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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GLOBAL INNOVATIONS, INC, a Maryland corporation, and RAMSEY LAMERSON, an individual,

Plaintiffs,

vs.

ALS Scan, Inc., a Maryland corporation, WAYNE KIRN, an individual, APIC WORLD-WIDE, INC., a Florida corporation, and STEVE EASTON, an individual,

Defendants.

CASE NO: C 03-01277 JSW

PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS OF DEFENDANTS ALS SCAN, INC. AND “ALEX” KIRN

DATE: August 1, 2003
TIME: 9:00 a.m.
COURTROOM: 2, 17th Floor

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES

Pursuant to Local Rule 7-4(3), the following issues are presented by this motion:

1. Whether ALS Scan, Inc. (“ALS”) is subject to the specific jurisdiction of this Court due to its specific aiming at causing damage to the California assets and business relations of plaintiff Global Innovations, Inc. (“Global”).
2. Whether the Court should order ALS to respond to jurisdictional discovery to determine whether its sales of online pornography over the Internet to California residents warrant its subjection to the general jurisdiction of this Court.

- 1 3. Whether the issue of forum non conveniens should be deferred until determination of the
2 threshold issue of personal jurisdiction.
- 3 4. Whether the Court should exercise its discretion to exert jurisdiction over plaintiffs'
4 claims for declaratory relief.

5 FACTS

6 This action for declaratory relief was commenced in California in to resolve
7 uncertainty cast over the legality of the California-related business activities of Global
8 Innovations, Inc. (“Global”), an Internet Service Provider (“ISP”), which has a
9 substantial presence in San Jose and Palo Alto, California. (Carreon Dec. ¶ 2.) Global’s
10 facilities and substantial business assets and commercial relations in the State of
11 California are established by Global’s CEO Ramsey Lamerson. (Lamerson Dec. ¶¶ 2 –
12 11.) ALS’s house counsel Robert Lombardo (“Mr. Lombardo”) specifically aimed at
13 causing damage to Global’s California business relationships when he sent a series of
14 four emails on March 17th, March 20th, and March 21st, to Equinix Associate Counsel
15 Kurt Pletcher. (Exhibit 1.) Equinix is a California resident that provides essential
16 services to Global. (Lamerson Dec. ¶¶ 2 – 11.) Mr. Lombardo’s first email threatened to
17 sue Equinix : “I represent ALS Scan, Inc. ... that is preparing a complaint to be filed
18 against Ramsey Lamerson, Global Communications, Inc. and others in the United States
19 District Court for the District of Maryland for massive copyright infringement. I also
20 plan on adding a civil RICO count.” (Exhibit 1.)

21 Mr. Lombardo’s next email “put Equinix on notice of the infringing activity [to]
22 demand that it not continue to cause, assist and/or materially contribute to the infringing
23 conduct of the named defendants.” (Exhibit 1.) Lombardo’s threats were directed at
24 stopping infringement “*at Equinix’s facility.*” (Exhibit 1, emphasis added). Equinix has
25 facilities in California and Virginia, but none in Maryland. (Carreon Dec. ¶ 13.)

26 Subsequent emails from Mr. Lombardo to Equinix continued in the same vein,
27 threatening to stir up trouble with “other copyright holders,” confirming that he made the
28 same threats over the telephone, and emphasizing the fact that ALS intended to burden

1 Equinix with long-term litigation in a distant forum, including appeal to the “Fourth
2 Circuit.” (Carreon Dec. ¶ 5, Exhibit 1.) On March 27, 2003, defendants APIC World-
3 Wide, Inc. (“APIC”) and Steve Easton (“Easton”), acting as the express agents for ALS,
4 sent an email purporting to identify Equinix as complicit with Global in a scheme of
5 copyright infringement. (Exhibit 2.) APIC’S Exhibit 2 email, however, identifies only
6 alleged infringements of photographs created by California photographer “Suze Randall,”
7 and no infringements of ALS content.

