a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of personal jurisdiction." 466 U.S. at 414 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The law in Marshall is not well-settled as to the appropriate test for determining whether a particular claim arose out of a defendant's forum-related activities. Further, the Supreme Court of the United States "has not provided precise criteria regarding the particular issue . . . [of] the necessary relationship between the plaintiff's cause of action and the defendant's contacts in the forum." *Vons Co., Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 453 (1996).

The trend in most jurisdictions is that specific personal jurisdiction is appropriate so long as a claim bears a substantial connection to the defendant's forum-related contacts. *See id.* at 452 ("[A]s long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate."); *Third Nat. Bank in Nashville v. Wedge Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (noting that specific jurisdiction requires only "that the cause of action, of whatever type, have a substantial connection with the defendant's in-

state activities . . . only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact]."); *Akro Corp v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (noting that the "arising out of" standard is flexible and does require that the claim arise out of the defendant's forum-related contacts in a strict sense); *see also, In re Oil Spill by Amoco Cadiz*, 699 F.2d 909 (7th Cir. 1983); *Vermeulen v. Renault, USA, Inc.*, 985 F.2d 1534 (11th Cir. 1992).

Federal Courts in other jurisdictions, including California, employ an even less stringent "but for" standard for determining whether the "arising out of" requirement is satisfied. *See e.g. Panavision Int'l.*, 141 F.3d at 1322; *Nissan Motor Co.*, 89 F. Supp. 2d at 1160; *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764 (D. Kan. 1981). This standard is satisfied if "but for" the defendant's forum-related conduct the plaintiff would not have been injured. In *Shute v. Carnival Cruise Lines*, the Ninth Circuit noted that a "but for" test is appropriate because it maintains the distinction between general and specific jurisdiction while preserving the requirement that there be some nexus between the claim and the defendant's forum activities. 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

This Court should follow trends in other jurisdictions by holding that Tekhead's claims need not arise directly from Dospam's forum contacts to be sufficiently related as to warrant the exercise of specific jurisdiction. Presuming that this State adopts a "but for" test, the issue here is whether Tekhead's claims against Dospam would have arisen "but for" Dospam's forum-related conduct of sending an unsolicited prank e-mail to Tekhead. It is incontrovertible that if not for Dospam's e-mail, Tekhead would not have appeared to have violated Distress' Employee Handbook by using his computer for personal business or viewing pornography on his computer and that Tekhead would not have been discharged. Further, were it not for Dospam's e-mail the unauthorized intrusion into Tekhead's workplace environment or his Microsoft Outlook address book would not have occurred.

Even if this Court were to adopt a more stringent "substantial connection" test, it is still evident that the nexus between Dospam's conduct and Tekhead's claims was sufficiently substantial to comport with due process requirements. Dospam's conduct was more than substantially-related to Tekhead's injury and subsequent claims. It was integrally-related to those claims. Before receiving Dospam's June 13, 2002 e-mail Tekhead was considered an "exemplary employee." (R. at 4.) He had received a favorable performance evaluation and had recently been recommended for Distress' Employee of the Month award. (R. at 4.) Tekhead had never violated, nor was he suspected of violating, Distress' Computer Policy before receiving Dospam's e-mail. Dospam's e-mail

made it appear that Tekhead was using his work computer for personal business and that he was using it to view pornography. Both activities, if true, would have been violations of Distress' Employee Handbook. (R. at 3.) Distress discharged Tekhead because of Tekhead's apparent violation of its Employee Handbook. (R. at 5.) The e-mail was integrally-related to Distress' decision to discharge Tekhead because Dospam's unsolicited e-mail, which caused a disturbance, was the one and only source for Distress' belief that Tekhead had violated its Employee Handbook. Because a substantial connection exists between Dospam's forum-related conduct, his directing a "gag" promotional e-mail toward Tekhead, and Tekhead's injury, Tekhead's claim must be considered to have "arisen out of" Dospam's contacts with the forum.

3. *The exercise of personal jurisdiction is reasonable because it comports with notions of fair play and substantial justice*

Dospam has not demonstrated that Marshall's exercise of personal jurisdiction over him would be unreasonable. Requiring defendants to have minimum contacts with the forum State protects defendants from the burden of having to litigate in a distant or inconvenient forum. *World-Wide Volkswagen*, 444 U.S. at 291. "[This] protection against inconvenient litigation is typically described in terms of 'reasonableness.' The relationship between a forum State and a defendant must be such that it is reasonable to require the defendant to defend a particular suit where it is brought." *Id.* at 292. Once a court establishes that a defendant has purposefully availed himself of the forum, the defendant's "contacts [with the forum State] may be considered in light of other factors to determine whether the assertion of jurisdiction would comport with 'fair play and substantial justice.' Minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction." *Burger King Corp.*, 471 U.S. at 476-78. To defeat jurisdiction, a defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* In considering whether jurisdiction comports with notions of fair play and substantial justice and, thus, is reasonable, courts typically weigh five factors:

> (1) The burden on the defendant of defending his suit in the forum State;
>
> (2) The interests of the forum State in adjudicating the dispute;
>
> (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 controversies; and
>
> (5) The shared interests of the several States in furthering fundamental substantive social policies.

Asahi Metal Indus., 480 U.S. at 113.

Based on undisputed facts in the record, Dospam has not met his burden of demonstrating that Marshall's exercise of jurisdiction offends due process. None of the five factors weigh strongly in Dospam's favor. On the contrary, the factors indicate that it is not unreasonable to require Dospam to defend his suit in Marshall. With respect to factor one, requiring Dospam to litigate in Marshall would not "make litigation 'so gravely difficult and inconvenient'" so as to place Dospam "unfairly . . . at a 'severe disadvantage' in comparison to his opponent." *Burger King Corp.*, 471 U.S. at 478. Dospam grew up in Marshall and currently resides in the neighboring State of Potter. Considering advances in telecommunications and transportation, Dospam's burden of litigating in Marshall, while not insignificant, is certainly not so onerous as to be unreasonable. As for factor two, Marshall has a strong interest in providing its citizens with a convenient and effective means of redress for tortious conduct committed by nonresident. Regarding factor three, Tekhead's interest in obtaining convenient and effective relief should be afforded substantial weight. As a result of Dospam's contacts with Marshall, Tekhead was discharged by Distress, his former employer. Fairness dictates that Tekhead, now unemployed, should not be forced to bear the burden of litigating in a foreign jurisdiction. Balancing Dospam's burden in defending in Marshall versus Tekhead's interest in relief, it is clear that Tekhead, as the injured party, should not have to endure further inconvenience to his life in order to receive redress.

Factor four, the interstate judicial system's interest in efficiency, is fairly neutral. Witnesses are located in both Marshall and Potter, while physical evidence and records are located in these two states and in Monaco where Webgags' Web site and e-mail service are hosted. Distress's retention of electronic evidence tips the balance slightly in favor of Marshall. Conversely, litigating in Potter offers no compelling advantages in terms of judicial efficiency. Finally, regarding factor five, the shared interests of the several States will be best served by allowing Marshall to assert jurisdiction over Dospam. That is, states have a strong policy interest in working together to prevent persons committing tortious conduct over the Internet from hiding behind jurisdictional lines based on the erroneous concept that conduct over the Internet is somehow "different" and normal rules regarding jurisdiction do not apply.

Based on these five factors, Dospam has not presented a "compelling case" that Marshall's exercise of jurisdiction would be unreasonable. Thus, as Dospam purposefully availed himself of the State of Marshall and Tekhead's claims arose out of Dospam's contacts with the State of Marshall, Marshall's exercise of jurisdiction over Dospam comports with the Due Process Clause.

"[T]he so-called Internet revolution has spawned a host of new legal issues as courts have struggled to apply traditional legal frameworks to this new communications medium." *Pavlovich*, 29 Cal. 4th at 266. Even in the Internet age, however, the fact remains that a state generally has a "manifest interest in providing effective means of redress for its residents." *McGee v. Int'l. Life Ins. Co.*, 355 U.S. 220, 223 (1957). The undisputed facts in the instant case demonstrate that a genuine issue of material fact exists as to whether Marshall may properly exercise personal jurisdiction over Dospam. In denying Dospam's motion for summary judgment as to this issue, the lower courts applied well-settled rules governing jurisdiction over nonresident defendants and also followed emerging trends as regards the application of traditional personal jurisdiction doctrines to Internet-specific cases. This Court should apply the same tests as the lower courts in denying Dospam's motion for summary judgment as to the issue of personal jurisdiction.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION THAT TEKHEAD FAILED TO ESTABLISH A CAUSE OF ACTION FOR TORTIOUS INTRUSION UPON SECLUSION AND PUBLICITY IN A FALSE LIGHT

The Court of Appeals improperly upheld summary judgment for Dospam on Tekhead's claims of intrusion upon seclusion ("intrusion") and false light invasion of privacy ("false light"). By adopting The RESTATEMENT (SECOND) OF TORTS the Marshall courts recognized that an unreasonable intrusion upon his seclusion or the public portrayal of a person in an offensive manner violates a person's right to privacy. *See* RESTATEMENT (SECOND) OF TORTS §§652B, 652D (1977). Tekhead's privacy rights were violated when Dospam tortiously induced him to open an e-mail that displayed offensive images, played an offensive audio stream, and accessed and absconded with the contents of his password protected e-mail address book.

Tekhead should succeed on his intrusion claim because Dospam invaded his private affairs without authorization in a manner that would be offensive to a reasonable person, and which caused Tekhead pain and suffering. RESTATEMENT (SECOND) OF TORTS §652B. The parties agree that Dospam's unauthorized access of Tekhead's e-mail address book was offensive to a reasonable person and that it caused pain and suffering. The appellate court erred however, in finding that the unauthorized access of Tekhead's address book was not an intrusion and that the information in it was not private.

To succeed on the false light claim Tekhead must demonstrate that Dospam was reckless in inaccurately portraying him in a manner that would be offensive to a reasonable person in his situation. RESTATEMENT

(SECOND) OF TORTS §652E; *see also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, §117 at 863 (5th ed. 1984). As the parties stipulated that the false light was offensive to a reasonable person and that Dospam acted with actual malice, this Court must rule only on the appellate court's erroneous finding that the wrongful portrayal of Tekhead was not public.

A. DOSPAM INVADED TEKHEAD'S PRIVACY RIGHTS BY HIS UNAUTHORIZED ACCESS AND USE OF THE PRIVATE CONTENTS OF TEKHEAD'S E-MAIL ADDRESS BOOK.

To succeed on his intrusion claim Tekhead must demonstrate that Dospam's access and use of his e-mail address book was an unauthorized intrusion upon his seclusion, that the intrusion was offensive to a reasonable person, that the contents of the e-mail address book were private, and that the intrusion caused anguish and suffering. (R. at 10); *see also* RESTATEMENT (SECOND) OF TORTS §652B. The parties stipulated at trial that the intrusion was offensive to a reasonable person and that it caused anguish and suffering. (R. at 10.) Accordingly, this Court must rule on the appellate court's improper decision that Dospam's unauthorized access and use of Tekhead's e-mail address book was not intrusive and that its contents were not private with respect to individuals not employed by Distress Technologies. (R. at 10.)

This Court should remand the appellate court's improper finding that Dospam's unauthorized access and use of Tekhead's e-mail address book was not a tortious invasion of his privacy. Tekhead had both a subjective and objective expectation that his e-mail address book would not be accessed by non-Distress employees. By tortiously inducing Tekhead to open an offensive e-mail, and by appropriating the contents of his e-mail address book, Dospam violated Tekhead's "right to be let alone" which is recognized by the Supreme Court of the United States as a fundamental freedom. *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting); *see also, Griswold v. Conn.*, 381 U.S. 479, 486 (1965). The appellate court erred in granting Dospam's Motion for Summary Judgment on the intrusion claim because Tekhead's e-mail address book is subjectively and objectively private, and because Dospam's violation of that privacy is a tortious intrusion upon his seclusion.

1. *The contents of Tekhead's e-mail address book, containing personal and business contacts, were private*

Tekhead may establish that his e-mail address book was private by demonstrating an actual, subjective expectation that its contents were private and that this expectation is objectively reasonable. *Medical Lab. Mgmt. Consultants v. Am. Broad. Co.*, 306 F.3d 806, 813 (9th Cir. 2002);

see also Sanders v. Am. Broad. Cos., 978 P.2d 67, 71 (Cal. 1999), *People for the Ethical Treatment of Animals (PETA) v. Berosini, Ltd.*, 895 P.2d 1269, 1279 (Nev. 1995). Tekhead's use of a password to protect his account and his reliance upon Distress' Computer Policy manifest his subjective expectation that his e-mail address book would not be accessed by non-Distress employees. Similarly, Tekhead's reliance on Distress' Computer Policy demonstrates that his expectation of privacy is objectively reasonable. Courts have held that a reasonable expectation of privacy exists in e-mail accounts. Additionally, the privacy of e-mail is objectively reasonable because it lies at the technological nexus of the telephone and the U.S. mail, both of which are Constitutionally protected.

a) Tekhead had a subjective expectation that his e-mail address book was private because his account was password protected and he relied upon Distress' Computer Policy

By using a password to protect the contents of his e-mail address book Tekhead manifested a subjective expectation that the contents of the account were private. In *Med. Lab. Mgmt. Consultants v. Am. Broad. Co.*, 306 F.2d 806, 813 (9th Cir. 2002), the Ninth Circuit Federal Court of Appeals held that a subjective expectation of privacy may be demonstrated by "any outward manifestations that [Petitioner] expected [the matter] to be private." A subjective expectation of privacy is demonstrated by comparing the actual precautions Tekhead took to safeguard this information with the precautions he might reasonably have taken to protect the privacy of that information. *Id.*; *see also Dow Chem. Co. v. U.S.*, 749 F.2d 307, 312-13 (6th Cir. 1984). Tekhead demonstrated a subjective expectation that his e-mail address book was private by using a password to protect his e-mail account.

Tekhead's use of a password to protect his e-mail address book account manifests his subjective expectation that the contents of his e-mail address book were private. The Computer Policy signed by Tekhead states that e-mail accounts are password protected to guard Distress' proprietary information against unauthorized access. (Exhibit A.) By signing the Computer Policy Tekhead agreed to use the password protection, and used a password each time he accessed his account. There is no other, more reasonable method of protecting this information, particularly in light of Distress' Computer Policy. Tekhead therefore manifested his subjective expectation that the contents of this e-mail address book were private by using a password protected system.

The Computer Policy implies that, while Distress may access the contents on Tekhead's account, Tekhead maintained a reasonable expectation that his privacy would not be invaded by third parties. While the Policy states that "Employees should not expect privacy in using the

Company's electronic information systems," this provision applies only to privacy violations by a Distress employee. Tekhead expected that his communications would be monitored by Distress employees. He only consented however, to Distress monitoring his account, and therefore retained a subjective expectation that the contents of his e-mail address book would not be susceptible to intrusion by a third party. Moreover, because Distress monitors its information systems so closely, Tekhead was reasonably certain that he would not be opening offensive and inappropriate e-mail because he assumed that Distress was screening incoming correspondence. Tekhead manifested a subjective expectation that the contents of his e-mail address book would not be accessed because he employed a reasonable method of protecting his confidential information and adhered to Distress' Computer Policy.

b) Tekhead's belief that his e-mail address book was private is objectively reasonable

In the information age where telecommunications abound it is objectively reasonable to expect that e-mail communications are private. *See e.g. U.S. v. Maxwell*, 42 M.J. 568, 575 (A.F. Ct. Crim. App. 1995). As Justice Brandeis noted in *Olmstead v. United States*, "Clauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to the changing world." 277 U.S. at 472. Tekhead's expectation that the contents of his e-mail address book would remain private is objectively reasonable because e-mail lies at the nexus of two constitutionally protected means of communication, the telephone and ordinary mail. Courts recognize that privacy rights extend to ordinary mail, *Birnbaum v. United States*, 436 F. Supp. 967 (E.D.N.Y. 1977); *see also Vernars v. Young*, 539 F.2d 966 (3rd Cir. 1976), and to telephone conversations. *See e.g. Fowler v. S. Bell Tel. Co.*, 343 F.2d 150 (5th Cir. 1965). It is therefore reasonable to expect that privacy extends to e-mail, which is simply a blend of the telephone and ordinary mail. Moreover, as Distress' Computer Policy clearly states that Distress is protecting its electronic privacy, Tekhead's expectation that the contents of his e-mail address book were private was objectively reasonable.

Courts have clearly stated that the US Mail and telephone conversations are private. In *Birnbaum* the court recognized that the unauthorized opening of mail is actionable as an intrusion upon seclusion. Similarly, in *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973), the Texas Supreme Court found that wiretapping was an actionable invasion of privacy. The court noted that "tapping of telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping was . . . recognized [as] 'an ancient practice which at common law was condemned as a nuisance." *Id.* at 860. Privacy rights were thus extended from eavesdropping to tapping telephone wires be-

cause "the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need for privacy." *Id.* Both wiretapping and the unauthorized opening of mail are actionable as an invasion of privacy. Analogously, Dospam's unauthorized access of Tekhead's e-mail address book is similarly actionable as an intrusion upon Tekhead's seclusion.

E-mail, which is a technological blend of the telephone and letters, has been explicitly recognized as private. In *United States v. Maxwell*, 42 M.J. 568 (A.F. Ct. Crim. App. 1995), the Air Force Court of Criminal Appeals found that there was an objectively reasonable expectation that messages stored in computers, and specifically in e-mail transmitted over America Online, were private. The court noted, "[i]n the modern age of communications, society must recognize such expectations of privacy as reasonable." *Id.* The court also stated that recognition of e-mail as private is implicit in the Electronic Communications Privacy Act. *Id., citing,* 18 U.S.C. §2210 *et seq.* E-mail was also recognized as private in *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914 (W.D.Wis. 2002), where the court found that summary judgment was improperly granted in an intrusion claim for the unauthorized access of an e-mail account.

Some cases explicitly recognize e-mail as private while others draw an analogy to the telephone or mail. It is clear however, that courts recognize that technological advancements require e-mail communications to be protected as private. Tekhead's expectation that his e-mail address book would be private is therefore recognized under the law as objectively reasonable.

Distress' Computer Policy similarly demonstrates that Tekhead could reasonably expect that his e-mail address book would not be accessed by unauthorized personnel. Distress recognized that an expectation that e-mail is private is objectively reasonable by providing that "Employees should not expect privacy in using the Company's electronic information systems." (Exhibit A.) By signing the Computer Policy Tekhead waived his privacy rights only with respect to Distress. He retained a privacy interest in the contents of his e-mail account with respect to anyone not employed by Distress, and specifically with respect to Dospam. The terms of the Policy clearly indicate that Distress recognized that Tekhead's expectation of privacy as objectively reasonable.

2. *Dospam's unauthorized access of Tekhead's e-mail account was intrusive*

Dospam's access and use of Tekhead's e-mail address book was unauthorized, nonconsensual and offensive, which shows that it was

wrongful, unwanted, and legally cognizable as an intrusion. The parties stipulated that Dospam's "intrusion" was offensive to a reasonable person and that it caused anguish and suffering. (R. at 10.) Dospam's conduct was obviously an intrusion because the court repeatedly referred to it as such. Alternatively, the conduct is intrusive because it is unauthorized, and therefore unwanted. Dospam's conduct was clearly an intrusion because the appellate court described it as such and because it was unauthorized.

