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23 24 25 26 27 28

David Bernis, et al 3244 Winton Road South H-32 Rochester, NY 14623 585-672-5410 Gary Alan Kurtz 20335 Ventura Blvd Suite 200 Woodland Hills, California 91364 818-884-8400

SUPERIOR COURT of the STATE of CALIFORNIA For the County of Los Angeles

Gary Alan Kurtz Plaintiff, vs. David Bernis and DOES 1 to 50 inclusive Defendant

)))))))))

Case No.: LC 095923 NOTICE OF MOTION AND MOTION TO QUASH SERVICE: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID BERNIS DATE: JUNE 5, 2012 TIME: 8:30 AM DEPARTMENT NORTHWEST DISTRICT, DEPARTMENT T JUDGE MARIA E. STRATTON

TO PLAINTIFF, GARY ALAN KURTZ pro per: Please take notice that on June 5, 2011 at 8:30 AM, or as soon after that as the matter can be heard, in Department NW-T of the above entitled court located at 6230 Sylmar Avenue, Van Nuys, California 91401 David Bernis, will move the Court for an order quashing plaintiff's purported service of summons and complaint on Defendant. This motion is made under Section 418.10 of the

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Code of Civil Procedure and other relevant laws both State and Federal on the grounds that as defendant is not a resident of California the court lacks jurisdiction over him. Therefore the purported service on Defendant was not valid and should be

quashed. This motion will be based on this notice of motion, the memorandum Bernis, action. Dated: May 7, 2012 the of points and authorities; the Declaration and files in David this

pleadings,

documents,

records

----- David Bernis, pro se

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MEMORANDUM OF POINTS AND AUTHORITIES I. STATEMENT OF FACTS On December 30, 2011, Plaintiff Gary Alan Kurtz filed his

complaint against Defendant David Bernis ET. Al.

Defendant is not a resident of California, does not own any property in California, has no business interests in California and has only minimal contact with the State of California, not having visited there for the last 30 years. Defendant contends that as he is not a resident of California, the California

courts lack jurisdiction over him and the Court should quash the purported service on him.

II. LEGAL ARGUMENT - POINTS OF LAW

A. THE PURPORTED SERVICE OF THE SUMMONS AND COMPLAINT IS NOT VALID AND SHOULD BE QUASHED AS DEFENDANT IS NOT A RESIDENT OF CALIFORNIA, THEREFORE THE COURT LACKS JURISDICTION OVER HIM

Code of Civil Procedure 418.10 states in part:

A defendant on or before the last day of his or her time to plead or within any further time the court for good reason may allow, may serve and file a notice of motion for one or more of the following purposes (1)

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To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

MOTION TO QUASH SUBPOENA IN KURTZ v BERNIS

by Aj Weberman

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DESCRIPTION

Motion citing lack of jurisdiction that will probably be denied as every other motion I helped work on was denied.

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As shown by the Declaration of David Bernis he is not a resident of California, does not own any property in California and has never lived in California and has only minimal contact with the State of California with no business interests there. Therefore, the courts of California lack jurisdiction over defendant.

Without personal jurisdiction over defendant, the court cannot impose any personal liability upon him or affect his personal rights. Personal jurisdiction cannot be based solely on the fact that the URL's are available in California or are processed by ENOM located in California. JDO v. Superior Court, 85 Cal. Rptr. 2d 611 - Cal: Court of Appeal, 2nd Appellate Dist., 7th Div. 1999.

HOW CITED Ruling that a defendant's contracting via computer with Internet service providers that may be incorporated or maintain offices or databases in California does not constitute purposeful

availment for purposes of personal jurisdiction:

1. CH Robinson Worldwide v. FLS Transp., 2009 and 9 similar citations. The plaintiff filed an action in California alleging that defendants (an organization based in New York and an

individual who resided in New York) posted a Web site containing defamatory statements about the plaintiff.

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2. In Mealey's Litigation Report and 4 similar citations. The court in JDO concluded that under that analysis the defendants' conduct in registering plaintiffs name as a domain name and

posting passive Web sites on the Internet was not sufficient to subject the defendants to jurisdiction in California.