8 Global and Equinix are contractually bound to detailed terms pursuant to a Master
9 Service Agreement (“MSA”) signed May 14, 2001 by both parties. (Carreon Dec. ¶¶ 8 –
10 9.) The MSA selects California law as the law governing interpretation of its terms in
11 Paragraph 10.b, as follows:

12 “This Agreement will be governed in all respects by the internal laws of
13 the State of California (as if made and entered into between California
14 residents and fully executed within California) without regard to its
15 conflict of laws provisions.”

16 Paragraph 15 of the MSA provides that Global will “indemnify and hold
17 harmless” Equinix in litigation arising out of Global activities.¹

18 ALS’s attacks on Global’s commercial relations with Equinix were intended to
19 interfere with Equinix’s performance of a contract made in California and governed by
20 California law. ALS intended to damage Global’s business in California and its relations
21 with Equinix, a California resident. ALS took direct aim at the relationship between a
22 California resident and Global, a company having substantial California contacts,
23 intending to cause harm within the jurisdiction, and creating the risk of harm to
24 California’s high-tech economy. (Carreon Dec. ¶p 11 – 12.)

25 The costs of defense incurred by Equinix due to ALS’s conduct will be settled
26 upon Global pursuant to an indemnity agreement that is expressly governed by California
27

28 ¹ The MSA is not attached to this Declaration, but will be submitted in camera upon the Court’s request.

1 law; therefore, Global should be allowed to “stand in the shoes” of Equinix from the
2 outset of the action, enjoying the forum that would be available to Equinix if it had
3 sought declaratory relief against ALS directly. (Carreon Dec. ¶ 12.)

4 The foregoing facts establish that ALS is subject to this Court’s specific
5 jurisdiction. Additionally, ALS is subject to the general jurisdiction of this Court because
6 it operates several websites that offer to sell pornography to California residents, inviting
7 them to use their credit or debit cards to engage in instantaneous transactions to purchase
8 these products, including www.alsscans.com, www.alsangels.com, and
9 www.heartbreakers.com. (Carreon Dec. ¶ 14.) All of these website offer “memberships”
10 to California residents at a charge of \$19.95/month. ALS also offers videos, DVDs, and
11 CDs directly to California residents through credit and debit card sales on its website at
12 www.alscdsonline.com. ALS also offers DVDs over the Internet through a distribution
13 arrangement with another Maryland company. (Carreon Dec. ¶ 14.)

14 Sarah Kiwak, ALS’s Director of Operations admits that “95% of ALS’ revenues
15 are derived through sign-ups and sales completed automatically through the Internet,” but
16 claims that “ALS does not keep records of where its members reside but membership is
17 available to anyone, over the age of 21, throughout the world.” (Kiwak Dec. ¶ 8.)
18 Kiwak’s sworn statement is directly controverted by the “Terms and Conditions of
19 Membership” on the www.alsscan.com website. (Exhibit 3.) The Terms and Conditions
20 plainly state:

21 **“ALS maintains a confidential log offline of all user information**
22 **including IP addresses and times, as required by Credit Card companies.**
23 **This data is secured *under 24 hour video surveillance*. This information**
24 **is never sold or distributed. However, *personal information is used in***
25 ***case of credit card fraud to assist law enforcement.*”**

26 <http://www.alsscans.com/terms.html> (Carreon Dec. ¶ 15; Exh. 3.)

27 Plaintiffs have propounded discovery to elicit information concerning the extent
28 and value of the pornography sales ALS makes in California through these websites.

- 1 a. **Exhibit 4:** Plaintiffs' First Requests for Admissions.
- 2 b. **Exhibit 5:** Plaintiffs' First Set of Interrogatories.
- 3 c. **Exhibit 6:** Plaintiff's First Request for Production of Documents.

4 Plaintiffs' counsel has set forth specifically which categories of discovery were
5 propounded to: (1) establish that ALS has knowledge of the extent and value of its sales
6 of goods and services to Californians, (2) identify the relevant facts, witnesses, and
7 documents, and (3) request production of the relevant documents. (Carreon Dec. ¶¶ 17 –
8 18.) When this discovery has been answered, it will be clear that ALS is subject to the
9 general jurisdiction of this Court, as well as the specific jurisdiction arising out of its
10 intentional "aiming" at causing harm within the jurisdiction.