The appellate Court's repeated reference to Dospam's conduct as an "intrusion" establishes to a legal certainty that the conduct was in fact intrusive. The court stated that "Dospam's *intrusion* into Tekhead's workplace environment (i.e., his computer) and his Microsoft Outlook address book was unauthorized." (R. at 10) (emphasis added). It is therefore apparent on the face of the opinion that Dospam's conduct was an intrusion. While the Court goes on to state that one of the issues is "whether the alleged conduct constitutes an unauthorized intrusion or prying into Tekhead's seclusion" it is clear from the record that the Court already found that the conduct was an intrusion.

Alternatively, Dospam's access of Tekhead's e-mail address book was an intrusion simply because it was unauthorized and unwanted. In *Hill v. MCI Worldcom Comm., Inc.*, 141 F. Supp. 2d 1205, (S.D. Iowa 2001), the court defined the term "intrude" as "to thrust oneself in without invitation, permission, or welcome." *Citing*, *O'Donnell v. U.S.*, 891 F.2d 1079, 1083 (3d Cir. 1989) (citing Webster's Third New International Dictionary 1187, (1996)). An "intrusion" is similarly defined as "the act of 'wrongfully entering upon, seizing, or taking possession of the property of another . . . and occurs 'when an actor 'believes or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act.'" *Id.* at 1209. Dospam's conduct was an intrusion under these definitions because it was a wrongful and unauthorized entry into Tekhead's private life. Tekhead did not give Dospam permission to access and abscond with the contents of his e-mail address book. Moreover, Dospam knew or should have known that he did not have permission to enter Tekhead's password protected e-mail account. Dospam clearly intruded upon Tekhead's seclusion by accessing and using Tekhead's e-mail address book because the court recognized this conduct as an intrusion and because it was done without Tekhead's authorization.

Dospam invaded Tekhead's privacy by accessing and using the contents of his e-mail address book because its contents were private and because the access of the e-mail address book was intrusive. Tekhead manifested a subjective expectation that the contents of his e-mail address book were private because he used a password to protect the account and because he relied on Distress' Computer Policy. Tekhead's

expectation that his e-mail address book was private was objectively reasonable because e-mail is recognized as private, and because it is analogous to telephone communication and the U.S. Mail, which are also recognized as private. Dospam invaded this private space by accessing and using the contents of Tekhead's e-mail address book because the conduct was intrusive and not authorized. It is therefore clear that the appellate court improperly granted Dospam's Motion for Summary Judgment because genuine issues of material fact remain as to Tekhead's intrusion claim.

B. Dospam Publicly Placed Tekhead in a False Light by Tortiously Inducing Him to Open an Offensive and Disruptive E-mail in the Presence of His Co-workers

The District Court's decision should be reversed because there is evidence demonstrating that Tekhead was placed in a false light before the public. The State of Marshall adheres to the Restatement (Second) of Torts in its analysis of a false light privacy tort, which requires that Tekhead demonstrate that he was placed in a false light before the public that would be highly offensive to a reasonable person, and that Dospam acted with actual malice in placing Tekhead in this light. *See* Restatement (Second) of Torts §652E. The parties have stipulated that the latter two elements are not in dispute, so the remaining issue is whether Tekhead was placed in a false light before the public.

1. *Dospam placed Tekhead in a false light by tricking him into opening the Webgags e-mail*

The tort of false light invasion of privacy requires a "public disclosure of falsity or fiction concerning the plaintiff." *Hoskins v. Howard,* 971 P.2d 1135, 1140 (Idaho 1998). Without material falsehood there can be no recovery. *Id.* Dospam's e-mail disclosed a falsity about Tekhead by publicly warning the recipient to stop viewing pornography, which give the impression to all within earshot that Tekhead was viewing pornography at his desk or that he was misusing his computer by indulging in a personal e-mail joke. Neither of these situations is true. On the contrary, Tekhead does not view pornography on his computer and he only opened Dospam's e-mail because it appeared to contain legitimate business information originating from a high-ranking Distress employee.

To constitute a false light invasion of privacy a statement must be false, and must also be a fictionalization of events or circumstances that are represented to be true. *See Davis v. High Socy. Mag.,* 457 N.Y.S. 2d 308, 315 (Sup. Ct. 1982). A plaintiff's claim will be barred only if the statements at issue "[cannot reasonably] be understood as describing actual facts about a plaintiff or actual events in which he has participated."

Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982). In *Dworkin v. Hustler Magazine,* 668 F. Supp. 1408 (C.D. Cal. 1987), the court addressed this issue in dismissing a claim for false light. In that case, feminist Andrea Dworkin was named by Hustler Magazine in sexually graphic cartoons. The court dismissed the action however, because while the depictions of Dworkin were certainly false, they were not represented to be true. The court stated that, "no reasonable reader would interpret these exhibits as expressing statements of fact." *Id. at* 1420.

Tekhead's claim sharply contrasts with the claim in *Dworkin* because the e-mail's warning and disruptive nature could be reasonably understood as depicting actual facts. It would be reasonable for any of Tekehad's co-workers or superiors to believe that he was viewing pornography on his computer. Further, once it was discovered that the e-mail was a joke, Tekhead's superiors could reasonably perceive the incident as a voluntary prank in which Tekhead intended to engage. While the viewers of the graphic cartoons in *Dworkin* could quickly ascertain the cartoon's satirical nature, Tekhead's co-workers would be justified in believing the incident to be actual fact.

While many false light claims involve a published statement by one person about another, written disclosure is not the only means to satisfy a false light claim. In *Santiesteban v. Goodyear Tire and Rubber Co.,* 306 F.2d 9 (5th Cir. 1962), the court held that a "publication" of an implied incorrect representation would support an invasion of privacy claim. In that case, all four tires were removed from plaintiff's vehicle while it sat in the parking lot of the country club where he was employed. *Id.* at 10. The car was left standing on its four rims in plain view of fellow employees and country club members. *Id.* While there were no statements regarding the incident, the action incorrectly and tortiously implied that the plaintiff was delinquent in his payments on the tires. *Id.*

As in *Santiesteban*, there were no direct statements made about Tekhead, but the e-mail very clearly implied certain facts about Tekhead. Everyone who witnessed the incident could reasonably infer that Tekhead was violating Distress' Computer Policy, when in fact he was the victim of a cruel joke. As a result of this implication, a false representation was made of Tekhead's character and behavior.

The appellate court incorrectly found that genuine issues of material fact exist as to whether Tekhead was placed in a false light. Dospam's e-mail caused a disturbance that ultimately led to Tekhead's dismissal. A reasonable person can conclude that the inaccurate portrayal of Tekhead as one who engages in inappropriate activities at the office was understood by his co-workers and superiors to be true. This inaccurate portrayal of Tekhead is actionable in the the State of Marshall as a claim for false light.

2. *Tekhead's co-workers constitute the public because of their special relationship with Tekhead*

The appellate incorrectly found an absence of genuine issue of material with respect to the publicity element of the false light claim. By relying upon an antiquated definition about what is "public" the court erroneously found that Tekhead was not tortiously placed in a false light before the public.

It is undisputed that the publicity requirement is satisfied when a disclosure of false facts is made to the public at large, or to so many people that the matter must be regarded as substantially certain to become one of public knowledge. *Alexander v. Culp*, 705 N.E.2d 378 (Ohio App. 1997). Courts however, have become increasingly willing to consider disclosure to smaller groups as a basis for a false light claim. The determining factor has been the degree of damage suffered by the plaintiff. For instance, in *Biedermans' of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959), a husband and wife were forced to seek employment elsewhere as a result of an embarrassing altercation that took place at the wife's place of work. The couple was accused of being "deadbeats" by a collection agent in a "loud, degrading and threatening manner." *Id.* at 892. The accusation took place at the wife's waitressing job in the presence of numerous restaurant patrons. *Id.* While the analysis focused on whether the publication was oral, the publicity element was satisfied due to the emotional distress and the widespread and lasting damage caused by disclosure to the restaurant patrons. *Id.* at 896.

The idea that the severity of damage has an effect on the publicity element has led to a widely accepted rule concerning the extent of publicity required for invasion of privacy claims. This rule creates a distinction between public and private figures in terms of what constitutes "the public."

> Such a public might be the general public, if the person were a public figure, *or a particular public such as fellow employees,* club members, church members, family or neighbors, if the person were not a public figure.

Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977) (emphasis added). This language was relied upon in *McSurely v. McClelland,* 753 F.2d 88 (D.C. Cir. 1985), as the court considered a long line of precedent and observed that prior cases consistently indicated that "the size of the public [is] not relevant to whether a disclosure of embarrassing facts [is] tortiuous." *Id.* at 76; *see also Gregory v. Bryan-Hunt Co.*, 174 S.W.2d 510 (Ky. 1943); *Voneye v. Turner,* 240 S.W.2d 588 (Ky. 1951); *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959).

With respect to the number of individuals sufficient to constitute a particular public, the *Beaumont* court "[did] not engage in a numbers

game." 401 N.W.2d at 532. In declining to place a numerical requirement on the publication element it stated:

> An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff.

Id. The court also observed that precedent supported the idea that "publication of the embarrassing facts to only one person alone was unlawful publication." *Id.* at 529. Tekhead was embarrassed when the particular public present on June 13, 2002 gained knowledge of the incorrect facts about his workplace habits. Tekhead worked diligently to gain the respect of his co-workers, but the results of his hard work vanished in a few short moments due to his inaccurate portrayal before the public caused by Dospam's e-mail.

The logic of the *Beaumont's* decision is readily applied to cases where one is disparaged in the presence of co-workers. In *Miller v. Motorola*, 560 N.E.2d 900 (Ill. App. Ct. 1990), the court reversed a finding of summary judgment for the defendant. There, an employee sued her employer seeking recovery for damages resulting from the employer's disclosure of her mastectomy surgery to her fellow employees. *Id.* at 977. In analyzing the "public disclosure" element of her claim the court held that "the public disclosure requirement may be satisfied by proof that the plaintiff has a *special relationship* with the 'public' to whom the information is disclosed." *Id.* at 903 (emphasis added). The court's rationale is that such a disclosure "may be just as devastating to the person even though the disclosure was made to a limited number of people." *Id.* The court specifically held that co-workers have a "special relationship" with one another stating, "[p]laintiff's allegation that her medical condition was disclosed to her fellow employees sufficiently satisfies the requirement that publicity be given to the private fact." *Id.*

Courts continue to rely on the wisdom of *Beaumont* and *Miller* in determining when a statement is made publicly. *Herion v. Village of Bensensville*, No. 00-C-1026, 2000 U.S. Dist. LEXIS 16745 (N.D. Ill. Nov. 1, 2000) (unreported), and *Austin, Eberhardt & Donaldson, Corp. v. Youngman*, No. 00-C-3303, 2001 U.S. Dist. LEXIS 1090 (N.D. Ill. Jan. 29, 2001) (unreported), follow the logic of the *Beaumont* court and are good law today. In *Herion*, the plaintiff brought a claim of false light after being maliciously accused of various criminal conduct in the presence of co-workers and employers. The court found that the false light claim sufficiently pled disclosure of private information before the public because individuals to whom information was disclosed had a "special relationship" with the plaintiffs. *Id.* In *Austin*, the court concluded that while the publicity requirement may be satisfied by disclosure to the public at large, it may also be satisfied by disclosure to a smaller group of people with whom the plaintiff has a special relationship. 2001 U.S.

Dist. LEXIS 1090 at 21. The *Austin* court cited *Miller* and specified this group as "a public whose knowledge of those facts would be embarrassing to the plaintiff." *Id.*; *see also Miller*, 560 N.E.2d at 903.

Applying well-settled precedent to this case it is clear that the appellate court erroneously eliminated Tekhead's false light claim. The parties stipulated that the individuals who witnessed the incident on June 13, 2002 were co-workers of Tekhead. As such, they are considered to have a special relationship with him, which is sufficient to establish the publicity requirement.

The opening of the June 13 e-mail set off a chain reaction of events that placed Tekhead in a false light before his co-workers. His co-workers and superiors reasonably believed that Tekhead blatantly violated Distress's Computer Policy. This apparent violation led to the sudden termination of Tekhead's employment with Distress. Had the incident been published in a newspaper article, the violations of Tekhead's privacy would have been negligible because the public at large is unconcerned with Tekhead's performance at his job. Tekhead's co-worker's however, have both a concern and a vested interest in his behavior and therefore constitute the public under well-settled precedent.

Tekhead's status as a private individual makes the extent of the publicity irrelevant. It is therefore not the size but the characteristics of the group that is important. Since the characteristic of the group at issue is of co-workers having a "special relationship" with Tekhead, it necessarily follows that Tekhead has sufficiently demonstrated the only element of his false light claim at issue on this appeal. It would therefore be improper for this Court to allow a judgment in favor of defendant Dospam to stand.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Alexander Tekhead respectfully requests that this Court reverse and remand the decision of the First District Court of Appeals for the State of Marshall so that all of Plainitiff-Appellant's claim may be heard in a trial on the merits.

Respectfully submitted,

Counsel for Plaintiff-Appellant
Alexander Tekhead

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APPENDIX A:
RESTATEMENT (SECOND) OF TORTS (1977)
SECTION 652B

One who intentionally intrudes, physically or otherwise, upon the seclusion of another in his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

APPENDIX B:
Restatement (Second) of Torts (1977)
SECTION 652E

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the dales light in which the other would be placed.

APPENDIX C:
Marshall Revised Code
Section 735 MRC 25-302.

A tribunal of the State may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person: (1) Transacting any business in this State . . . .

BRIEF FOR THE PETITIONER

No. 03-SC-0035

IN THE
SUPREME COURT OF MARSHALL
OCTOBER TERM 2003

ALEXANDER TEKHEAD,
Petitioner,

v.

ALLAN DOSPAM,
Respondent.

ON WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEALS
OF THE STATE OF MARSHALL

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT HAS PERSONAL JURISDICTION OVER DOSPAM WHEN ONE OF DOSPAM'S UNSOLICITED PROMOTIONAL EMAILS GAVE RISE TO TEKHEAD'S CLAIMS FOR FALSE LIGHT INVASION OF PRIVACY AND INTRUSION UPON SECLUSION, AND ALSO DIRECTLY RESULTED IN TEKHEAD'S TERMINATION FROM DISTRESS?

II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT TEKHEAD FAILED TO ESTABLISH THE REQUISITE ELEMENTS TO EVIDENCE A THEORY OF FALSE LIGHT INVASION OF PRIVACY AS DEFINED BY THE RESTATEMENT (SECOND) OF TORTS WHEN DOSPAM INTENTIONALLY TRANSMITTED AN EMAIL MESSAGE THAT CREATED THE FALSE IMPRESSION AMONG TEKHEAD'S COLLEAGUES THAT HE VIEWED PORNOGRAPHY ON HIS WORKPLACE COMPUTER, AND AS A RESULT, DIRECTLY LED TO HIS TERMINATION?

III. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT TEKHEAD FAILED TO ESTABLISH THE REQUISITE ELEMENTS TO EVIDENCE A THEORY OF INTRUSION UPON SECLUSION AS DEFINED BY THE RESTATEMENT (SECOND) OF TORTS WHEN DOSPAM SURREPTITIOUSLY ACCESSED AND PILFERED THE CONTENTS OF TEKHEAD'S WORKPLACE MICROSOFT OUTLOOK ADDRESS BOOK?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certify that the following listed parties have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate any possible disqualification or necessary recusal.

ALEXANDER TEKHEAD ..... *Petitioner*

ALLAN DOSPAM ..... *Respondent*

ATTORNEYS FOR ALEXANDER TEKHEAD
PETITIONER
(Signatures omitted in accordance with section 1020(6) of the Rules of the Twenty Second Annual John Marshall Moot Court Competition in Information Technology and Privacy Law)

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TO THE SUPREME COURT OF MARSHALL:

Petitioner, Alexander Tekhead, respectfully submits this brief in support of his request that this Honorable Court reverse the judgment of the court of appeals as to the false light invasion of privacy and intrusion upon seclusion claims, and affirm the judgment as to personal jurisdiction in favor of Petitioner.

OPINIONS BELOW

The Farbrook County Circuit Court denied in part and granted in part summary judgment Respondent's motion for summary judgment. The First Circuit Court of Appeals of the State of Marshall affirmed in part and denied in part the circuit court's order granting summary judgment in case number 02-CV-6245.

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted in accordance with section 1020(5) of the rules for the Twenty Second Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Alexander Tekhead (hereinafter "Tekhead"), a citizen of the state of Marshall, began his employment at Distress Technologies (hereinafter "Distress") on June 20, 2000. (R. at 3.) Distress is a company incorporated in and with its principal place of business in the state of Marshall. (R. at 2, 3.) On December 6, 2000, Tekhead received his initial performance review, and as a result, was granted permanent status. (R. at 3, 4.)

As a new employee, Tekhead received a copy of the Distress Employee Handbook (hereinafter "The Handbook"). (R. at 3.) The Handbook articulates Distress' policies with respect to the workplace, and contains guidelines specifically concerning the use of Distress' computers. (R. at 3); (*See* Exhibit A-1.) Distress' Electronic Information Systems Policy (hereinafter "EISP") states the Company's concern with "protecting [their] confidential and proprietary information and [to] avoid misuse of its electronic information systems." (R. at A-1.) The EISP reserves Distress' right to "access, monitor, and disclose communications and information stored in, transmitted from, or received by any part of its electronic information systems. . ." (*See* Exhibit A-1.) Further, "e-mail. . .are subject to review and use by authorized Company representatives and by third parties. . .as the Company, in its discretion, deems necessary or appropriate." (R. at A-1.) Also, the EISP expressly

states that "[e]mployees should not expect privacy in using the Company's electronic information systems," that "[a]ll passwords and access codes are the Company's property." (R. at A-1.)

The guidelines relevant to this action provide that an employee may not (1) use Distress' computers for personal use; (2) use any Distress computers to retrieve, store, or view offensive, obscene, or threatening content; or (3) use any computer equipment in a manner that is excessive, loud, or disturbing to other employees. (R. at 3.) The Handbook states that Distress reserves the right to monitor the use of its communications systems at its discretion and without notice, and that misuse of any of the information systems may result in disciplinary action up to and including termination. (R. at 3.)

Subsequent to his June 20, 2001 performance review, Tekhead became a model employee. (R. at 4.) Both his attitude and professional demeanor significantly improved, and he excelled at his job. (R. at 4.) As a result of his remarkable turnaround, Tekhead received favorable reviews in his December of 2001 performance evaluation. (R. at 4); (*See* Exhibit C.) In April of 2002, Tekhead had improved to such an extent that he was recommended by an immediate supervisor for the "Employee of the Month" award. (R. at 4.)