3. In Nam Tai Electronics, Inc. v. Titzer, 2001 and 5 similar citations: "Courts have had to consider, for example, whether a defendant in New York who publishes defamatory material on the Internet is subject to personal jurisdiction in California."

4. In Flat Broke and Busted, but Can I Keep My Domain Name Domain Name Property and 4 similar citations "No jurisdiction over New York based corporation in libel action brought by New York resident which arose out of passive website mirror posting on California website in Civil practice and litigation

techniques in the federal courts."

5. ALI-ABA (American Law Institute - American Bar Association) and 4 similar citations "Affidavits or declarations consisting primarily specific of vague assertions facts are of not ultimate fact rather than

evidentiary

sufficient"

establish

jurisdiction.

6. In Paneno v. Centres For Academic Programmes Abroad LTD.,
26

2004 and 3 similar citations "Defamation action; a passive web
27 28

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site delivering only information insufficient contact with forum for assertion of personal jurisdiction."

7. In Marketing of Travel Services over the Internet and the Impact upon the... and 5 similar citations "Similarly, this

Court has held that foreign resident publishing information on a passive web site, which gives rise to an action, has not

undertaken

sufficient

minimum

contacts

to

warrant

California

Jurisdiction."

8. In COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT and 3 similar citations "Denying jurisdiction in

defamation suit where court determined that defendants Web posts constituted neither minimum contacts nor purposeful availment.

9. In *Pedus Building Services, Inc. v. Allen*, 2002 and 4 similar citations "Lack of minimum contacts right to violates due the nonresident and "offends

defendant's

constitutional

process

traditional notions of fair play and substantial justice." Also see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

B. WEBSITE IS PASSIVE USE

Interactive Use

v. Passive

Use:

Most courts when a

have applied

an

"interactive-passive" jurisdiction courts have over

distinction

determining Web Site. in

personal Generally,

someone

operating

conferred

personal

jurisdiction

cases

where

"interactive" uses of the Internet have taken place within the
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state.

Interactive

contact fosters an

encompasses

two-way

online

communication which

ongoing business

relationship,

while "passive" contacts are those that simply make information available to interested viewers. A Web Site can be characterized as interactive if business transactions can be conducted over the Internet or if information can be exchanged with users for the purpose of soliciting business. In making an "interactive vs. passive" determination, the greater the commercial nature and level of interactivity associated with the site, the more likely it is that the website operator is "purposefully availing itself" of the forum state's jurisdiction. The seminal case in this regard is *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W. D. Pa. 1997), wherein the Court

established a three-prong test for determining whether a court has jurisdiction over a website. Under the test, "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."

"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, then personal jurisdiction is proper." "At the opposite end are situations where a defendant has simply posted information on an internet website which is accessible to users in foreign jurisdictions." "A

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passive

website

that

does

little

more

than

make

information available to those who are interested in it is not grounds "The for the exercise is of personal by

jurisdiction." interactive

middle where

ground a

occupied can

websites

user

exchange

information with the host computer." "In these cases, the exercise the of level jurisdiction is determined and by

examining

of interactivity

commercial

nature of the exchange of information that occurs on the website."

Another

important

case

is

Bensusan

Restaurant

Corp.

v.

King , 126 F.3d 25 (2d Cir. 1997). See, also, Hearst Corp. v. Goldberger , 1997 WL 97097 (S.D.N.Y. 1997).

In Bensusan, a trademark infringement case brought by the Blue Note Club in New York against a similarly named club in Missouri, a federal court declined to assert personal jurisdiction in New York because the Web Site operator

received no revenue from the forum state, did not advertise in the forum state, and to did the not even disseminate of the a

telephone

contact

number

residents

forum

states. The site only provided general information about shows and ticket sales and its Missouri location, but did not permit on-line purchases. The website steverombom.org nor is non-commercial, it solicits contains from

neither

advertising

does

funds

California residents. C. WEBSITE DOES NOT SPECIFICALLY TARGET CALIFORNIA

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Mr. Kurtz argues: Jurisdiction publish is based on Defendant's about a decision to

defamatory

material

California

resident, whom Defendants know has a law practice in California, in such a manner as to be reasonably

calculated to be read in California, have its main effect in California and cause damages to Plaintiff in California.