On June 13, 2002, Tekhead received an unsolicited e-mail message (hereinafter "June 13 e-mail") that deceptively appeared to be addressed from one of Distress' senior managers with a subject line that read, "Documents for Review." (R. at 4.) Believing that the message related to his upcoming performance review, which was scheduled for the following week, Tekhead opened the e-mail. (R. at 4.) When the June 13 e-mail was opened, an animated image of a naked George and Jane Jetson dancing the fandango appeared on his computer screen. (R. at 5.) At the same time, an audible message began to play the phrase, "ALERT! STOP VIEWING PORN! CLOSE YOUR BROWSER IMMEDIATLEY!" at maximum volume. (R. at 5.) Despite Tekhead's efforts to close the June 13 e-mail, he was unsuccessful, and the message continued to play. (R. at 5.) As the message continued to play, at least five of Tekhead's coworkers began to assemble around his computer. (R. at 5.) Tekhead's supervisor attempted to shut down the offending display and audible message through keyboard commands, but was unsuccessful, so he unplugged the computer. (R. at 5.) The supervisor then directed Tekhead to leave for the remainder of the day. (R. at 5.) The next day, Distress' general counsel placed a call to Tekhead and informed him of his termination. (R. at 5.)

Soon after his termination, Tekhead filed a wrongful discharge suit against Distress, alleging that he did not willfully violate the Handbook. (R. at 5.) During discovery in his suit against Distress, Tekhead discovered that the June 13 e-mail had originated with Allan Dospam (herein-

after "Dospam"), and had been routed through a third-party relay server in Korea, which forwarded the message to Distress. (R. at 5.) Based on the unearthing of this information, Tekhead filed the instant suit against Dospam for intrusion upon seclusion and false light invasion of privacy. (R. at 5.)

Although Dospam is a citizen of and resides in the state of Potter, which borders Marshall, he was raised in Marshall, where his parents still reside. (R. at 6.) After his graduation from college, Dospam submitted his resume to Distress, along with several other high-technology companies in Marshall and surrounding states. (R. at 6.) He ultimately accepted a position with another employer in Potter. (R. at 6.)

Since 2001, Dospam has operated a commercial online joke service through a Web site called Webgags.com (hereinafter "Webgags"). (R. at 6.) Although Webgags contains paid advertisements, Dospam claims that the Web site has not realized a profit. (R. at 6.) The domain name "webgags.com" is registered with OffshoreDomainNames, an ICANN[1] accredited registrar located in the Cayman Islands. (R. at 6.) Although the name "Webgags Corporation" appears on the domain registration and it lists a Grand Cayman address, no evidence has been presented to indicate that Webgags is incorporated in any jurisdiction. (R. at 6.) The Web site Webgags.com is hosted by Datahaven Hosting (hereinafter "Datahaven"), a web hosting service located in Monaco. Datahaven also provides e-mail services for Webgags. (R. at 6.) Dospam admitted in his affidavit that the purpose of this complicated arrangement was to minimize his exposure to nuisance lawsuits. (R. at 6.)

Webgags allows its customers to play digital practical jokes on other unsuspecting individuals by offering an assortment of gags that can be sent to recipients through e-mail. (R. at 6.) Several "gags" are available, including one that makes the recipient's computer screen appear as if files are being deleted, and one that plays different loud noises or distracting songs. (R. at 6.) A Webgags customer can have one of the gags sent to a specific individual e-mail address (hereinafter "target"). (R. at 6, 7.) When the target opens the e-mail, it takes control of the target's computer and acts as the customer directed. (R. at 7.)

As a method of promoting Webgags, Dospam employed Internet "spiders." (R. at 7.) Spiders are software programs that search the World Wide Web looking for e-mail addresses published on Web sites, and then collect any e-mail addresses that are found. (R. at 7.) Dospam compiles these addresses and sends unsolicited e-mails to them. (R. at 7.) Dospam's spiders collected the e-mails of all Distress employees from Distress' Web site, including Tekhead's. (R. at 7.) Dospam's unsolicited promotional messages take the form of the June 13 e-mail that led to

1. The Internet Corporation for Assigned Names and Numbers

Tekhead's termination. (R. at 7.) The messages also include a program that secretly copies and transmits the contents of the target computer's Microsoft Outlook address book to Dospam. (R. at 7.)

Immediately after receiving service of process for Tekhead's suit against Dospam, Dospam published the contents of Tekhead's Outlook address book on Webgags.com Web site. (R. at 7.) The Web page upon which all of the e-mail addresses from Tekhead's Outlook address book appeared included a statement that read, "Mr. Tekhead filed suit against me, obviously, he can't take a joke. Here's his address book. Make him pay for his lack of humor." (R. at 7, 8.) Tekhead's Outlook address book contained not only professional contacts, but also several personal contacts, some of whom complained to Tekhead that they began receiving spam after their e-mail addresses were published on the Webgags Web site. (R. at 8.)

The Circuit Court of Cook County awarded summary judgment in favor of Respondent as to Tekhead's false light invasion of privacy and intrusion upon seclusion causes of action. (R. at 1.) The court denied Respondent's motion to dismiss for lack of personal jurisdiction. (R. at 1.) Tekhead appeals the circuit court's grant of summary judgment as to the false light invasion of privacy and intrusion upon seclusion causes of action. (R. at 1.)

II. SUMMARY OF THE PROCEEDINGS

Petitioner Tekhead sued (Respondent) in the Circuit Court of Farbrook County, State of Marshall, alleging false light invasion of privacy and intrusion upon seclusion. (R. at 1.) The parties have stipulated to the facts set forth in the record. (R. at 2.) The circuit court granted Respondent's motion for summary judgment, holding that, as a matter of law, Tekhead failed to prove :(1) false light invasion of privacy; and (2) invasion of privacy by intrusion upon seclusion. (R. at 9-10.) The circuit court denied Respondent's motion to dismiss the claims for lack of personal jurisdiction. (R. at 1.)

The First District Court of Appeals affirmed the circuit court's granting of summary judgment because Tekhead failed to establish the required elements for both claims. The court held that there was no indication that Respondent had cast Tekhead in a false light before the public, as required by the Restatement definition of the tort as followed by the State of Marshall. (R. at 9.) Further, the court determined that Respondent's conduct did not amount to an intrusion or prying into a private matter under the Restatement definition of intrusion upon seclusion, as followed by the State of Marshall. (R. at 10.) Finally, the court rejected Respondent's challenge to the circuit court's determination that personal jurisdiction was properly exercised over Respondent.

SUMMARY OF THE ARGUMENT

I.

The exercise of personal jurisdiction over Respondent was proper because the exercise of such jurisdiction was both within the purview of the Marshall long-arm statute and consistent with the basic principles of due process. Respondent purposefully availed himself of the benefits of conducting business in the State of Marshall when he sent Tekhead a deceptively labeled, unsolicited, promotional e-mail message that gave rise to Tekhead's claims for false light invasion of privacy and intrusion upon seclusion. Several jurisdictions have held that in cases where an intentional tort is committed, the tort occurs where the injury occurs. By indiscriminately directing his unwanted e-mail message to a business in this state, Respondent was afforded the opportunity to advertise his commercial venture to the residents of this state, including Tekhead. Since the exercise of personal jurisdiction is plainly warranted by the events related to Respondent's transmission of the June 13 e-mail, this court must affirm the circuit court's determination that the exercise of personal jurisdiction over Respondent was proper.

II.

Genuine issues of material fact remain at issue as to whether the unsolicited promotional e-mail message sent by Respondent caused Tekhead to be placed in a false light before the public when "at least of five" of his coworkers along with his supervisor were given the false impression that Tekhead views pornography on his workplace computer. The injury suffered by Tekhead as a result of Respondent's transmission of the offensive e-mail program constituted an injury to his peace, happiness, and feelings. A minority of jurisdictions have recognized that a false light invasion of privacy that occurs in the workplace before a small number of employees may be sufficient to satisfy the publicity requirement. Should this Honorable Court determine that the record does not support a finding of widespread publicity under the majority Restatement approach, justice requires the adoption of a special exception to the publicity requirement that recognizes the audience that the false light is portrayed to. In the instant case, those who witnessed the offensive display caused by Respondent's e-mail message were more influential in his life than an anonymous public at large. Moreover, the adoption of the special exception to the widespread publicity requirement will allow Tekhead to recover for respondent's patently blameworthy and irresponsible acts. Therefore, this Court must either remand for a determination by the trial court that the publicity requirement has been satisfied, or adopt the exception to the widespread publicity requirement and instruct the lower court accordingly.

III.

Respondent's unsolicited promotional e-mail message intruded into a private matter of Tekhead when the attached computer program surreptitiously accessed his e-mail address book and transmitted to Respondent the private contents therein. The June 13 e-mail transmitted by respondent acted as an electronic burglar that committed an unauthorized intrusion into a private matter of Tekhead. This Court must recognize the growing legal trend of holding cyber tortfeasors responsible for their conduct online, and broaden traditional common law definitions to adapt to new legal problems. Further, this Court must also recognize that Tekhead possesses a reasonable expectation of privacy in the workplace as to deceptive intrusions by those not authorized by the company to access valuable company data in his charge. Therefore, the Court must remand to the circuit court for determinations as to whether an intrusion or prying occurred, and whether Tekhead possessed a reasonable expectation of privacy as to Respondent.

ARGUMENT AND AUTHORITIES

I. RESPONDENT SUBJECTED HIMSELF TO PERSONAL JURISDICTION IN THE STATE OF MARSHALL BY SENDING AN UNSOLICITED PROMOTIONAL E-MAIL MESSAGE TO TEKHEAD THAT GAVE RISE TO TEKHEAD'S CAUSES OF ACTION FOR FALSE LIGHT INVASION OF PRIVACY AND INTRUSION UPON SECLUSION

Years before the advent of the Internet, courts in this country were fully cognizant that the concept of personal jurisdiction would have to adapt in tandem with society's increasing reliance on technology. For example, Chief Justice Harlan Stone, in the landmark decision in *International Shoe v. Washington*, suggested that a personal jurisdiction analysis can never be a rigidly applicable test, but rather, must be an evolving constitutional standard that adapts to a changing society. 326 U.S. 310, 319 (1945). In 1958, Chief Justice Earl Warren predicted, "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958). Courts now confront worldwide access to web pages, e-mail contracts, and other electronic business relationships in deciding whether an assertion of personal jurisdiction satisfies constitutional muster. *See* Keith S. Dubanevich & Gary J. Strauss, *Personal Jurisdiction in a Virtual World*, 66 TEX. B.J. 131, 131 (2003). As courts examine Internet-related claims, there is an apparent decline in the level of contacts needed to sustain

assertions of personal jurisdiction. *Id* at 135. Thus, Chief Justices Stone and Warren could not have made more insightful predictions.

Traditionally, to determine the validity of exercising personal jurisdiction over a non-resident defendant, a court performs a two-step analysis. *See, e.g.*, *World Wide Volkswagen v. Woodsen*, 444 U.S. 286, 290-291 (1980). First, the court looks to the state's long-arm statute, which authorizes personal jurisdiction over non-resident defendants. *See id.* If the criteria set forth in the state long-arm statute are satisfied, the court then performs a second step, which involves a constitutional inquiry. *See id.* Where state long-arm statutes extend jurisdiction to the full extent allowed by the Due Process Clause of the Fourteenth Amendment, as the State of Marshall's long-arm statute does, the court will collapse the two steps and perform a single due process inquiry. *See id.* The majority of the circuit courts of appeal have held that such statutes should be construed liberally in favor of finding personal jurisdiction over a non-resident defendant. *See, e.g., Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found.*, 297 F.3d 1393, 1350 (Fed. Cir. 2002).

In the instant case, personal jurisdiction properly lies in the State of Marshall. As discussed in the sections that follow, Respondent committed intentional acts outside of this state that had dire consequences within the State of Marshall. Even where a defendant has no physical presence in the forum state, a single purposeful contact is sufficient to confer personal jurisdiction if the cause of action arises from that contact. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). "By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation." *Internet Doorway, Inc. v. Parks*, (S.D. Miss. 2001) 138 F. Supp. 2d 773, 779-80.

Respondent must not be permitted to take advantage of modern technology via the Internet or other electronic means to escape traditional notions of jurisdiction. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). Accordingly, the circuit court's rejection of Respondent's challenge to personal jurisdiction in the State of Marshall must be affirmed.

A. By Sending an Unsolicited Promotional E-mail Message that Caused Tekhead to be Portrayed in a False Light and By Appropriating Information Stored On His Workplace Computer that Ultimately Caused Tekhead's Termination, Respondent Established Sufficient Minimum Contacts With the State of Marshall So as to Make the Exercise of Personal Jurisdiction Proper

The exercise of personal jurisdiction over Respondent was proper because the exercise of such jurisdiction was both within the purview of the Marshall long-arm statute and consistent with the basic principles of due process. The Marshall long arm statute provides in pertinent part that: "[a] tribunal of the State may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to a cause of action or other matter arising from such person: (1) Transacting any business in this State." Marshall Revised Code, 735 MRC 25-302 (2003). Marshall courts interpret the reach of the long-arm statute coextensive with that permitted by the Due Process Clause of the Fourteenth Amendment. (R. at 8.)

If statutory jurisdiction exists, the court must then evaluate whether the exercise of long-arm jurisdiction comports with the due process clause. Because Marshall's long-arm statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same. *Panavision Int'l L.P., v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). Due process requires that the non-resident defendant have at least "minimum contacts" with the relevant forum such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

Under most long-arm statutes, state courts may exercise either general or specific jurisdiction over a non-resident defendant, depending on the nature of the contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415 (1984). General jurisdiction is proper only where a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the plaintiff's action is unrelated to the defendant's contacts with the state. *See id.*

Even though it appears that Respondent's contacts with the state of Marshall were not "continuous" or "systematic," Respondent's contacts in the case at bar do allow for the application of specific jurisdiction. To obtain specific jurisdiction over a non-resident defendant, plaintiff must show that three requirements have been satisfied: (1) the non-resident defendant must have purposefully directed his activities or consummated some transaction with the forum or resident thereof, or perform

some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. *See, e.g., Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). The minimum contacts requirement is usually satisfied if the non-resident defendant "purposefully avails" himself of the benefits of doing business in the forum state. *See, e.g., Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1986). Recent cases involving intentional tort claims have utilized an "effects test" to determine whether a non-resident defendant's conduct rises to the level of purposeful availment. *See Calder v. Jones*, 465 U.S. 783, 783-787 (1984). As discussed below, specific jurisdiction is proper because Respondent's conduct in the instant case satisfies all three requirements.

For the reasons discussed in the sections that follow, this Court should find that specific jurisdiction over Respondent was proper since his conduct fell within the purview of the Marshall long-arm statute and satisfied all three specific jurisdiction elements. Both the law and notions of fundamental justice require Respondent to answer for his conduct in the state of Marshall, where the consequences of his activities were most severely felt. Therefore, this Court should affirm the conclusion of the Circuit Court that personal jurisdiction properly lies in the State of Marshall.

1. *Respondent purposefully availed himself of the benefits of the State of Marshall*

a) *Specific jurisdiction is appropriate because Respondent purposefully availed himself of the benefits of conducting business in the State of Marshall under a traditional purposeful availment analysis*

Purposeful availment is satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on his contacts with the forum. *See U.S. v. Swiss Am. Ltd.*, 274 F.3d 610, 623 (1st Cir. 2001). Respondent purposefully availed himself of the benefits of conducting business in the State of Marshall when he sent Tekhead a deceptively labeled, unsolicited, promotional e-mail message. This message attempted to attract Tekhead to Respondent's commercial Web site via hyperlink. Additionally, Respondent pilfered private data from Tekhead's workplace computer. These activities directly resulted in Tekhead's termination from Distress. (R. at 6-7.)

Respondent's contacts with the state of Marshall yielded valuable commercial benefits. By indiscriminately directing his unwanted e-mail message to a business in this state, Respondent was afforded the opportunity to advertise his commercial venture to the residents of this state, including Tekhead. Further, by utilizing computer software to essentially steal the contents of Tekhead's e-mail address book, Respondent was provided with contacts that would help allow him to continue his barrage of unsolicited promotional e-mail messages. (R. at 7.) Respondent, who willingly engaged in reckless conduct in the State of Marshall, should have expected to be haled into court there for any consequences stemming from his conduct.

Respondent may argue that purposeful availment cannot be established because the transmission of a single unsolicited promotional e-mail message into the forum state cannot satisfy the "conducting business" prong of Marshall's long-arm statute. *See* 735 MRC 25-302. However, Respondent's argument is unpersuasive because at least one federal court has specifically held that a single promotional e-mail message is sufficient to satisfy the purposeful availment requirement. *See Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 776 (S.D. Miss. 2001) (holding that an e-mail message sent to "*a recipient or* recipients" that attempted to solicit business in the forum state satisfied the "doing business" prong of the Mississippi long-arm statute) (emphasis added). Other courts are moving in that direction as well. *See Graduate Mgmt. Admissions Council v. Raju*, 241 F. Supp. 2d 589, 593 (E.D. Va. 2003) (noting that "[I]t is well established that soliciting business through a Web site accessible by Virginians satisfies the remaining requirement of the long-arm statute, namely that the person 'does or solicits business' in Virginia."); *see also Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assurance Corp.*, 160 F. Supp. 2d 1327, 1333 (M.D. Ala. 2001) (holding that "[e]-mails, like letters and phone calls, can constitute minimum contacts, at least if the defendant or his agents send the message for pecuniary gain rather than substantially personal purposes"). Clearly, Respondent's transmission of the June 13 e-mail was for pecuniary gain because it was an attempt to solicit business for his commercial online joke service. (R. at 6-7.) Therefore, the State of Marshall must recognize the trend in the federal courts towards holding e-mail tortfeasors responsible for their conduct online.

b) Should the court determine that respondent's conduct did not amount to purposeful availment under the traditional analysis, the court must recognize that purposeful availment exists through application of the Calder *effects test*

Specific jurisdiction exists over respondent because he purposefully availed himself of the benefits of the State of Marshall under the "effects

test" articulated by the United States Supreme Court in *Calder*. *See Calder v. Jones*, 465 U.S. 783, 788 (1984) holding that California could exercise jurisdiction over individual libel defendants based on the "effects" of their Florida conduct in California). Although *Calder* involved a libel claim, courts have expanded the application of the effects test to other intentional torts. *See IMO Indus. v. Kiekert AG*, 155 F.3d 254, 259-261 (3rd Cir. 1998) (noting that courts must consider *Calder* in intentional tort cases); *see also Janmark Inc., v. Reidy*, 132 F.3d 1200, 1201-1203 (7th Cir. 1997) (applying effects test to tort of interference with prospective economic advantage); *see also Far W. Capital Inc., v. Towne*, 46 F.3d 1071, 1077 (10th Cir. 1995) (noting that courts have applied the effects test to business torts).

Defamation is arguably the cause of action most suited for the effects test because defamation cannot exist unless the defamatory material is perceived by someone (other than the plaintiff). Dennis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW 601, 613-614 (2003). Also, as a matter of practicality, it is easier for a court to find the greatest impact of defamation where the plaintiff is best known, that is, *where the plaintiff lives and works*. *Id.* Similarly, the effects of false light invasion of privacy and intrusion upon seclusion are felt most severely where the plaintiff is located. As such, the effects test is appropriate for application in the case at bar.

The effects test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *E.g. Bancroft & Masters, Inc. v. Augusta Nat., Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (citing *Calder*, 465 U.S at 788-789). Respondent's conduct easily satisfies all three elements, and demonstrates that purposeful availment has occurred.

Respondent's conduct satisfied the first requirement of the effects test because he committed an intentional act when he sent an unsolicited promotional e-mail message to Tekhead in the State of Marshall. (R. at 7.) The facts clearly indicate that respondent "compiles these [e-mail] addresses *and then sends unsolicited e-mail messages to them*." (R. at 7) (emphasis added). Any argument by respondent that he did not intend the harm is unavailing because "[i]t does not matter . . . that the injury was not intended. The only relevant consideration is whether the wrongful acts were committed intentionally, and not negligently." *Ford Motor Co. v. Greatdomains.com, Inc.*, 177 F. Supp. 2d 628, 632 (E.D. Mich. 2001). The facts leave absolutely no doubt that Respondent intentionally transmitted the June 13 e-mail to Tekhead. (R. at 6.)

Respondent's conduct also satisfies the second element of the effects test, the "express aiming" requirement. Respondent knew that Distress

was located in the State of Marshall, as the facts indicate that he had submitted his resume there after graduating from college. (R. at 6.) The facts also indicate that Respondent's spiders collected e-mail addresses from Distress' Web site. (R. at 7.) A reasonable inference may also be drawn that Distress' corporate e-mail addresses include the name of the company. For example, it is well within the realm of reasonable inferences that Tekhead's Distress corporate e-mail address is Atekhead@Distress.com. Finally, the nature of the audio portion of Respondent's e-mail message indicates that it was created to embarrass the recipient at work in front of fellow employees by giving the recipient's fellow employees the impression that the recipient is watching pornography on his workplace computer. (*See* R. at 7.)

When combined, these facts indicate that Respondent knew or should have known that the unsolicited promotional e-mail message sent to Tekhead would be received in the State of Marshall and specifically, by Tekhead at his place of employment. In other words, Respondent knew that he was sending the June 13 e-mail into the State of Marshall because he knew Distress was located there. (R. at 6.) Such knowledge on Respondent's part satisfies the "express aiming" requirement necessary to satisfy the second element of the effects test. *See Bancroft*, 223 F.3d at 1087 (noting that the "express aiming" requirement satisfied when the defendant alleged to have engaged in wrongful conduct targeted plaintiff whom defendant knows to be resident of forum state).

To satisfy the third element of the effects test, the plaintiff must establish that the defendant's conduct caused harm, the brunt of which was suffered, and the defendant knew was likely to be suffered, in the forum state. *See Calder* 465 U.S. at 789-790 (1984). As discussed in great detail above, there is no question that the harm suffered by Tekhead occurred in the State of Marshall. (R. at 5.) Most significantly, Respondent was terminated from Distress in this state. (R. at 5.)

In *Bancroft & Masters*, the ninth circuit recently illustrated the application of the third prong of the *Calder* effects test. In that case, the plaintiff California corporation which owned the Internet domain name "masters.com," brought an action against Augusta National golf club ("ANI"), which held the "Masters" trademark, seeking declaratory judgment of non-dilution and non-infringement of mark, and cancellation of golf club's mark due to misuse. *Bancroft & Masters*, 223 F.3d at 1084. Plaintiff argued that defendant purposefully availed itself in California by sending a letter to Network Solutions, Inc. ("NSI"), a Virginia company that registered the Web site for Bancroft & Masters ("B&M"), demanding that B & M cease and desist all use of the name "masters.com." *Id.* The letter triggered B & M's dispute resolution policy, which left plaintiff with no choice but to obtain a declaratory judgment establishing its right to use the "masters.com" domain name. *Id.*

In reversing the district court's dismissal of B & M's claim for lack of personal jurisdiction, the ninth circuit held that defendant ANI purposefully availed itself in California by "act[ing] intentionally when it sent its letter to NSI [in Virginia]. The letter was expressly aimed at California because it individually targeted B & M, a California corporation doing business almost exclusively in California. Finally, the effects of the letter were primarily felt, as ANI knew they would be, in California." *Bancroft & Masters,* 223 F.3d at 1088. In the instant case the effects of the June 13 e-mail sent by Respondent were felt primarily in the State of Marshall, just as the effects of ANI's demand letter sent to NSI in Virginia were felt in California. *Id.* As such, this court should follow the analysis applied by the ninth circuit in *Bancroft & Masters* and find that the third element of the *Calder* effects test is satisfied by Respondent's conduct.

2. *Specific jurisdiction is appropriate because Tekhead's cause of action arose out of Respondent's activities in the state of Marshall*

Respondent's conduct satisfied the second element of the specific jurisdiction calculus because, but for Respondent's transmission of the unsolicited promotional e-mail message to Tekhead, no allegations of false light invasion of privacy or intrusion upon seclusion would have been raised. *See Bancroft & Masters, Inc. at* 1088 (noting "[t]he second requirement for specific jurisdiction is that the contacts constituting purposeful availment must be the ones that give rise to the current suit. We measure this requirement in terms of 'but for' causation"). Tekhead's claims are plainly derived from the e-mail sent by Respondent. (R. at 9-10.)

Further, several jurisdictions have held that in cases where an intentional tort is committed, the tort occurs where the injury occurs. *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir.1997) (citing *Calder v. Jones*, 465 U.S. 783, 783-787 (1984) ("There can be no serious doubt after *Calder* that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor.")); *see also Phillip Morris, Inc. v. Angeletti*, 752 A.2d 200, 233 (Md. 2000) (holding that a tort occurs where the injury occurs).

In the instant case, Tekhead was terminated by Distress in the State of Marshall as a direct result of being portrayed in a false light by Respondent's e-mail message. (R. at 7-8.) Additionally, Respondent's e-mail message, directed to Tekhead at Distress, accessed and retrieved information from Tekhead's workplace computer without authorization. This act of deceptively misappropriating information serves as the basis for Tekhead's intrusion upon seclusion cause of action. (R. at 7-8.) The

injuries caused by Respondent's conduct clearly occurred in and arose out of Respondent's contacts with the State of Marshall. As such, specific jurisdiction is properly lies in this state.

3. *Specific jurisdiction over Respondent is reasonable because the exercise of such jurisdiction comports with notions of fair play and substantial justice required by the Constitution*

An inference arises that the third factor of the specific jurisdiction analysis is satisfied if the first two requirements are met. *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (noting that, "if we find, as we do, the first two elements of a prima facie case—purposeful availment and a cause of action arising from the defendant's contacts with the forum state—then an inference arises that this third factor is also present"). However, assuming that no such inference exists, specific jurisdiction is nevertheless reasonable.

For jurisdiction to be reasonable, it must comport with the Due Process Clause of the Fourteenth Amendment. *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 476 (1985). *Burger King* explicitly places upon the defendant the burden of demonstrating unreasonableness and requires the defendant to put on a "compelling case." *Id.* at 476-477. The reasonableness determination requires the consideration of several specific factors: (1) the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum. *Id.* An analysis of the aforementioned factors makes it clear that the exercise specific jurisdiction over Respondent is constitutionally reasonable.

The first requirement, the extent of the defendant's purposeful interjection into the forum state, clearly weighs in favor of Tekhead. As discussed above, it was Respondent's intentional acts that serve as the basis for Tekhead's false light invasion of privacy and intrusion upon seclusion claims. Further, because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). The facts indicate that Respondent grew up in Johnstonville, Marshall, where his parents still reside. (R. at 6.) Since Potter is a neighboring state of Marshall, Respondent would not be required to travel cross country to defend here. (R. at 6.) Finally, modern means of

communication allow Respondent to litigate in Marshall while remaining at his home in Potter for the majority of the time spent in litigation. *See Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 252, 259 (11th Cir. 1996).

For the fourth requirement, a State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. *See Burger King*, 471 U.S. at 473. This interest is not outweighed by Respondent's inconvenience. *Id.* at 462. Furthermore, no conclusion can be drawn that the State of Marshall does not have a legitimate interest in holding an extraterritorial tortfeasor answerable on a claim related to the contacts he has established in this state. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984). Finally, Tekhead obviously has a strong interest in obtaining convenient and effective relief in his home forum. *See Beverly Hills Fan Club v. Royal Sovereign Corp*, 21 F.3d 1558, 1569 (Fed. Cir. 1994).

Since the exercise of specific jurisdiction is plainly warranted by the events related to Respondent's transmission of the June 13 e-mail, this court must affirm the circuit court's determination that the exercise of personal jurisdiction over Respondent was proper.

II. RESPONDENT COMMITTED FALSE LIGHT INVASION OF PRIVACY WHEN HE SENT AN UNSOLICITED PROMOTIONAL E-MAIL MESSAGE TO TEKHEAD THAT MADE IT APPEAR TO TEKHEAD'S COLLEAGUES THAT HE VIEWED PORNOGRAPHY ON HIS WORKPLACE COMPUTER

The State of Marshall affirmatively recognizes a cause of action for false light invasion of privacy, and has consistently followed the Restatement (Second) of Torts when adjudicating such claims. (R. at 9.) The Restatement provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of privacy if,
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977). The heart of this tort lies in the publicity. *See Lovgren v. Citizens First Nat'l Bank of Princeton*, 534 N.E.2d 987, 989 (Ill.1989). The Restatement explains that, "a matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially one of public knowledge." RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a.

Generally understood, a false light invasion of privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation. *See Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983). The element of publicity in a false light claim differs from the element of publication in other defamation claims. *See Ali v. Douglass Cable Communications*, 929 F. Supp. 1362, 1383 (D. Kan. 1996). The latter means any communication by the defendant to a third party; the former concerns communications made to the public at large or to so many persons that the matter will certainly become public knowledge. *Id.*

The standard of review for a motion for summary judgment is de novo. *U.S. v. Diebold*, 369 U.S. 654, 655 (1962). On summary judgment, inferences to be drawn from underlying facts contained in materials presented must be viewed in light most favorable to the party opposing the motion, Tekhead. *See id.* In the instant case, summary adjudication was inappropriate because genuine issues of material fact exist as to whether Respondent placed Tekhead in a false light before the public.

A. By Creating the False Impression in the Eyes of Tekhead's Colleagues that Tekhead Viewed Pornography On His Workplace Computer, Respondent Placed Tekhead in a False Light Before the Public Under the Restatement Standard for Publicity

Genuine issues of material fact remain at issue as to whether the unsolicited promotional e-mail message sent by Respondent caused Tekhead to be placed in a false light before the public when "at least of five" of his coworkers along with his supervisor were given the false impression that Tekhead views pornography on his workplace computer. (R. at 5.) By sending an unsolicited promotional e-mail to Tekhead that created such an impression, Respondent placed Tekhead in a false light before the public, "or to so many persons that the matter must be regarded as substantially one of public knowledge." Restatement (Second) of Torts § 652D (1977). Therefore, the grant of summary judgment by the circuit court was inappropriate, and this Court should remand for further adjudication of the unresolved issues.

Genuine issues of material fact have not be resolved due to the fact that discovery has not been completed. (R. at 9.) For example, when Respondent's e-mail message took control of Tekhead's computer and broadcast the offensive sounds and images, "*at least* 5 co-workers" and his supervisor converged around his workstation. (R at.5) (emphasis added). A reasonable inference may easily be drawn that as a result of this relatively small publication, Tekhead will become falsely known as someone who views pornography at his office computer among the entire Dis-

tress Corporation and possibly even the entire computer software industry in the State of Marshall. Additionally, if just one of Tekhead's coworkers that witnessed the offensive display on Tekhead's computer were to tell one other person, the matter could very easily be broadcast to so many persons that the matter would eventually become "substantially one of public knowledge." *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977). Therefore, without the completion of discovery, it is premature to dispose of Tekhead's claim for false light invasion of privacy on summary judgment grounds. *See Grossman v. Computer Curriculum Corp.*, 131 F. Supp. 2d 299, 312 (D. Conn. 2000); *Krochalis v. Ins. Co. of N. America*, 629 F. Supp. 1360, 1371 (E.D. Pa. 1985). Further, courts have recognized that a false light invasion of privacy that occurs in the workplace before a small number of employees may be sufficient to satisfy the publicity requirement. For example in *Santiesteban*, the fifth circuit held that a country club employee who had his newly bought tires wrongly repossessed when stripped from his vehicle in front of several coworkers was held to have met the publicity requirement. *Santiesteban v. Good Year Tire and Rubber Co.*, 306 F.2d 9, 10 (5th Cir. 1962). Significantly, the court took into account the "embarrassment, humiliation, and wounded feelings" entailing two sleepless nights caused by the defendant's unreasonable conduct. *Id.* The court, in considering the appropriate amount of damages to be awarded plaintiff, reasoned

> In some torts the entire injury is to the peace, happiness or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and *all the attendant facts should be weighed.*

Id. at 11-12 (citing *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662 (1936)) (emphasis added).

Similarly, the injury suffered by Tekhead as a result of Respondent's transmission of the offensive e-mail program constituted an injury to his peace, happiness, and feelings. This Court should follow the fifth circuit and take into consideration that, "all attendant facts should be weighed." *Id.* at 12. The Court should consider the fact that Respondent's e-mail message was deceptively labeled so as to preclude the recipient from deleting it before it was opened. (R. at 4.) The Court should also consider the fact that Respondent's e-mail message was nothing more than tasteless promotional device soliciting business for Respondent's commercial online joke service. (R. at 6.) This Court must take into account the deceptive and irresponsible nature of Respondent's conduct and apply the expanded definition of publicity utilized by the fifth circuit in *Santiesteban.*

Regardless of the definition utilized, however, genuine issues of material fact remain unresolved as to whether the portrayal of Tekhead as

one who views pornography on his workplace computer before "at least five" of his coworkers and his supervisor satisfies the publicity requirement. Therefore, summary judgment is not warranted at this juncture of the proceedings, and Tekhead is entitled to his day in court.

B. In the Alternative, Should the Court Determine that the Record Does Not Support a Finding that Tekhead was Placed in a False Light Before the Public Under the Restatement Standard, Justice Requires that this Court Find that the Publicity Requirement was Satisfied Under the Special Relationship Exception

The state of Marshall should adopt the special relationship exception to the publicity requirement in false light cases to close the loophole that allows false light defendants to escape liability for placing someone in a false light before those whom the plaintiff has a relationship. The impression left in the minds of Tekhead's professional colleagues, those with whom he interacts with on a daily basis, has much more of an impact than the same impression would have had if given to an anonymous "public at large." The Illinois Court of Appeals has addressed this specific problem and held that, the special relationship exception to the publicity requirement for false light invasion of privacy provides that the "element of [publicity] in an action for false light may be satisfied by establishing that false and highly offensive information was disclosed to a person or persons with whom a plaintiff has a special relationship." *Poulos v. Lutheran Soc. Serv. of Ill., Inc.*, 728 N.E.2d 547, 555-556 (Ill. App. Ct. 2000). Such an exception is based on the premise that a disclosure of false information to a limited number of persons may be just as devastating to a plaintiff as a disclosure to the general public since the plaintiff may have a special relationship with the particular public to whom the information is disclosed. *See id.* at 555; *see Kurczaba v. Pollock*, 742 N.E.2d 425, 435 (Ill. App. Ct. 2000).

In *Poulos*, the false light shed on plaintiff foster parent was a false accusation of child molestation by his former foster child. 728 N.E.2d at 552. Defendant social worker, knowing that the allegations were potentially unfounded, called the chairman of the board of trustees of the school where plaintiff was employed as a teacher. *Id.* After plaintiff was terminated, the accuser recanted his allegations. *Id.* Defendant argued that a false light invasion of privacy claim could not be sustained since her phone call did not place plaintiff in a false light before the public, as required by the Restatement. *Id.* at 555. The Illinois Court of Appeals rejected defendant's lack of publicity argument and pointed out that, "the adoption of such an exception is both justified and appropriate in that a disclosure to a limited number of persons may be just as devastat-

ing to a plaintiff as a disclosure to the general public." *Id.* at 555. Absent the special exception utilized by the court in *Poulos*, plaintiff would have had no recourse against the defendant whose actions led to his termination.

Likewise, the false light created by Respondent in the case at bar, although only before a minimum of five of Tekhead's coworkers and his supervisor, had a similarly devastating effect in that it resulted in Tekhead's termination. (R. at 5.) A requirement that the false light publication be made to the public at large would leave Tekhead with no recourse for the blameworthy and indiscriminate acts of Respondent. An invasion of plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. *See Kurczaba*, 742 N.E.2d at 435 (citing *Beaumon v. Brown*, 257 N.W.2d 522, 531-532 (Mich. 1977)). Such a public might be a general public, if the person were a public figure, *or a particular public such as fellow employees*, if the person were not a public figure. *See id.* (emphasis added). Obviously, being portrayed as one who views pornography on his workplace computer before can have devastating effects, as experienced by Tekhead in the instant case. Therefore, this Court must recognize that a fair and just outcome can only be preserved by adoption of the special relationship exception. As such, this Court must remand and instruct the circuit court to apply the special relationship exception.

III. RESPONDENT'S TRANSMISSION OF AN UNSOLICITED PROMOTIONAL E-MAIL MESSAGE THAT SURREPTITIOUSLY LOCATES AND TRANSMITS TO RESPONDENT THE CONTENTS OF TEKHEAD'S E-MAIL ADDRESS BOOK CONSTITUTES AN INVASION OF PRIVACY BY INTRUSION UPON SECLUSION

According to the Restatement, as followed by the State of Marshall, an actionable intrusion claim may be premised on an intrusion, physical or otherwise, upon the solitude or seclusion of another or his private affairs or concerns. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977). An intrusion may also occur by the use of one's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by tapping his telephone wires. *Med. Lab. Mgmt. v. Am. Broad. Co.*, 30 F. Supp. 2d 1182, 1187 (D. Ariz. 1998) (quoting RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b (1977)). To prevail on an intrusion claim, a plaintiff must show that the defendant penetrated some zone of physical or sensory privacy surrounding him. *See Shulman v. Group W. Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). An intrusion may also occur by some other form of investigation into the plaintiff's private concerns, as by opening his private and personal mail, searching his safe or wallet, or examining his private bank account. *See Med. Lab. Mgmt.*,

30 F. Supp. 2d at 1187. The tort of intrusion upon seclusion is based upon the manner in which an individual obtains the information. *See Ali v. Douglas Cable*, 929 F. Supp. 1362, 1382 (D. Kan. 1996) (citing *Werner v. Kliewer*, 710 P.2d 1250, 1255 (Kan. 1985)). A legitimate expectation of privacy is the touchstone of intrusion upon seclusion. *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 877 (8th Cir. 2000).

A motion for summary judgment will be denied unless the evidence on record demonstrates the absence of any genuine issue of material fact presented by Tekhead and that the moving party is entitled to judgment as a matter of law. *See* MARSHALL R. CIV. P. 56(c). The requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248 (1986). Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See id.* at 248. Further, the record evidence must be construed in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party. *Id.* Therefore, the evidence of Tekhead is to be believed, and all justifiable inferences are to be drawn in his favor. *See id.* at 265.

There is no direct authority addressing the specific question presented here, that is, whether the transmission of an e-mail message with an attached program that surreptitiously locates and transmits to the sender the contents of one's e-mail address book amounts to an actionable intrusion upon seclusion. Nonetheless, substantial authority addressing similar privacy invasions suggests that several genuine issues of material fact are at issue as to whether Respondent pried into a private matter of Tekhead. Therefore, summary judgment is not warranted at this stage in the proceedings, and this Court must remand to the circuit court for further adjudication of the disputed facts.