1. Website <http://steverombom.org> mainly concerns Steve Rombom, whose offices are in his home in Brooklyn N.Y. (Steve Rombom is also licensed as a Private Investigator in Texas and Louisiana) and secondarily so Gary it is Kurtz, not whose offices are at located in

California,

aimed

specifically

California.

Nowhere does its content state that it is aimed at the State of California. It is unavoidable that steverombom.org contains

information about Kurtz's activities in California due to the fact Mr. Kurtz is a resident of California. Mr. Kurtz represents 85% of senior homes in 17 States. The website hopes to reach the residents and owners of these old age homes. The steverombom.org website also attempts to expose judicial corruption in Superior Court in Brooklyn and elsewhere. (steverombom.org/judge_Theodore_Jones). no one state. It specifically targets

2.

Additional

proof

that

website

is

not

aimed

solely

at

California rests in its assertion that according to Mr. Kurtz's

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ex-wife, Starr Taxman, Clare and Sara Bronfman, residents of New York State, dropped Mr. Kurtz as their attorney after visiting steverombom.org and having evaluated the information presented there about Mr. Kurtz.

3. The Website in question describes itself as "AN ELECTRONIC NEWSPAPER DEDICATED TO BRINGING YOU NEWS ABOUT GARY

A I A A I

KURTZ AND FBI SNITCH PI STEVEN PAUL ROMBOM (3/24/12 edition)." This implies the purpose of the website is to tell the world about Rombom and Kurtz not just the people of California.

Website statistics bear this out and indicate that approximately 25% of the visitors to steverombom.org come from 79 countries other than the United States. Of the remaining 75% only 24% of the visits originate in California. This means that only 18% of the visitors to http://steverombom.org are California residents. If steverombom.org was specifically targeted at California the percentages of visitors from that State would be much higher. These statistics can be verified in real time on line at

steverombom.org.

4. The ramifications of a ruling that a website that concerns a resident of California and is read in California falls under the long arm jurisdiction of California court system are far

reaching. A ruling of this nature implies that any California resident who feels he or she has been libeled by a website

located anywhere in the United States can sue the person who originated the websites content and force that person to incur the expense of hiring an attorney licensed to practice law in

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the State of California to defend against these charges or be forced to go pro se despite lack of legal background not only in the defendant's home state but in the State of California. If the website content originator lacked the funds to defend

himself or herself in another state a Default Judgment followed by a Sister State Judgment could put the website content

originator in financial jeopardy. This would deprive the website owner of due process and interfere with the website content

originators freedom of speech. It would have a chilling effect on the right of self-expression. Article 1 Declaration Of Rights Sec. 2.

(a) of the California Constitution states "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The Fourteenth Amendment of the United States Constitution grants the right to not be compelled to defend a lawsuit in a remote jurisdiction unless a party's actions have made it fair to hale that party into court. A court's exercise of jurisdiction over a party must "not offend traditional justice." Forcing to defend himself David notions Bernis, Gary of of fair who is play a pro and se

substantial defendant attorney,

against

Kurtz fair

California play and

offends

traditional

notions

substantial justice.

5. Plaintiff contends that because certain URL's used by A. J. Weberman are registered in the name of a web service owned by Defendant, Defendant has conspired with A. J. Weberman to defame Plaintiff. The Communication Decency Act, at 47 U.S.C. 230(c),

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specifically

provides

that

"No

provider

or

user

of

an

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Assuming the complaint had some legal basis to it the proper venue for a case of this nature would be New York State, not California. No civil liability exists against defendant Bernis so the California Court system lacks

jurisdiction over David Bernis and Rochester Internet Service because there is no real cause of action. 47 U.S.C. § 230(c)(1), expressly preempts any state law to the contrary, § 230(e)(3).

State law--Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

B. THE PLAINTIFF HAS THE BURDEN OF SHOWING THAT THE PURPORTED SERVICE OF THE SUMMONS AND COMPLAINT ON DEFENDANT IS VALID.