A. BY USING A COMPUTER PROGRAM ATTACHED TO A DECEPTIVELY LABELED E-MAIL MESSAGE THAT SURREPTIOUSLY LOCATED AND TRANSMITTED TO RESPONDENT THE CONTENTS OF TEKHEAD'S E-MAIL ADDRESS BOOK, RESPONDENT INTRUDED UPON TEKHEAD'S SECLUSION BY UNREASONABLY PRYING INTO HIS PRIVATE AFFAIRS

Respondent's unsolicited promotional e-mail message intruded into a private matter of Tekhead when the attached computer program surreptitiously accessed his e-mail address book and transmitted to Respondent the private contents therein. (R. at 7.) Essentially, Respondent deployed an electronic thief to infiltrate Tekhead's computer for the purposes of copying and stealing data that did not belong to him. The Southern District of New York held that a theoretically similar intrusion was actionable in *Socialist Workers Party*. In that case, the F.B.I. uti-

lized informants who infiltrated private meetings conducted by the Socialist Party to overhear and report upon private discussions and conversations and to read, copy and steal private documents. *Socialist Workers Party v. Atty. Gen. of the U.S.*, 463 F. Supp. 515, 524 (S.D.N.Y., 1978).

Although Respondent did not deploy a person to appropriate the data from Tekhead's computer in the instant case, the reasoning of *Socialist Workers Party* remains applicable. A private matter, Tekhead's e-mail address book, was accessed and the contents were copied and stolen. (R. at 7.) Respondent, like the F.B.I. in *Socialist Workers Party*, utilized an informant to carry out the same type of mission, the only difference being that the informant in the instant case took the form of a computer program. (R. at 7.) Warren and Brandeis warned of this precise type of intrusion in their seminal law review article, *The Right to Privacy*: "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right to be let alone . . . Numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Samuel D. Warren & Lewis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). At a minimum, genuine issues of material fact exist as to whether an actionable intrusion or prying occurred.

Respondent may argue that an intrusion upon seclusion cause of action cannot be sustained because he did not commit a physical intrusion or prying. Such equivocation is not persuasive, especially in light of the deceptive nature of his conduct. Furthermore, the law is rapidly responding to advances in technology brought about by the Internet age. For example, in *Thrifty-Tel, Inc., v. Bezenek*, the California Court of Appeal held that computer-generated signals used to access a telephone system were sufficiently tangible to support the rarely applied trespass to chattels[2] cause of action against the defendant computer hacker. *See Thrifty-Tel, Inc., v. Bezenek*, 46 Cal. App. 4th 1559, 1567 (Cal. Ct. App. 1996). A trespass to chattel requires a physical trespass to physical property. *See* Laura Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels*, BERKELEY TECH. L.J., 421, 424-425 (2002).

In their decision, the Court in *Thrifty-Tel* expanded traditional common law definitions so that the law could keep pace with technology. *See id.* Likewise, this Court should apply an expansive definition of "intrusion" or "prying" to incorporate the use of an e-mailed program to cause an unauthorized appropriation of information stored on another's com-

2. A trespass to a chattel may be committed by intentionally dispossessing another of the chattel, or using or intermeddling with a chattel in the possession of another. *See* RESTATEMENT (SECOND) OF TORTS § 217 (1965).

puter. An expanded definition is necessary for the dual purposes of keeping pace with technological advances and holding Respondent accountable for his deceptive conduct.

B. Respondent Intruded Upon a Private Matter of Tekhead By Deceptively Gaining Unauthorized Access to his E-mail Address Book on His Workplace Computer

1. *Tekhead possessed a reasonable expectation of privacy with regards to his workplace computer and e-mail address book*

By sending an e-mail message that surreptitiously accessed and transmitted the contents of Respondent's workplace e-mail address book, Respondent intruded into a private matter of Tekhead because Tekhead possessed a reasonable expectation of privacy therein. In the interests of judicial efficiency, this Court should look to Fourth Amendment jurisprudence to determine whether Tekhead possessed a reasonable expectation of privacy in the instant case. The Fourth Amendment analysis for determining whether a reasonable expectation of privacy exists embraces two questions: (1) whether the individual, by his conduct, has exhibited an actual expectation of privacy, and (2) whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. *Bond v. U.S.*, 529 U.S. 334, 339 (2000). Application of this analysis to the instant case proves that Tekhead possessed both a subjective and objective expectation of privacy in his workplace computer and e-mail address book.

a) Tekhead possessed a subjective expectation of privacy with regards to his workplace computer and e-mail address book

Respondent intruded upon a private matter when his unsolicited promotional e-mail message surreptitiously located and transmitted the contents of Tekhead's e-mail address book because Tekhead had an actual, subjective expectation of privacy therein. The plaintiff in an invasion of privacy case must conduct himself in a manner consistent with an "actual expectation of privacy." *See Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 648 (Cal. 1994). Further, he must not have manifested by his conduct a voluntary consent to the invasive actions of defendant. *See id.* Tekhead's conduct in the instant case demonstrates a subjective expectation of privacy.

Respondent may argue that Tekhead possessed no subjective expectation of privacy in his workplace computer and e-mail address book because he signed the Distress Electronic Information Systems Policy (hereinafter "EISP"), which makes it clear that employees should not expect privacy in using the Company's computers. (*See* Exhibit A-1, ¶ 3.) However, Respondent's argument is without merit because the EISP

specifically delineates those to whom Tekhead's expectation of privacy is surrendered. (*See* Exhibit A-1, ¶ 2) ("[t]he contents of all. . .information on the systems, including e-mail, are subject to review and use by *authorized Company representatives and by third parties (including law enforcement officials) as the Company, in its discretion, deems necessary or appropriate.*") (emphasis added). The record clearly indicates that the EISP contains no language that would lead Tekhead to believe that his expectation of privacy was in any way diminished as to *unauthorized* third parties. (*See* Exhibit A-1, ¶ 2.) The fact that Tekhead surrendered an expectation of privacy to his employer is not dispositive as to his expectation of privacy with Respondent. Therefore, Tekhead's subjective expectation of privacy remains intact. By signing the EISP, Tekhead did not manifest by his conduct a voluntary consent to the invasive actions of Respondent. *See Hill*, 865 P.2d at 648.

Since discovery has not been completed, several questions involving issues of material fact regarding Tekhead's subjective expectation of privacy are unresolved by the record as it stands. (R. at 10.) Reasonable inferences can be made to suggest that Tekhead expected the information in his e-mail address book to remain private. As the party opposing summary judgment, all justifiable inferences are to be drawn in Tekhead's favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 264 (1986).

The facts suggest that Tekhead may have used a password to protect the information on his computer and his e-mail address book. (*See* Exhibit A-1, ¶ 3.) The EISP suggests that the use of passwords to protect information on computers by employees at Distress was a common practice. (*See* Exhibit A-1, ¶ 3.) Therefore, a reasonable inference can be drawn that Tekhead utilized a password to prevent unauthorized access to his computer. By using a password, Tekhead would obviously have been conducting himself in a manner consistent with an actual expectation of privacy. *See Hill*, 865 P.2d at 648. Further, the simple fact that Tekhead stored information in his e-mail address book, as opposed to entering the information in a traditional address book, suggests that he wanted to keep it secluded, away from the prying eyes of passerby. Again, a reasonable inference can be drawn that such conduct demonstrates a subjective expectation of privacy. Since several genuine issues of material fact remain at issue as to whether Tekhead possessed a subjective expectation of privacy with regards to his workplace computer and e-mail address book, summary adjudication is obviously premature at this juncture of the proceedings. *See Anderson*, 477 U.S. at 265. As such, this Court should remand to the circuit court for resolution of all unresolved factual disputes.

b) Tekhead possessed an objective expectation of privacy with regards to his computer and e-mail address book

Respondent intruded upon a private matter when his unsolicited promotional e-mail surreptiously located and transmitted the contents of Tekhead's e-mail address book because Tekhead had an objectively reasonable expectation of privacy therein. There can be no intrusion upon seclusion absent an invasion into a matter with which the plaintiff possessed a reasonable expectation of privacy. *See Med. Lab. Mgmt. v. Am. Broad. Co.*, 306 F.3d 806, 814 (D. Ariz. 1998) (noting that an objectively reasonable expectation of privacy is required by a plaintiff in an intrusion upon seclusion cause of action). An objective expectation of privacy is one that society is prepared to recognize as reasonable. *See Katz v. U.S.*, 389 U.S. 347, 361 (1967). Clearly, Tekhead's expectation that the contents of his workplace computer was a private matter as to unauthorized third party computer hackers was one that society is prepared to recognize as reasonable.

Respondent will undoubtedly argue that Tekhead possessed no objectively reasonable expectation of privacy as to his workplace computer, because the vast majority of cases considering this issue have held that such an expectation of privacy does not exist. *See Immgr. and Naturalization Serv. v. Delgado*, 466 U.S. 210, 213 (1984). However, such an argument is unavailing because the issue presented here should be whether Tekhead possessed an objective expectation of privacy in his workplace computer and e-mail address book *as to unauthorized third parties,* such as Respondent. By accurately framing the issue, Tekhead clearly possessed an objectively reasonable expectation of privacy as to any information appropriated from his workplace computer by an unauthorized third party.

Tekhead's expectation of privacy in the contents of his e-mail address book is reasonable because such an expectation is one that society is undoubtedly prepared to recognize as such, especially in light of what Tekhead may have had stored on his computer. The record is not clear as to exactly what "contents" were accessible to Respondent. (*See* R. at 7.) A Microsoft Outlook address book, like the one used by Tekhead, is capable of storing much more than just e-mail addresses. *See* PETER AITKEN, et al., MICROSOFT OFFICE 2000 SMALL BUSINESS EDITION 6-IN-1 372-378 (Lisa Gebken & San Dee Phillips, eds., Que Books 2001) (1997). Along with e-mail addresses, Tekhead's address book could have contained home, business, and fax numbers, job titles, and home addresses for every person who he entered as a contact.[3] *Id.* at 372-373. Additionally, more private information could have been stored in Tekhead's ad-

3. In Microsoft Outlook, a "contact" is any person or company for which the user enters a name, address, phone number, or other information. *See* PETER AITKEN, et al.,

dress book, such as the names of a contact's spouse and children, and their anniversaries and birthdays. *Id.* The record indicates that Tekhead did store several personal contacts in his e-mail address book. (R. at 8.) Once again, as the party opposing summary judgment, all justifiable inferences are to be drawn in Tekhead's favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 264 (1986). Assuming Tekhead utilized all of the features of his e-mail address book, the "contents" referred to in the record become much more valuable to him, increasing his expectation that they remain private. (R. at 7.) Therefore, this Court must remand to the circuit court for a determination as to whether Tekhead's expectation of privacy in his workplace computer was an expectation that society is prepared to recognize as reasonable. Reasonable inferences may easily be drawn that Tekhead stored private, personal information in his e-mail address box. (R. at 8.) Such inferences must be presented to a jury.

CONCLUSION

For the foregoing reasons, this Court must affirm the circuit court's determination that personal jurisdiction properly lies over Respondent in the State of Marshall. Further, this Court must reverse the circuit courts grant of summary judgment in favor of Respondent as to Tekhead's false light invasion of privacy and intrusion upon seclusion causes of action, as genuine issues of material fact have not been resolved.

Respectfully submitted,

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief for Petitioner Alexander Tekhead was mailed by first class certified mail, return receipt requested, to all counsel of record this 15th day of September, 2003.

MICROSOFT OFFICE 2000 SMALL BUSINESS EDITION 6-IN-1 372 (Lisa Gebken & San Dee Phillips, eds., Que Books 2001) (1997).

BRIEF FOR THE RESPONDENT

No. 03-SC-0035

IN THE
SUPREME COURT OF MARSHALL
OCTOBER TERM 2003

ALEXANDER TEKHEAD,
Petitioner / Cross-Respondent,

v.

ALLAN DOSPAM,
RESPONDENT / CROSS-PETITIONER.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF MARSHALL

BRIEF FOR RESPONDENT/CROSS-PETITIONER

Steven Anderson
Chad Edgington
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Attorneys for Respondent

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRIAL COURT HAS PROPER JURISDICTION OVER DOSPAM?

II. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE AUDIO AND VIDEO DISPLAY ON TEKHEAD'S COMPUTER CONSTITUTE FALSE LIGHT?

III. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER THE DISPLAY OF NUDE IMAGES AND THE UNAUTHORIZED ACCESS OF THE MICROSOFT OUTLOOK ADDRESS BOOK CONSTITUTED INTRUSION UPON SECLUSION?

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TO THE SUPREME COURT OF MARSHALL:

Respondent/Cross-Petitioner, Allan Dospam ("Dospam"), Appellee in Cause No. 02-CV-6245 before the First District Court of Appeals for the State of Marshall respectfully submits this brief in response to the brief filed by the Petitioner/Cross-Respondent, Alexander Tekhead ("Tekhead"), and requests this honorable Court reverse the judgment of the Court of Appeals holding that the trial court properly asserted jurisdiction over Dospam, and affirm the judgment of the Court of Appeals holding that the trial court properly granted summary judgment in favor of Dospam with respect to Tekhead's claims of publicity placing a person in a false light and intrusion upon seclusion.

OPINION BELOW

The Farbrook County Circuit Court denied Dospam's motion for summary judgment as to the issue of personal jurisdiction and granted the motion as to the issues of false light and intrusion upon seclusion. The First District Court of Appeals of the State of Marshall affirmed the circuit court's order denying in part and granting in part Dospam's motion for summary judgment as shown in the record.

CONSTITUTIONAL, STATUTORY, AND RESTATEMENT PROVISIONS

The constitutional, statutory, and Restatement provisions relevant to the determination of this case include the following: the Due Process Clause of the United States Constitution provided in Appendix A; MARSHALL REVISED CODE, chapter 735, section 25-302 provided in Appendix B; and RESTATEMENT (SECOND) OF TORTS, section 652B and 652E provided in Appendices C and D, respectively.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Dospam is a resident and citizen of the State of Potter. (R. at 6.) After graduating from college in June, 1996, he accepted a position with a software development company in the State of Potter. (R. at 6.) Since 2001, he has operated a Web site called Webgags.com. (R. at 6.) The domain name "webgags.com" is registered with a domain name registrar located in the Cayman Islands. (R. at 6.) The domain name is registered to Webgags Corporation, George Town, Grand Cayman. (R. at 6.) Web hosting and e-mail service for the Web site is provided by a Web hosting service located in Monaco. (R. at 6.)

Webgags.com is a commercial online joke service that offers its customers the service of allowing them to play digital practical jokes on

other Internet users. (R. at 6.) To accomplish this, Webgags.com offers a selection of jokes that can be sent to others through e-mail. (R. at 6.) These jokes include making a computer screen appear as if files are being deleted, playing noises, and playing distracting songs. (R. at 6.)

In order to promote Webgags, Dospam utilizes "spiders", e-mail marketing software, which search Web sites for e-mail addresses. (R. at 7.) The spiders randomly extract e-mail addresses from the Web sites and return them to Dospam so that he can send out a promotional e-mail message to each of the addresses. (R. at 7.) Dospam's spiders collected e-mail addresses from a Web site of Distress Technologies, Inc. ("Distress"), which listed all of its employees and their e-mail addresses. (R. at 7.) Included in the list of e-mail addresses that the spiders extracted from Distress' Web site was that of Alexander Tekhead. (R. at 7.)

Alexander Tekhead was hired by Distress on June 20, 2000. (R. at 3.) Upon being hired Tekhead read and signed the Distress Employee Handbook ("Handbook"). (*See* R. at 3.) Included in the Handbook were the established guidelines for employee computer use. (R. at 3.) By signing the guidelines, Tekhead agreed that he would not use Distress' computers for personal use, and that Distress reserved the right to monitor and disclose information stored in his computer. (R. at Ex. A-1.) Further, Tekhead acknowledged that he understood that his use of passwords and access codes does not confer or imply privacy rights. (R. at Ex. A-1.)

At his first performance review on December 6, 2000, Tekhead was described as having "a lack of enthusiasm, an apparent desire to distract other employees, a 'jokester' attitude, and an unwillingness to meet demands when needed." (R. at 3.) At his second performance evaluation on June 20, 2001, the review concluded that Tekhead's performance was barely passable. (R. at 4.) Comments from his supervisors included a lack of motivation and unprofessional behavior. (R. at 4.) One supervisor complained that he enjoyed practical jokes, and he had played quite a few of them. (R. at Ex. B-1.)

On June 13, 2002, Tekhead received a promotional message from Dospam. (R. at 7.) The message originated from Dospam and was routed through a third-party relay server in Korea, which forwarded the message on to Distress. (R. at 5.) The promotional e-mail that Dospam sends out contains a practical joke which, when opened, (1) shows an animated image of two cartoon characters dancing in the nude; (2) displays a hyperlink with the caption "Click here to send this or other delightful Webgags to a friend."; (3) increases the target computer's speaker volume; (4) audibly announces "Alert! Stop viewing porn! Close your browser immediately!"; (5) repeats the message; and (6) disallows any keyboard control of the computer. (R. at 7.) The message also in-

cludes a program that collects the contents of the target computer's Microsoft Outlook address book and sends it back to Dospam. (R. at 7.)

Tekhead opened the e-mail and the joke ran on the computer as described above. (R. at 5.) As the audible message repeated itself, at least five other Distress employees congregated at Tekhead's computer. (R. at 5.) Tekhead's supervisor thereafter dismissed Tekhead for the remainder of the day. (R. at 5.) The next day, Distress' general counsel telephoned Tekhead and informed him that he had been discharged. (R. at 5.) Soon after being fired, Tekhead filed a wrongful termination lawsuit against Distress. (R at 5.) Tekhead later filed suit against Dospam after discovery had commenced in the wrongful termination suit. (R. at 5.) After receiving service of process for Tehead's suit against him, Dospam published the contents of an Outlook address book he retrieved from a Distress computer on his Webgags.com Web site. (R. at 7-8.)

II. Summary of the Proceedings

Tekhead sued Dospam in the Farbrook County Circuit Court ("trial court") alleging causes of action of intrusion upon seclusion and publicity placing a person in a false light. (R. at 1.) Dospam moved for summary judgment against all claims brought against him by Tekhead, and additionally moved for summary judgment as to whether jurisdiction existed over him. (R. at 8.) The trial court denied Dospam's motion as to jurisdiction, but granted his motion as to the claims of intrusion upon seclusion and publicity placing a person in a false light. (R. at 8.) The First District Court of Appeals affirmed the trial court's order denying in part and granting in part Dospam's motion for summary judgment. (R. at 11.)

SUMMARY OF ARGUMENT

I.

On de novo review, this Court should reverse the decision of the First District Court of Appeals which denied summary judgment to Dospam as to personal jurisdiction and dismiss this action. Alternatively, this Court should affirm the decision which granted summary judgment in favor of Dospam on Tekhead's claims for false-light publicity and intrusion upon seclusion. A summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Thus, when a reasonable juror could not return a verdict for the nonmoving party, summary judgment is proper.

The Due Process Clause of the Fourteenth Amendment of the Constitution requires that the defendant have sufficient minimum contacts with the forum state in order to assert personal jurisdiction. In order to satisfy this requirement when the cause of action does not arise out of or

relate to the defendant's activities in the forum state, those activities must be sufficiently continuous and systematic to make the assertion of in personam jurisdiction reasonable. Specific jurisdiction can be asserted despite a lesser showing of contacts with the forum state, so long as the defendant purposefully avails himself of the laws of the forum state through his activities, and the litigation results from the alleged injuries that arise out of or relate to those activities. Regardless of whether the defendant has sufficient minimum contacts with the forum state, the exercise of jurisdiction must also be reasonable.

The assertion of general jurisdiction is improper because Dospam does not have continuous and systematic contacts with the State of Marshall. The standard for establishing general jurisdiction is high and requires that the defendant's contacts approximate physical presence. In this case, the only current contact that Dospam has with the State of Marshall is his operation of Webgags.com, which is accessible to anyone around the world. This is not the type of continuous and systematic contact that satisfies this high standard. Dospam's previous contacts with Marshall are irrelevant when determining whether general jurisdiction is proper. The only relevant forum contacts are the contacts at the time of the incident complained of. Dospam's relevant contacts ended six years prior to the incident complained of. Therefore, these contacts with the State of Marshall are not systematic and continuous.

Dospam's operation of his Web site is insufficient to assert personal jurisdiction over him because the Web site does nothing more than make information available to those who are interested in it. A majority of courts agree that this type of Web site may not serve as the basis for exercising personal jurisdiction. This is so because otherwise every complaint arising out of the Internet would automatically result in personal jurisdiction wherever the plaintiff is located. Therefore, general jurisdiction is improper based on his Web site.

Further, specific jurisdiction is inappropriate because Dospam did not purposefully avail himself of the laws of Marshall. If the Dospam's conduct was insufficient to confer general jurisdiction, the court may only exercise jurisdiction if: (1) he purposefully availed himself of the privilege of conducting activities in Marshall, thereby invoking the benefits and protections of its laws; (2) the claim arose out of or resulted from his forum-related activities; and (3) an exercise of jurisdiction would be reasonable. Because the first and third requirements are not met here, personal jurisdiction over Dospam is improper.

Dospam did not purposefully avail himself of the laws of Marshall because the June 13 e-mail was not sent for direct financial gain. In order for the e-mail to have met the purposeful availment requirement, the e-mail, at a minimum, must have been sent for pecuniary gain. Since this e-mail was not sent for pecuniary gain, Dospam did not purposefully

avail himself of the laws of Marshall and personal jurisdiction was improperly asserted.

Even if Dospam's e-mail was sent for pecuniary gain, the e-mail did not have a "substantial connection" with the State of Marshall as required by the Due Process Clause. While a single contact can serve as the exclusive basis for personal jurisdiction, that contact must have a substantial connection with the forum state. The only connection that this e-mail had with the State of Marshall was that it was opened there. To hold that this satisfies the "substantial" requirement would render the concept of "substantial" meaningless.

Further, Dospam did not purposefully avail himself of the laws of Marshall by posting Tekhead's e-mail address book on his Web site. Unlike a newspaper or magazine, Dospam did not have the option of bypassing certain forums. Dospam's Web site was available around the world, and he did not specifically encourage residents of the State of Marshall to visit it. Such contacts are insufficient to trigger personal jurisdiction.

Finally, jurisdiction over Dospam offends traditional notions of fair play and substantial justice. A factor that must be considered in determining whether jurisdiction is reasonable is the burden on the defendant. The nature of the defendant's contacts with the forum must be such that he should reasonably anticipate having to litigate in that jurisdiction. In this case there is no way that Dospam could have known that Tekhead would open the e-mail in the State of Marshall, this was merely a random act. However, even if he had known, the notion that he would be subject to litigation in Marshall simply by sending out an e-mail was beyond his reasonable expectations. Therefore, requiring Dospam to litigate in Marshall offends traditional notions of fair play and substantial justice.

II.

Tekhead's claim against Dospam alleged publicity placing him in a false light before the public. However, this claim fails as a matter of law because the June 13 could not reasonably have been taken as factual, and therefore, did not place him in a false light. The reasonable viewer of the message would have concluded that the e-mail was a joke, and the only impression the e-mail could have possibly communicated about Tekhead was that he was a practical jokester. This impression is not a false one. Therefore, summary judgment was properly granted to Dospam as to publicity placing a person in a false light.

Tekhead was not represented as being a pornographer through the content of Dospam's e-mail message because the reasonable viewer of the e-mail would have treated its contents as a joke. In addition to having pictures of cartoon characters, the message made clear that it was a joke

by displaying a hyperlink, which manifested that it was a joke. If a statement cannot reasonably be taken as factual, there is no false light invasion of privacy because the public did not receive a false impression about Tekhead. Therefore, the message does not amount to false light because a false impression was not created about Tekhead.

The only impression that could have been created about Tekhead through the contents of the June 13 e-mail was that he was a practical jokester. However, an essential element of the false light element of this tort is that the impression be a false one. Tekhead's performance review comments from his supervisors evidence that Tekhead was indeed a practical jokester. Therefore, because Tekhead was not placed in a false light, summary judgment as to the false light publicity claim was proper.

Even if this Court should find that Tekhead was placed in a false light, the appellate court correctly held that the element of publicity was lacking. The Restatement's definition of "publicity" requires a communication to the public at large. Here, the message was only communicated to a small group of Tekhead's co-workers. This court should adhere to the rule requiring publicity to the public at large because it properly constrains the tort of false light publicity. Thus, because the message was viewed by an insufficient number of people to constitute the "public at large", summary judgment is proper as to false light publicity.

III.

The First District Court of Appeals properly granted summary judgment as to Tekhead's claim of intrusion upon seclusion. Dospam did not intrude into Tekhead's seclusion because Tekhead did not have an actual expectation of seclusion in his e-mail address book. If Tekhead did have an expectation of seclusion, then that expectation is unreasonable. Therefore, summary judgment in favor of Dospam was proper.

Dospam did not intrude into Tekhead's seclusion by collecting his e-mail address book because the address book was not secluded. Seclusion does not exist when the plaintiff does not exhibit an actual expectation of seclusion in the matter. By putting his personal contacts into an address book he knew was not confidential according to company policy, which he signed, Tekhead indicated he did not consider the address book to be secluded. Thus, summary judgment was properly granted because there was no seclusion as a matter of law.

Even if this court holds that the e-mail address book was secluded, it should still affirm summary judgment for Dospam because this expectation of privacy was unreasonable. Tekhead's e-mail address book was placed on his work computer and was part of the workplace environment. Further, there was no reasonable expectation of privacy because Tekhead was subject to a computer policy which stated that Tekhead's

use of the computer would not be private. Finally, any reasonable expectation of privacy was destroyed when Tekhead placed his address book on a computer accessible by third parties. Tekhead knew that the e-mail address book was accessible to third parties because the policy he signed informed him of that fact. Therefore, there was no reasonable expectation of privacy in the contents of his Outlook program and summary judgment was properly granted to Dospam on this issue.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEALS ERRED IN HOLDING THAT JURISDICTION OVER DOSPAM WAS PROPER BECAUSE DOSPAM'S CONTACTS WITH THE STATE OF MARSHALL WERE INSUFFICIENT TO SATISFY DUE PROCESS REQUIREMENTS.

The appellate court erred in ruling that jurisdiction over Dospam was properly acquired. This decision is contrary to the Due Process Clause of the Fourteenth Amendment because Marshall's exercise of jurisdiction over Dospam offends "traditional notions of fair play and substantial justice." *Miliken v. Meyer,* 311 U.S. 457, 463 (1940). First, Dospam does not have systematic and continuous contacts with the State of Marshall. Second, Dospam did not purposefully direct his activities into the State of Marshall. Finally, assertion of jurisdiction over Dospam would be unreasonable. Therefore, the lower court should be reversed and Dospam's motion for summary judgment as to jurisdiction should be granted.

Under MARSHALL RULE OF CIVIL PROCEDURE 56(C), a party is entitled to summary judgment if the evidence on record demonstrates the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). A party is entitled to summary judgment if "under the governing law, there can be but one reasonable conclusions as to the verdict." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 317, 322 (1986). Dospam was entitled to summary judgment as a matter of law because the undisputed facts demonstrate that jurisdiction over Dospam is impermissible.

A district court may only render judgment against a person over whom it has acquired personal jurisdiction. *Zenith Corp. v. Hazeltine,* 395 U.S. 100, 110 (1969). The trial court's determination of the exercise of personal jurisdiction over a defendant is a question of law subject to *de novo* review. *See Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1326 (9th Cir. 1985). When a nonresident defendant challenges personal jurisdiction the plaintiff bears the burden of establishing the district court's jurisdiction over the defendant. *See Felch v. Trans-*

portes Lar-Mex S.A. De CV, 92 F.3d 320, 324 (5th Cir. 1996). The plaintiff "is obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Scott v. Breeland,* 792 F.2d 925, 927 (9th Cir. 1986).

The State of Marshall long-arm statute authorizes the exercise of jurisdiction over a person as to any cause of action arising from the transaction of any business within the State of Marshall. *See* MARSHALL REVISED CODE, 735 MRC 25-302. The Marshall statute has been construed to permit the exercise of jurisdiction to the full extent permitted by the Fourteenth Amendment. (R. at 8.) Thus, the issue before the Court is whether the assertion of in personam jurisdiction in this case satisfies the requirements of the Due Process Clause of the Constitution. *See Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774 (1984).

The Due Process Clause of the Fourteenth Amendment limits the circumstances in which a state may assert personal jurisdiction over nonresident individuals. *Pennoyer v. Neff,* 95 U.S. 714, 733 (1878). In *International Shoe Co. v. Washington,* the Supreme Court held that the Due Process Clause of the Fourteenth Amendment imposes significant limits on the ability of states to employ long-arm statutes to assert jurisdiction over nonresident defendants. 326 U.S. 310, 316 (1945). The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* The minimum contacts inquiry serves at least two interests. First, it protects the defendant from having to defend a lawsuit in a jurisdiction where it has no meaningful contacts and therefore may be unfamiliar with both the substantive and procedural law. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada,* 149 F.3d 1086, 1090 (10th Cir. 1998). Second, it acts to ensure that the state courts do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system. *Id.* Courts consider the due process analysis as a two part inquiry: (1) the court must determine whether "minimum contacts" exist and, if so, (2) the court must determine whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice. *Tingstol Co. v. Rainbow Sales, Inc.,* 8 F. Supp. 2d 1113, 1115 (N.D. Ill. 1998).

A. DOSPAM DID NOT HAVE SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF MARSHALL TO SUPPORT PERSONAL JURISDICTION

To determine whether minimum contacts have been satisfied, a court should look at the degree to which a defendant purposely initiated activity within the state. *Hanson v. Denckla,* 357 U.S. 235 (1978). A defendant's conduct and connection with the forum must be such that it should reasonably anticipate being haled into court there. *World-Wide*

Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Such a defendant has enjoyed the benefits and protections of that state's laws, and jurisdiction over it satisfies due process. *Hanson*, 357 U.S. at 253.

In determining whether minimum contacts exist so as to permit an assertion of jurisdiction, the Supreme Court has distinguished "general" and "specific" in personam jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n.8, 9 (1984); *Calder v. Jones,* 465 U.S. 783, 787 (1984). In order to assert jurisdiction when the cause of action does not arise out of or relate to the defendant's activities in the forum state, those activities must be sufficiently continuous and systematic to make the assertion of in personam jurisdiction reasonable. *See Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 447-48 (1952). Those contacts must be "so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely different from those activities." *Intl. Shoe,* 326 US. at 318. If they are, then the forum state can exercise general jurisdiction over the defendant notwithstanding the lack of a connection between the activities and the cause of action. *Perkins,* 342 U.S. at 447-48. Specific jurisdiction, on the other hand, can be asserted despite a lesser showing of contacts with the forum state, so long as "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985).

1. *The assertion of general jurisdiction over Dospam is inappropriate because he does not have continuous and systematic contacts with the State of Marshall*

The appellate court erred when it ruled that Dospam has "extensive contacts" with the State of Marshall justifying general jurisdiction. (*See* R. at 9.) The Supreme Court has said that general jurisdiction exists only when a defendant's contacts with the forum state are "continuous and systematic." *Helicopteros,* 466 U.S. at 414-16. Under this standard courts "regularly have declined to find general jurisdiction even where the contacts were quite extensive." *Amoco Egypt Oil Co. v. Leonis Navigation Co.,* 1 F.3d 848, 851 n.3 (9th Cir. 1993). "The standard for establishing general jurisdiction is 'fairly high' . . . and requires that the defendant's contacts be of the sort that approximates physical presence." *Bancroft & Masters, Inc. v. Augusta Natl. Inc.,* 223 F.3d 1082, 1086 (9th Cir. 2000).

In *Perkins*, the Supreme Court found systematic and continuous contacts sufficient to establish general jurisdiction over a foreign corporation where the president of the corporation maintained an office in the forum and conducted business on behalf of the company, kept company

files in the forum, held director's meetings in the forum, and held bank accounts in the forum. 342 U.S. at 447-47. In *Helicopteros*, the plaintiffs brought suit in Texas against a Colombian helicopter transportation provider for injuries suffered in a crash in Peru. *Id.* at 411. The plaintiff-decedents' employer, a Texas joint venture, contracted with the defendant for the use of helicopters to transport the decedents to their workplace in Peru. *Id.* The contract was executed in Peru, but a representative of the defendant went to Texas once to negotiate the deal. *Id.* In addition, the defendant purchased helicopters and spare parts from a Texas company and sent pilots to Texas for training. *Id.* The Supreme Court concluded that purchases and unrelated trips, standing alone, are not a sufficient basis for a state's assertion of jurisdiction. *Id.* at 420.

In this case, Dospam's contacts with the State of Marshall are insufficient to grant general jurisdiction over Dospam. Dospam does not maintain an office in Marshall and does not carry on general business activities in the state. The only current contact Dospam has with Marshall is his operation of Webgags.com, which is accessible to anyone in the world with access to the Internet. (*See* R. at 6.) Dospam grew up in Marshall, but is no longer a resident of Marshall. (R. at 6.) Dospam also submitted resumes to several companies in Marshall over seven years ago. (R. at 6.) These are the only additional contacts that Dospam has with the State of Marshall as set out in the record. If purchases and unrelated trips are insufficient to assert jurisdiction, as they were in *Helicopteros*, then Dospam's limited contacts set out in the record are even less sufficient to assert jurisdiction.

2. *Dospam's previous contacts with the State of Marshall are irrelevant when determining whether general jurisdiction is proper*

Dospam's direct contacts with the State of Marshall ceased over six years ago and are therefore irrelevant for the determination of jurisdiction. All of these contacts existed prior to the creation of Webgags.com. (*See* R. at 6.) Contacts before the time of the alleged wrongdoing are irrelevant in the consideration in establishing general jurisdiction. *See Clearclad Coatings, Inc.*, No. 98 C 7199, 1999 WL 652030, at *23 (N.D. Ill. Aug. 20, 1999); *see also Sara Lee Corp. v. Interstate Warehousing, Inc.*, No. 96 C 5375, 1997 WL 189308, at *2 (ND. Ill. Apr. 15, 1997) (because the defendant had ceased all activities in the forum before the injury to the plaintiff, no general jurisdiction); *Scherr v. Abrahams*, No. 97 C 5453, 1998 WL 299678, at *5 (N.D. Ill. May 29, 1998) (contacts before the allegedly infringing journal was created are not basis for jurisdiction). "[W]hat is relevant is whether [his] forum contacts *at the time of the incident complained of* [were] continuous and systematic." *Mobay*

Chemical Corp. v. Air Products and Chemicals Inc., 434 A.2d 1250, 1253 (Pa. Super. Ct. 1981). Therefore, because Dospam's contacts with Marshall ended six years prior to the incident complained of, his contacts with Marshall were not "systematic and continuous" as the Fourteenth Amendment requires and the appellate court erred in concluding "Dospam has other extensive contacts with the State of Marshall [justifying the assertion of jurisdiction]." (R. at 8-9.)

3. *Dospam's Web site did not confer general jurisdiction over him because it is a "passive site"*

Dospam's Web site is not grounds to assert general jurisdiction over him because the Web site does little more than make information available to those who are interested in it. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* introduced the current test, called the "sliding scale," to determine if a Web site confers jurisdiction to the forum state. 952 F. Supp. 1119 (W.D. Pa. 1997). In that case, the court determined that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet." *Id.* at 1124. The court then developed a sliding scale to measure contacts with the forum:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. (citations omitted). Finding that jurisdiction was proper, the *Zippo* court concluded that the defendant's actions of selling approximately 3,000 passwords and entering into seven contracts with Pennsylvania residents "constitute[d] the purposeful availment of doing business in Pennsylvania." *Id.* at 1126.

A passive Web site "does little more than make information available to those who are interested in it." *Id.* at 1124. A majority of courts agree that a passive Web site may not serve as the basis for exercising personal jurisdiction. *See e.g. Remick v. Manfredy*, 238 F.3d 248, 259 n.3 (3d Cir. 2001); *GTE New Media Services, Inc. v. BellSouth*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000); *Mink v. AAAA Development, LLC*, 190

F.3d 333, 336-37 (5th Cir. 1999); *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373 (Fed. Cir. 1998); *Bensusan Restaraunt Corp. v. King*, 126 F.3d 25 (2d Cir. 1997); *Miami Breakers Soccer Club, Inc. v. Women's United Soccer Ass'n*, 140 F. Supp. 2d 1325, 1329-30 (S.D. Fla. 2001); *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194, 1203-04 (C.D. Cal. 2000); *Amberson Holdings, LLC v. Westside Story Newspaper*, 110 F. Supp. 2d 332, 337 (D.N.J. 2000); *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 795-96 (E.D. Tenn. 2000); *Brown v. Geha-Werke*, 69 F. Supp. 2d 770, 777-78 (D.S.C. 1999); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999). One opinion that exemplifies this proposition is *Cybersell, Inc. v. Cybersell Inc.*, in which the court held that maintenance of a Web site containing advertisements about its products was not enough to subject the defendant to personal jurisdiction. 130 F.3d 414, 420 (9th Cir. 1997). The Web site contained the Cybersell logo, its telephone number, and an invitation for customers to contact the owners via e-mail. *Id.* at 415. The site also included a link that allowed users to post information about them. *Id.* In discussing the purposeful availment issue, the court found that the defendant did not sell products on its Web site or direct contacts to the forum. *Id.* at 419. Therefore, the court held the exercise of jurisdiction was inappropriate. *Id.* at 419-20.

Dospam's Web site is passive because unlike the defendant in *Zippo*, Dospam did not sell anything to the residents of the forum, or enter into any contracts with them. In fact, Dospam's Web site is even more passive than the Web site in *Cybersell* because Dospam's Web site did not include a link where users could post information about themselves, a telephone number, or an invitation to e-mail the owner. Further, the advertisements on Dospam's Web site were for other companies' products. (R. at 6.) Dospam's Web site simply posts information that is accessible to users in any foreign jurisdiction. If this Court were to rule that Dospam's Web site conferred jurisdiction, then every complaint arising out of the use of the Internet would automatically result in personal jurisdiction whenever the plaintiff is located in Marshall. This does not comport with what the Supreme Court has defined as invoking the benefits and protections of the forum state and would violate due process.

B. The Assertion of Specific Jurisdiction Over Dospam is Inappropriate Because He Did not Purposefully Avail Himself of the Law of Marshall

Specific jurisdiction is also inappropriate over Dospam because he did not purposefully avail himself of the privilege of conducting activities in the State of Marshall. Specific jurisdiction arises when the defendant's contacts with the forum are related to the controversy underlying the litigation. *See Helicopteros*, 466 U.S. at 414 n.8. If the defendant's

activities are not "substantial" or "continuous and systematic," the court may not exercise jurisdiction unless the following three criteria are met: (1) the nonresident purposefully availed himself of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of its laws; (2) the claim arose out of or resulted from the defendant's forum-related activities; and (3) an exercise of jurisdiction would be reasonable. *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986).