Although defendant is the moving party, the burden of proof is on the plaintiff: "Where jurisdiction is challenged by a nonresident defendant, the burden of proof is upon the plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal

jurisdiction." *Mihlon v. Sup.Ct. (Murkey)* (1985) 169 Cal.App.3d

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703,

710; Floveyor

Int'l,

Ltd.

v.

Sup.Ct.

(Shick

Tube-Veyor

Corp.) (1997) 59 Cal. App. 4th 789, 793.

The burden is on the plaintiff to demonstrate by a preponderance of the evidence that all jurisdictional criteria are met. *Ziller Electronics Lab GmbH v. Sup.Ct. (Grosch Scenic Studios)* (1988) 206 Cal. App. 3d 1222, 1232.

Jurisdictional

facts

such

as

evidence

steverombom.org

is

specifically aimed at the people of California, must be proved by competent evidence at the hearing on the motion to quash. This generally requires affidavits or declarations by competent witnesses. A properly verified complaint may be treated as a declaration for this purpose. See *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship* (1983) 146 Cal.App.3d 440, 444. An unverified personal *supra*. Even pleading has no evidentiary See *Mihlon are v. value in*

determining (*Murkey*),

jurisdiction. so, such

Sup.Ct. in

pleadings

relevant

defining the cause of action asserted, and whether it arises out of the nonresident's alleged local activities.

Except as otherwise provided by statute, hearsay declarations are not competent proof of facts alleged. *Floveyor Int'l, Ltd. v. Sup.Ct. (Shick Tube-Veyor Corp.)* (1997) 59 Cal.App.4th 789, 796, 69 Cal.Rptr.2d 457, 462 declaration by plaintiff's attorney stating "discovery in this case revealed nothing more than

inadmissible hearsay."

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CONCLUSION

Based on the above, it is requested that defendant's motion to quash service of summons and complaint be granted.

Dated this May 7, 2012 _____

David Bernis - Pro se 3244 Winton Road South H-32 Rochester, NY 14623

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DECLARATION OF DAVID BERNIS

I, David Bernis declare as follows.

1. I am over the age of 18 years and am a party to this action. I have personal knowledge of the facts stated in this declaration and if called as a witness, could and would testify competently to the truth of the facts as stated herein.
2. I do not reside in California, now do I own any property in California. I have not visited California in the last 30 years and have no business interests there.
3. As the complaint fails to allege that I have committed any actions in the State of California, the Court lacks personal jurisdiction over me.

4.

I

have

not

created

any

of

the

content

on

the

website

steverombom.org nor did I have any knowledge of Gary Alan Kurtz prior to his of filing the URL a complaint against me. that I am merely a

provider

digital

identifier

translates

into

steverombom.org on the internet.

4. I respectfully request the Court grant my motion to quash service of the summons and complaint.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that

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this Declaration was executed on May 7, 2012 at New York, New York.

(signed) David Bernis 3244 Winton Road South H-32 Rochester, NY 14623

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PROOF OF SERVICE I am a resident of the county of Kings, State of New York. I am over 18 years old and not a party to the within action; my business address is 510 BRIGHTON BEACH AVENUE PMB 180 BROOKLYN NY 11235 On May 7, 2012 I served the following document described as:

NOTICE OF MOTION AND MOTION TO QUASH SERVICE: MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID BERNIS

-- on all interested parties in this action by placing a true copy thereof as follows: 1. Gary Kurtz 20335 Ventura Blvd. Suite 200 Woodland Hills, California 91364 4. Clerk, The Honorable Maria E. Stratton, Superior Court of California, LA County Van Nuys Courthouse East 6230 Sylmar Blvd, Van Nuys, Ca. 91401 By U.S. mail as follows: I am "readily familiar" with the judgment debtor's practice of collection and processing correspondence for mailing. Under this practice it would be deposited with the U.S. postal service on the same day with this postage thereon fully prepaid at New York, New York in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or meter date is more than one day of deposit for mailing in affidavit. Executed May 7, 2012, at New York, New York. I declare under penalty of perjury under the laws of State of New York that the forgoing is true and correct.

Aron Morton Kay

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