1. *Dospam did not purposefully avail himself of the law of Marshall because the June 13 e-mail was not sent for pecuniary gain*

Dospam did not purposefully avail himself of the privilege of conducting activities in the State of Marshall because his e-mail was not sent for direct financial gain. In order for an e-mail to meet the purposeful availment requirement, courts that have addressed the issue have held that the e-mail, at a minimum, must have been sent for pecuniary gain. *See Verizon Online Services, Inc. v. Ralsky*, 203 F. Supp. 2d 601 (E.D. Va. 2002); *Reliance Natl. Indemnity Co. v. Pinnacle Casual Assurance Corp.*, 160 F. Supp. 2d 1327 (M.D. Ala. 2001) (citing *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 779 (S.D. Miss. 2001)). Dospam may eventually hope to reap a pecuniary gain off of his Web site, but as of yet he is not doing so. (R. at 6.) While Dospam's e-mail was sent out as a promotional tool, there is no evidence that the purpose of the e-mail was pecuniary gain. Dospam's Web site does contain paid advertisements (R. at 6.); however, there is no evidence that these advertisements are dependent upon traffic to the Web site. Therefore, because the June 13 e-mail was not sent for pecuniary gain, Dospam did not purposefully avail himself of the privilege of conducting activities in the State of Marshall through that e-mail.

2. *Dospam did not purposefully avail himself of the law of Marshall because the June 13 e-mail did not have a substantial connection with the State of Marshall*

Even if this Court finds that Dospam's e-mail was sent for pecuniary gain, the e-mail did not have a "substantial connection" with the State of Marshall. While the Supreme Court has held that a single contact can serve as the exclusive basis for finding that the defendant "purposefully availed himself" of the privileges of the forum, that contact must have a "substantial connection with [the forum] State." *See McGee v. Intl. Life Ins. Co.*, 355 U.S. 220, 223 (1957). In *McGee*, the Texas defendant's sole connection with the California forum was the mailing of an offer to renew a life insurance contract to the decedent at his California home. *Id.* The Supreme Court upheld the California courts' jurisdiction over the

subsequent suit on the insurance contract by the plaintiff beneficiary. *Id.* However, the court based its holding on the fact that the "contract . . . had substantial connection with [the forum] State." *Id.* This substantial connection arose from several facts: the contract was delivered in California, the premiums were mailed from there, and the insured died there. *Id.*

Unlike *McGee*, where there was a substantial connection between the single contract and the forum state, the only connection here is that an e-mail sent from Potter was opened in Marshall. To say that Dospam's single e-mail solicitation to Tekhead created a "substantial connection" with Marshall renders the concept of "substantiality" meaningless. Because the June 13 e-mail was not substantially related to Marshall, the appellate court erred in finding jurisdiction proper.

3. *Dospam did not purposefully avail himself of the law of Marshall by posting Tekhead's Outlook address book on his Web site*

Dospam did not target the State of Marshall by publishing Tekhead's Outlook address book on Webgags.com. A review of several cases specifically addressing Internet contacts reveals that the purposeful availment requirement is absent in this case. For instance, in *Barrett,* 44 F. Supp. 2d at 728, the court concluded that the defendant had not purposefully availed itself of the forum by simply posting allegedly defamatory statements and articles about the plaintiff on two informational Web sites maintained by the defendant and in messages that the defendant posted on e-mail news groups that had links back to the defendant's Web sites. *Id.* Specifically, the court ruled that because "the nature and quality of the contacts made by the Defendant were accessible around the world and never targeted nor solicited [the forum's] residents," such contacts were insufficient to trigger specific personal jurisdiction. *Id.* The court distinguished the defendant's postings on the Internet from magazines or newspapers stating: "Unlike distributors of magazines or other materials who can affirmatively decide not to sell or distribute to certain forums, after posting to a[n] [e-mail] discussion group . . . the option of bypassing certain regions is not available." *Id.* Similarly, the court in *Bensusan Restaurant Corp. v. King,* 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd,* 126 F.3d 25 (2d Cir. 1997), held that "[the defendant] has done nothing to purposefully avail himself of the benefits of [the forum]. [The defendant], like numerous others, simply created a Website and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum state."

As in *Barrett*, where the defendant did not target the forum by publishing allegedly defamatory statements on its Web sites, Dospam did not target Marshall by placing Tekhead's address book on Webgags.com. Dospam's Web site was available around the world, and there is no evidence that he specifically encouraged residents of Marshall to visit the site. Unlike a magazine or newspaper publisher, Dospam could not choose to have his Web site bypass certain regions. The nature and quality of the contacts made by Dospam may have been felt around the world, but such contacts are insufficient to trigger specific personal jurisdiction in Marshall.

C. Jurisdiction Over Dospam Offends Traditional Notions of Fair Play and Substantial Justice

Even if this Court holds that Dospam satisfies the minimum contacts requirement of the due process analysis, the appellate court should have concluded that jurisdiction over Dospam is fundamentally unfair because litigating in Marshall is too high of a burden for Dospam. In *International Shoe*, the Supreme Court noted that in addition to minimum contacts with the state, the court must also consider other factors to determine whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice. 326 U.S. at 316. One of the factors that must be considered is the burden on the defendant. *See World-Wide Volkswagen,* 444 U.S. at 292. As noted in *World-Wide Volkswagen,* the burden on the defendant is "always a primary concern." 444 U.S. at 292.

The Supreme Court elaborated on the burden issue in *Burger King*. 471 U.S. 462. In that case, the Court expressed concern about asserting personal jurisdiction over out-of-state consumer defendants. *Id.* at 485-86. The Court noted that "[t]he 'quality and nature' of an interstate transaction may sometimes be so 'random,' 'fortuitous,' or 'attenuated' that it cannot fairly be said that the potential defendant 'should reasonably anticipate being haled into court' in another jurisdiction." *Id.* at 486 (quoting *World-Wide Volkswagen,* 444 U.S. at 297). The Court explained that the Due Process Clause would "prevent rules that would unfairly enable [plaintiffs] to obtain default judgments against unwitting [defendants]." *Id.* In *Pres-Kap, Inc. v. System One, Direct Access, Inc.,* the court applied the reasoning of *Burger King* in a case denying personal jurisdiction over a defendant computer database user. 636 S.2d 1351, 1353 (Fla. Dist. Ct. App. 1994). The court expressed concern that by simply using an online service, defendants would be subject to jurisdiction wherever the online service's database was located. "Such a result," the court noted, "is wildly beyond the reasonable expectations of such com-

puter-information users, and, accordingly the result offends traditional notions of fair play and substantial justice." *Id.*

Dospam's case is analogous to the "out-of-state consumer" discussed in *Burger King,* and the "out-of-state computer-system user" discussed in *Pres-Kap*. Dospam set up a Web site and sent out promotional e-mail without realizing the legal implications of what he was doing. He was as "unwitting" as the out-of-state consumer who makes small purchases. There is no way possible that Dospam could have known for certain that Tekhead would open the e-mail in the State of Marshall. The fact that Tekhead did open the e-mail in the State of Marshall was just a 'random,' 'fortuitous,' or 'attenuated' act. There isn't even an indication in the record that Dospam was even aware of the residency of the individuals to whom his e-mails were directed. However, even if this had been shown, it would not have altered Dospam's reasonable expectation that any litigation over the contents of his e-mails would be litigated in the State of Potter. The notion that he could be sued in Marshall by sending out a single e-mail to an unknown regional location was "wildly beyond his reasonable expectations," and therefore offends traditional notions of fair play and substantial justice.

Dospam does not have minimum contacts with the State of Marshall, and personal jurisdiction over Dospam would be unreasonable. The State of Marshall cannot assert general jurisdiction over Dospam because he does not have "continuous and systematic" contacts with the forum. Further, specific jurisdiction is inappropriate because Dospam did not purposefully avail himself of the laws of Marshall. Finally, personal jurisdiction over Dospam would be unreasonable because Dospam could not have anticipated being haled into court in Marshall based on a single e-mail message. Therefore, this Court should hold that the appellate court erred in not granting Dospam's motion for summary judgment as to personal jurisdiction and dismiss this action.

II. THE FIRST DISTRICT COURT OF APPEALS CORRECTLY GRANTED DOSPAM'S MOTION AS TO FALSE LIGHT PUBLICITY BECAUSE TEKHEAD WAS NOT PLACED IN A FALSE LIGHT, NOR WAS ANY MATTER CONCERNING HIM MADE PUBLIC

Should this Court determine that the assertion of personal jurisdiction over Dospam is permissible, it should hold that the appellate court correctly granted Dospam's motion as to false light publicity because the evidence shows that Tekhead was neither placed in a false light, nor was any matter concerning him made public. Dospam is entitled to summary judgment because the undisputed facts in this case demonstrate that there is no publicity placing Tekhead in a false light, or intrusion upon Tekhead's seclusion, as a matter of law. Therefore, the First District

Court of Appeals' decision granting summary judgment in favor of Dospam as to these issues should be affirmed.

As Professor Prosser noted, invasion of privacy is now "declared to exist by the overwhelming majority of American courts." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960). Professor Prosser had concluded that invasion of privacy was "not one tort, but a complex of four." *Id.* at 389. The Second Restatement adopted Prosser's view, describing four distinct injuries: (1) intrusion upon seclusion, (2) appropriation of likeness, (3) public disclosure of private facts, and (4) false-light publicity. RESTATEMENT (SECOND) OF TORTS § 652A (1977). In this case Tekhead has alleged that Dospam committed the torts of intrusion upon seclusion and false-light publicity.

A. THE JUNE 13 E-MAIL DID NOT PLACE DOSPAM IN A FALSE LIGHT

The courts of Marshall follow the RESTATEMENT (SECOND) OF TORTS governing claims for invasion of privacy stemming from publicity placing a person in a false light. (R. at 9.) The relevant text of section 652E reads: "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the liability to the other for invasion of privacy. . . ." RESTATEMENT (SECOND) OF TORTS § 652E (1977). The Court of Appeals correctly held that summary judgment was proper because the June 13 e-mail did not place Tekhead in a "false light" before the public.

1. *The June 13 e-mail could not have reasonably been taken as factual*

Tekhead was not placed in a false light through the content of Dospam's e-mail message. No reasonable viewer of the e-mail would treat the contents of the e-mail as a factual commentary that Tekhead was a pornographer. Since the e-mail could not be taken as factual, the e-mail does not amount to false light invasion of privacy because Tekhead's co-workers and supervisor did not receive a false impression about Tekhead.

While the false light invasion of privacy tort protects individuals from major misrepresentations of character, history, activities or beliefs, if a statement cannot reasonably be taken as factual, the statement does not amount to false light invasion of privacy because the public did not receive a false impression about the plaintiff. *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997). A false light claim is "closely allied" with an action for defamation, and "the same considerations apply to each." *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 766-67 (D.N.J. 1981). Under the law of defamation, "[a] parody or spoof that no reasonable person would read as a factual statement

or anything other than a joke . . . cannot be actionable as a defamation." *Walko v. Kean College,* 561 A.2d 680, 683 (N.J. Super. Ct. Law Div. 1988). Similarly, "an action for 'false light' invasion of privacy cannot survive when the publication or statement sued upon cannot be reasonably viewed as a factual claim and is nothing more than a joke or a spoof." *Stien,* 944 P.2d at 380.

For example, in *Stien,* the defendants made a video in which the plaintiff was asked to describe in detail a chore he hated doing. *Id.* at 376. Unbeknownst to the plaintiff the video was edited to make it appear as if the plaintiff were answering the question, "What's sex like with your partner?" *Id.* The court held that "an action for false light invasion of privacy cannot survive when the publication or statement sued upon cannot be reasonably viewed as a factual claim and is nothing more than a joke or spoof." *Id.*; *see also Partington v. Bugliosi,* 825 F. Supp. 906, 925 (D. Haw. 1993); *Hicks v. Casablanca Records,* 464 F. Supp. 426, 433 (S.D.N.Y. 1978); *Byrd v. Hustler Mag., Inc.,* 433 S.2d 593, 595 (Fla. Dist. Ct. App. 1983); *Walko,* 561 A.2d at 683. Similarly, in *Walko,* a college administrator brought an action for false light publicity for a phony ad placed in a student newspaper. 561 A.2d at 682. The ad was included among several other phony ads and identified the plaintiff, among three other individuals, as someone available for "good phone sex." *Id.* The court held that because "no reasonable reader would interpret the ad . . . as a factual claim about the plaintiff's ability for 'good telephone sex' the 'false light' cause of action must . . . fail." *Id.* at 688. *See also Pring v. Penthouse Intl., Ltd.,* 695 F.2d 438, 441-42 (10th Cir. 1982) (sexual parody in magazine did not place the plaintiff in a false light when the parody could not be taken literally and could not reasonably be considered a statement of fact).

Any communication by the June 13 e-mail that Dospam was viewing pornography on his computer cannot reasonably be taken as factual. The e-mail contained an animated image of George and Jane Jetson dancing the fandango on the screen. (R. at 5.) The e-mail also audibly announced "ALERT! STOP VIEWING PORN! CLOSE YOUR BROWSER IMMEDIATELY!" (R. at 7.) Just like the video in *Stien,* or the phony ad in *Walko,* the reasonable viewer of this message would have concluded that this was a practical joke. However, if there were any doubt in the viewer's mind, the message also displayed a hyperlink on the screen with the caption "Click here to send this or other delightful Webgags to a friend," making it clear that this was intended to be a joke. (R. at 7.) Therefore, the message does not amount to false light invasion of privacy because Tekhead's co-workers and supervisor did not receive a false impression that the plaintiff was a pornographer.

2. *The June 13 e-mail did not attribute to Tekhead characteristics that were false*

The reasonable viewer of this e-mail message would have concluded that it was a practical joke. The only impression that the message in the e-mail could have created about Tekhead was that he was a practical jokester. An essential requirement of the false light element of this tort is that any publicity attributes to the plaintiff characteristics, conduct or beliefs that are false. RESTATEMENT (SECOND) OF TORTS § 652E cmt. b. (1977). However, as the record evidences, Tekhead was already known to be a practical jokester. Therefore, the June 13 e-mail did not attribute to him characteristics that were false.

To constitute the tort of invasion of privacy by publicity that places one in a false light, there must be established as one of the elements of the tort that the publicity "depicts the plaintiff as something or someone he is not." *Brown v. Capricorn Records, Inc.,* 222 S.E.2d 618, 619 (Ga. App. 1975); *see also Swerdlick v. Kock,* 721 A.2d 849, 862 (R.I. 1998) ("defendant's statements, while sometimes overstated or slightly off the mark in one factual detail or another, nonetheless were based on substantially true facts, and thus cannot be relied upon to support an action for false light"). In *Brown*, a blind preacher and singer, whose songs were only religious, was held not to have been falsely represented on a record album cover of a rock and roll band. *Id.* at 620. The court acknowledged in that case, that the photograph in question portrayed the plaintiff in front of a liquor store with the imputation that he was involved therewith, and implied an association with rock musicians. *Id.* at 619. However, the court pointed to evidence establishing that the plaintiff was indeed a frequenter of that particular liquor store, and had been associated with rock and roll musicians in the past, so that whatever embarrassment he might have received from the album cover's publication, the cover did not portray him falsely. *Id.* at 619-20.

The element of falsity is absent in this case, as well. As early as Tekhead's first performance review in December of 2000, comments from his supervisors included "a lack of enthusiasm, an apparent desire to distract other employees," and "a 'jokester' attitude." (R. at 3.) At his next performance review six months later, his supervisors again noted his unruly sense of humor. One supervisor commented that, "[h]e enjoys practical jokes, and has played quite a few in the past ninety days. His sense of humor tends to be on the boisterous side, and this has been a distraction among his fellow employees from time to time." (R. at Ex. B-1.) Another supervisor noted that "if this trend he has shown continues, it may very well happen [that Mr. Tekhead will become a liability]." (R. at Ex. B-3.) Tekhead may have toned down his sense of humor in order to save his job (*See* R. at Ex. C.); however, he was still not portrayed falsely, just

as the plaintiff in Brown was not portrayed in a false light even after he had stopped associating with rock and roll musicians. Therefore, because Tekhead cannot prove that he was placed in a false light, summary judgment as to the false light publicity claim was proper.

B. THE JUNE 13 E-MAIL DID NOT GIVE PUBLICITY TO ANY MATTER CONCERNING TEKHEAD

Even if Tekhead was placed in a false light, the appellate court correctly held that the false light was not made publicly. Publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." RESTATEMENT (SECOND) OF TORTS § 652E cmt. a. (1977). Therefore, Dospam did not make any matter concerning Tekhead public because, "it is not an invasion of privacy to communicate a fact concerning the plaintiff's private life to a single person or even a small group of persons." *Id.* This court should adhere to this rule because it properly constrains the tort of false light publicity.

1. *An insufficient number of people viewed the e-mail to constitute "publicity"*

Dospam's e-mail was not communicated to the public because the contents of the e-mail were not communicated to the public at large. The Restatement distinguishes between "publicity" for purposes of invasion of privacy, and "publication" as that term is used in connection with liability for defamation. *Id.* at § 652D cmt. a.[1] Publicity, unlike the element of publication in a defamation case, requires that the information disclosed has or is substantially likely to become general knowledge to the public at large. *Id.*; *Jones v. U.S. Child Support Recovery,* 961 F. Supp. 1518, 1520-21 (D. Utah 1997); *Kuhn v. Account Control Tech.*, 865 F. Supp. 1443, 1448 (D. Nev. 1994). Examples would include newspapers, magazines, handbills to a large number of people or a statement made in an address to a large audience of people. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977). For example, as the Restatement illustrates, a creditor that posts a statement in the window of its shop that a customer owes it a debt has invaded the customer's privacy. *Id.* at § 652D cmt. a, illus. 2; *see also Brents v. Morgan,* 299 S.W. 967, 968, 971

1. The publicity required for the tort of false light publicity is identical to that required for publication of private facts. *See Restatement (Second) of Torts* § 652E cmts. a, b, illus. 1-5 (1997). (The Restatement refers readers to comment a of § 652C which should read § 652D. *See Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 554 n.3 (Minn. 2003)). Therefore, it is proper to look to cases analyzing publicity with respect to publication of private facts when discussing false light publicity.

(Ky. 1927) (posting a 5-by-8-foot notice calling attention to customer's overdue account in a show window of an automobile garage constitutes publicity).

In contrast, dissemination to only a handful of people, including the plaintiff's employer and co-workers, does not constitute publicity as it is defined in the Restatement. *See e.g. C.L.D. v. Wal-Mart Stores, Inc.,* 79 F. Supp. 2d 1080, 1084 (D. Minn. 1999) (the disclosure of private facts to a few employees does not constitute publication); *Dancy v. Fina Oil & Chemical Co.,* 3 F. Supp. 2d 737, 740 (E.D. Tex. 1997) (insufficient publication where "the allegedly publicized facts, at worst, were made know to some workers in the refinery"); *Wells v. Thomas,* 569 F. Supp. 426, 437 (E.D. Pa. 1983) (publication to a community of employees at staff meetings and discussions between defendants and other employees does not constitute "publicity"); *Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 558 (Minn. 2003) (distribution of names and social security numbers of 204 employees to 16 terminal managers did not constitute publicity); *Doe v. Methodist Hosp.,* 690 N.E.2d 681, 692 (Ind. 1997) (disclosures to co-workers that the plaintiff was HIV positive was not "publicity"); *Eddy v. Brown,* 715 P.2d 74, 78 (Okla. 1986) (disclosure to coworkers that the plaintiff was undergoing psychiatric therapy was not "publicity"); *Vogel v. W.T. Grant Co.,* 327 A.2d 133, 137 (Pa. 1974) (there was no "publicity" where three relatives and an employer were notified of plaintiff's indebtedness). The Restatement provides the following illustration, which exemplifies this principle: "A, a creditor writes a letter to the employer of B, his debtor, informing him that B owes the debt and will not pay it. This is *not* an invasion of B's privacy under this section." RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, illus. 1 (1997) (emphasis added). Relying on this illustration, the court in *Kuhn* held that there was no publicity when any dissemination that occurred was limited to the small group of the plaintiff's co-workers and was not made "public." 865 F. Supp. at 1447. In that case a creditor made six separate phone calls to the plaintiff's employer in an attempt to collect a debt. *Id.* The court concluded, that under these facts, "while a private fact may have been disclosed, it was not made 'public' as that term is used in the Restatement." *Id.*

Similarly in *Jones,* the court concluded that delivery of a poster to the plaintiff's employer as well as a few close relatives was not "publicity." 961 F. Supp. at 1521. In that case defendants threatened to disseminate a dead-beat parent "wanted poster" to the public at large, but in fact only delivered the poster to the plaintiff's employer, mother and two siblings. *Id.* The court held that distribution to this "handful of people" was insufficient to constitute publicity. *Id.*

Tekhead's claim of false light publicity fails because he cannot prove that the contents of Dospam's e-mail message were communicated to the

"public at large." The facts of this case are parallel to these cases that held that any dissemination of private information was insufficient to constitute publicity. Any information that was communicated about Dospam was disseminated to no more than five of Dospam's co-workers and a supervisor. (R. at 5.) As the cases illustrate, this small group of Tekhead's co-workers falls very short of the number of people the courts consider adequate to satisfy the element of "publicity."

2. *This court should follow the rule adhered to by a majority of courts which require publicity to the public at large*

The Restatement definition of "publicity" appropriately limits the false light publicity cause of action. *See Bodah*, 663 N.W.2d at 557. Therefore, this court should follow the majority of other courts that have rejected the "special relationship" approach taken by a very limited number of jurisdictions. A minority of jurisdictions have concluded that in situations where there is a special relationship between the plaintiff and the public, a departure from the Restatement's publicity requirement is warranted. *See Beaumont v. Brown,* 257 N.W.2d 522, 531 (Mich. 1977) (holding a disclosure made to "a particular public with a special relationship to the plaintiff, such as co-workers, family, or neighbors, could be actionable), *overruled on other grounds by Bradley v. Saranac Community School Board of Education,* 565 N.W.2d 650, 658 (Mich. 1997). This approach broadens the scope of the tort of invasion of privacy beyond its intended and necessary protections.

The invasion of privacy tort had its beginning in an 1890 law review article written by Samuel Warren and Louis Brandeis entitled: *The Right to Privacy*. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193 (1891). They were seeking "a principle which can properly be invoked to protect the privacy of the individual." *Id.* at 197. Warren and Brandeis were especially concerned with "the evil of the invasion of privacy by the newspapers." *Id.* at 195. This new right was not intended to be boundless: the authors recognized its limitations. Its object was solely to "protect the privacy of private life, and *to whatever connection a man's life has ceased to be private . . . to that extent the protection is to be withdrawn." Id.* at 215 (emphasis added). Professor Prosser noted the danger of expanding the tort of invasion of privacy:

> [O]ne disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation. . . . If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discour-

> agement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

Prosser, *supra*, at 401. These concerns are just as legitimate today as they were when Professor Prosser first expressed them over forty years ago.

Following the reasoning set out by Warren and Brandeis, and Professor Prosser, the court in *Bodah* declined to accept the minority rule, stating: "We also reject the 'special relationship' or 'particular public' approach taken by some jurisdictions." *Bodah*, 663 N.W.2d at 556. The court there, specifically addressing the tort of publication of private facts, reasoned that the tort focused on a very narrow law that was nonactionable under defamation rules. The court concluded that "[t]he Restatement's definition of 'publicity,' which requires a broad reach, constrains the tort of publication of private facts."

As noted, a false light claim is very similar to an action for defamation. *Cibenko* 510 F. Supp. at 766-67. However, as Warren and Brandeis' article reflects, this tort was not intended to evade the law of defamation. The Restatement properly constrains this tort in order to avoid circumventing the elements of defamation "in so casual and cavalier a fashion." This court should follow the majority of other courts that adhere to the Restatement's definition of "publicity" and reject the "special relationship" approach to the false light tort.

Therefore, even if personal jurisdiction over Dospam was properly asserted, Tekhead's claim of publicity placing him in a false light before the public fails as a matter of law. The June 13 e-mail did not place Tekhead in a false light because the e-mail could not have reasonably been construed as factual. The only matter that could have been communicated about Tekhead was that he was a practical jokester; however, because Tekhead was a practical jokester, this message did not place him in a false light. If the June 13 e-mail did place Tekhead in a false light, his claim of false light publicity still fails because he was not placed in a false light before the public at large. Therefore, this Court should hold that the appellate court properly granted summary judgment to Dospam as to Tekhead's claim of false light publicity.

III. THE FIRST DISTRICT COURT OF APPEALS CORRECTLY GRANTED DOSPAM'S MOTION FOR SUMMARY JUDGMENT AS TO INTRUSION UPON SECLUSION BECAUSE DOSPAM DID NOT INTRUDE UPON TEKHEAD'S SECLUSION BY COLLECTING HIS E-MAIL ADDRESS BOOK

Should this Court determine that personal jurisdiction over Dospam was proper, Tekhead's claim of intrusion upon seclusion fails. An intru-

sion upon seclusion occurs when a person commits (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion is highly offensive or objectionable to a reasonable person; (3) the matter on which the intrusion occurs is private; and (4) the intrusion causes anguish and suffering. RESTATEMENT (SECOND) OF TORTS § 652B (1977). The issues in dispute in this case are whether the conduct here constitutes an unauthorized intrusion or prying into Tekhead's seclusion, and whether the matter on which the alleged intrusion occurs was private. (R. at 10.) Dospam did not intrude into Tekhead's seclusion because Tekhead did not have an actual expectation of seclusion in the e-mail address book. Even if Tekhead did have an actual expectation of solitude, that expectation was unreasonable. Therefore, this Court should hold that the appellate court correctly granted summary judgment in favor of Dospam as to this issue.

A. TEKHEAD'S OUTLOOK ADDRESS BOOK WAS NOT SECLUDED BECAUSE HE HAD NO ACTUAL EXPECTATION OF SECLUSION

Dospam did not intrude into Tekhead's seclusion by collecting his e-mail address book because the address book was not secluded. A defendant is subject to liability for intrusion upon seclusion "when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." RESTATEMENT (SECOND) OF TORTS § 652B cmt. c. (1976). Seclusion does not exist when the plaintiff does not exhibit an actual expectation of seclusion in the matter. *Med. Laboratory Mgt. Consultants v. Am. Broad. Companies,* 306 F.3d 806, 813 (9th Cir 2002); *Kemp v. Block,* 607 F. Supp. 1262, 1264 (D. Nev. 1985). Tekhead's e-mail address book was not secluded because Tekhead did not exhibit an expectation of seclusion by placing it on Distress' computer system.

A subjective expectation of seclusion is tested by any outward manifestations by Tekhead that he expected his e-mail address book to be confidential. *See id. Kemp* is instructive on this principle. In that case, the plaintiff, a technician, had a loud argument with the defendant, who was his foreman in the instrument shop where they both worked. *Id.* at 1263. Unbeknownst to the plaintiff, the defendant tape-recorded the argument. *Id.* In dismissing the plaintiff's invasion of privacy claim, the court noted that the plaintiff could not have had a reasonable expectation of privacy because the plaintiff argued in a loud voice, and the small size of the shop and lack of interior walls further indicated that an expectation of privacy would be objectively unreasonable. *Id.* Further, the instrument shop was a place where the plaintiff's co-workers had a right to be and the plaintiff did not "have a right to exclude other persons from entering the shop while the argument ensued." *Id.* The court concluded,

therefore, that the plaintiff knew that others could overhear the argument and he had no reasonable expectation of privacy. *Id.*

Similarly, in *Medical Laboratory Management Consultants v. American Broadcasting Companies* the Ninth Circuit held that there is no subjective expectation of seclusion in information readily exposed to others. 306 F.3d 806, 813 (9th Cir. 2002). In that case, a laboratory technician who was conducting a tour claimed that he had a subjective expectation of privacy in the laboratory where he conducted his meeting with undercover representatives from American Broadcasting Companies ("ABC") and gave them a tour. *Id.* In discharging his claim, the court noted the technician's willingness to invite the strangers into the administrative offices for a meeting and then give a tour of the premises. *Id.* The court reasoned that the fact that he had no expectation of privacy in the parts of the lab that he showed to the ABC representatives was exemplified by the fact that the technician did not allow access to his personal office. *Id.* The court concluded that the technician's conduct reflected that he regarded his office as private, but not the other parts of the laboratory's administrative offices that he readily exposed to the undercover representatives. *Id.* at 814.

By placing personal contacts into an address book he knew was not confidential according to company policy, Tekhead indicated that he did not consider his e-mail address book to be secluded. The Distress electronic information systems policy, which Tekhead acknowledged by signature at the onset of his employment, informs employees that the company reserves the right to "access, monitor, and disclose communications and information stored in . . . any part of its electronic information systems." (R. at Ex. A-1.) As in *Kemp*, Tekhead did not have a right to exclude others from viewing his Outlook address book. Tekhead gave up all expectations of seclusion when he "readily exposed" his address book to Distress. *See Am. Broad. Companies,* 306 F.3d at 814. Thus, summary judgment for Dospam was correctly granted because Tekhead's Outlook address book did not constitute seclusion as a matter of law.

B. Any Expectation of Privacy that Tekhead Had was Objectively Unreasonable

Should the Court find that Tekhead's e-mail address book was secluded, summary judgment was still proper because this expectation of privacy was objectively unreasonable. The Restatement requires that the matter upon which an alleged intrusion occurs be private in order to sustain an intrusion upon seclusion claim. Restatement (Second) of Torts § 652B (1977). Even if Tekhead expected his e-mail address book to be private, this expectation was unreasonable because his e-mail address book was company property. Also, this expectation was unreasona-

ble because Dospam's use of the e-mail address book was subject to company policy. Further, any reasonable expectation of privacy was forfeited when he placed private information within reach of a third party by using a company information system. Therefore, the court of appeals correctly granted Dospam's motion for summary judgment as to intrusion upon seclusion.

1. *Tekhead had no reasonable expectation of privacy because his e-mail address book was company property and subject to monitoring by Distress.*

Tekhead had no expectation of privacy in his e-mail address book because it was placed on his work computer. "An employee's expectation of privacy is lower in the workplace areas and items that are related to work and are generally within the employer's control." *Adkins v. Kelly-Springfield Tire Co.,* No. 97 C 50381, 1998 U.S. Dist. LEXIS 16816, at *9 (N.D. Ill. Oct. 14, 1998) (citing *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987)). In *O'Connor,* the U.S. Supreme Court outlined the boundaries for an employee's expectation of privacy in the work environment. 480 U.S. at 715 (holding that a government employee had a reasonable expectation under the Fourth Amendment to be free from unreasonable search and seizure in the workplace). The Court explained that the hallways, cafeteria, offices, desks, and file cabinets are all part of the workplace regardless of whether they contain an employee's personal items. *Id.* On the other hand, not every personal effect an employee brings into the workplace becomes subject to an employers search. *Id.* If an employee brings a closed briefcase into the office, the contents of the case remain protected by traditional privacy considerations. *Id.* However, expectations of privacy may be reduced in the public or private sector by virtue of actual office practices and procedures, or by legitimate regulation. *Id.* at 717.

Following this reasoning, a Texas court ruled that searching e-mail stored in an employee's private computer folder is not the same as searching an employee locker, for which courts have held an employee does have a reasonable expectation of privacy. *McLaren v. Microsoft Corp.,* No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *11-12 (Tex. App. May 28, 1999). In that case, after being sued for sexual harassment, the plaintiff sued the based on invasion of privacy, alleging that the defendant broke into the personal folders on his office computer to read his e-mail. *Id.* at *2. He argued that there was an expectation of privacy because the personal folders were only accessible with a personal password. *Id.* The court rejected this argument, holding instead that he had no reasonable expectation of privacy because "the e-mail messages contained on the company computer were not [the plaintiff's] personal property, but were merely part of the office environment." *Id.* at *11.

Similar to the filing cabinet in *O'Connor*, and the personal folders in *McLaren*, Tekhead's e-mail address book was part of the workplace environment. Both the computer and Outlook e-mail program, which contained the address book, were both owned by Distress. (R. at Ex. A-1.) The Outlook program electronically provides many of the same office supplies such that companies have provided their employees for years. The program arranges information using electronic files, folders, a "desktop" and even a trash can. The address book was company property, and the use of the address book was limited to company business by Distress' electronic communications Policy. (R. at Ex. A-2.) In fact, Tekhead had an even less reasonable expectation of privacy that the plaintiff in *McLaren* because in this case Tekhead signed a policy that stated that he acknowledged that the passwords were property of Distress. Therefore, Dospam had no reasonable expectation of privacy because the e-mail addresses in his Outlook address book contained on the company computer were not his personal property, but were merely part of the office environment.

2. *Tekhead had no reasonable expectation of privacy because his e-mail address book was subject to a company policy*

Further, any expectation that Tekhead had that his Outlook e-mail address book would be private was unreasonable because he signed a company policy that stated that his e-mails would be monitored. An employee lacks a legitimate expectation of privacy when the employer has instituted a company Internet policy. *U.S. v. Simons,* 206 F.3d 392, 398 (4th Cir. 2000). In *Simons*, the court held that a government employee "did not have a legitimate expectation of privacy with regard to the record or fruits of his Internet use in light of the [agency] policy." *Id.* The policy stated that the agency would "audit, inspect, and/or monitor" all Internet and e-mail activity. *Id.* The court concluded that whether or not the employee believed the files transferred from the Internet were private, his belief was not reasonable in light of his knowledge of the policy. *Id.*

Several other circuit courts have held that a company policy may destroy employee privacy expectations. *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001); *Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002); *U.S. v. Angevine*, 281 F.3d 1130, 1132 (10th Cir. 2002). In *Muick*, the Seventh Circuit held that an employee accused of receiving and possessing child pornography on his laptop did not have a privacy interest in the computer because it had been loaned to him by his employer for business use. *Muick*, 280 F.3d at 743. The court held that the employee's reasonable privacy expectations had been destroyed when the employer had announced that it could inspect employee laptops which it provided. *Id.*

Similarly, in *Angevine*, the Tenth Circuit held that an Oklahoma State University professor who had downloaded obscene material from the Internet did not have a privacy claim to the information on his computer. 281 F.3d 1135. The court found that the university's computer policy made it clear to the professor that administrators regularly audited his computer, and that the data on his computer was "'fairly easy to access' by third parties." *Id.* In light of the university privacy policy, the court held that the professor's careless effort to maintain a privacy interest indicated that he did not establish a reasonable expectation of privacy. *Id.*

As in the aforementioned cases, Tekhead did not have a reasonable expectation of privacy in his e-mail address book. The Distress information systems policy states that: "The Company reserves the right to access, monitor, and disclose communications and information stored in . . . any part of its electronic information systems." Therefore, Tekhead knew that Distress owned his system, would be monitoring his computer use, and even owned his password. Any belief that Tekhead had that his e-mail address book would remain private was unreasonable under these circumstances.

3. *Tekhead's reasonable expectation of privacy was forfeited when he placed his Outlook address book within reach of a third party by using the Distress information system*

Even if the fact that his e-mail address book was part of the workplace environment, and subject to company policy, did not destroy his reasonable expectation of privacy, this expectation was forfeited when he placed his address book on a Distress computer. Employee expectations of privacy are destroyed when the employee places information within reach of a third party by using the company information system. *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa 1996); *see also McLaren*, 1999 Tex. App. LEXIS 4103, at *12 (holding an expectation of privacy unreasonable when "any e-mail messages stored in [plaintiff's] personal folders were first transmitted over the network and were at some point accessible by a third-party"). Therefore, since Tekhead placed his e-mail address book where a third party could reach it, he had no reasonable expectation of privacy in it.

The *Pillsbury* court noted that the mere possibility of an e-mail message being intercepted rendered the employee's privacy expectation unreasonable. In *Pillsbury*, the plaintiff claimed that the company intruded upon his seclusion by terminating him based upon the contents of private e-mail messages between him and his supervisor. *Id.* at 98. The e-mail contemplated his private desire to poison fellow employees. *Id.* The court held that once the plaintiff had placed the private informa-

tion on a system that was accessible by third parties he forfeited any right to expect privacy. *Id.* at 101. The court concluded that no intrusion upon seclusion had taken place because the plaintiff was never forced to make any of his private thoughts available to third parties. *Id.*

Similarly, in this case, no intrusion upon seclusion has taken place because Tekhead placed his e-mail address book on a computer system accessible by a third party. The Distress Electronic Information Systems Policy made it clear that there was a possibility that third parties could view the contents of its computers when it stated that, "the contents of all communications and all information on the systems . . . are subject to review and use by . . . third parties." (R. at Ex. A-1.) This mere possibility of a third party accessing the e-mail address book on Tekhead's computer destroyed any reasonable expectation of privacy he may have had in it.

Therefore, even if this Court holds that personal jurisdiction over Dospam was proper, Tekhead's claim of intrusion upon seclusion still fails. Tekhead did not have an actual expectation that his e-mail address book was secluded, and even if he did, this expectation would be unreasonable because the address book was not private. Therefore, this Court should hold that the appellate court properly granted summary judgment in favor of Dospam as to Tekhead's claim of intrusion upon seclusion.

CONCLUSION

For the reasons set for above, Dospam respectfully requests that this Court reverse the decision of the First District Court of Appeals denying Dospam's motion for summary judgment as to jurisdiction and dismiss this case. Alternatively, Dospam requests that this Court affirm the decision of the Court of Appeals granting Dospam's motion for summary judgment as to Tekhead's claims of intrusion upon seclusion and publicity placing him in a false light.

Respectfully submitted,

COUNSEL FOR RESPONDENT

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APPENDIX A:
CONSTITUTIONAL PROVISION
U.S. CONST. amend. XIV

Due Process Clause

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . .

APPENDIX B:
MARSHALL REVISED CODE (WEST 2002)
SECTION 735 MRC 25-302

A tribunal of the State may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this section if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person: (1) Transacting any business in this State . . .

APPENDIX C:
RESTATEMENT (SECOND) OF TORTS (1977)
SECTION 652B

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

APPENDIX D:
RESTATEMENT (SECOND) OF TORTS (1977)
SECTION 652E

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.