11 Defendant Alex Wayne Kirn ("Kirn") seeks to dismiss the action against him,
12 claiming he lacks jurisdictional contacts. Plaintiffs have proceeded against Kirn on the
13 basis of an alter ego theory. The discovery directed to ALS should produce detailed
14 information concerning the financial structure of ALS. This information will provide the
15 basis for evaluating whether the alter-ego allegations made by plaintiffs on information
16 and belief are supportable with fact. If they are, then Kirn's motion to dismiss should be
17 denied.

18 Kirn's statements are subject to impeachment, since he is a convicted Federal
19 felon. Attached hereto as **Exhibit 7** is the Judgment of Conviction in United States v.
20 Wayne Alexander Kirn, Case No. AMD-97-0068, District of Maryland, for Possession of
21 Child Pornography in violation of 18 U.S.C. § 2252(a)(4)(B) on March 9, 1998.
22 (Carreon Dec. ¶ 22.) While it may be surprising that a convicted child pornographer
23 continues to be successful in the pornography business, Kirn is successful, and in an
24 online interview that he gave to Washington Business Forward, a Beltway periodical,
25 announced that his websites get 150,000 visitors per day. (**Exhibit 8.**) With 150,000
26 visitors per day, at least a few thousand must be from California, yet his company is
27 playing coy with the facts. Given Kirn's criminal background, and the dissimulation
28 practiced by his employee Sarah Kiwak's concealment of the fact that ALS keeps address

1 information on its customers, Kim's own statements that he lacks jurisdictional contacts
2 with California, the epicenter of the pornography industry, are worthy of further scrutiny.

3 ARGUMENT

4 **1. ALS Is Subject To The Specific Jurisdiction of The Court**

5 A party that takes aim at business interests located in the forum state subjects
6 itself to the specific jurisdiction of the forum, regardless of whether it generally lacks
7 contacts with the forum state. *Calder v. Jones*, 465 U.S. 783, 788 – 790 (1984)(libel
8 defendants from Florida held to answer in California for allegedly defaming California
9 actress whose career revolved around California business relationships.) The *Calder* test
10 applies the “minimum contact analysis” to all cases of intentional tort generally. In
11 *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087-1088 (9th Cir. 2000),
12 following *Calder*, the Ninth Circuit found that a single letter that was sent to Virginia
13 with the intent to cause harm to a California resident was sufficient to subject the foreign
14 defendant to jurisdiction in California. *Bancroft & Masters*, 223 F.3d at 1087-1088.

15 In this case, the same type of facts are present. Global is a corporation with
16 substantial business interests in California, and its relationship with Equinix is entirely
17 premised upon a contract formed and to be interpreted under the law of California.
18 (Carreon Dec. ¶¶ 8 – 9; Lamerson Dec. ¶¶ 4 – 11.) Further, Global has indemnity
19 obligations to Equinix that make it equitable to allow it to “stand in the shoes” of Equinix
20 from the inception of the action, since it will ultimately be obliged to stand in those shoes
21 for purpose of defense and indemnity. (Carreon Dec. ¶ 10; Pletcher Dec. ¶ 7.)

22 ALS and its agents, Mr. Lombardo, APIC and Easton, have all directed hostile
23 threats of litigation into California via offensive email. Those threats have been
24 unambiguously targeted at inducing a breach in the relations between Equinix and
25 Global. Those relations are governed by California law. It can come as no surprise to
26 ALS that, having sought to induce a breach between Equinix, a California resident, and
27 Global, which has substantial assets and business activity in the state, it should be haled
28 into this jurisdiction for suit. ALS has engaged in the precise activity that activates the

1 doctrine of specific jurisdiction, by engaging in “(1) intentional actions (2) expressly
2 aimed at the forum state (3) causing harm, the brunt of which is suffered--and which the
3 defendant knows is likely to be suffered—in the forum state.” *Core-Vent Corp. v. Nobel*
4 *Industries, AB*, 11 F.3d 1482, 1486 (9th Cir. 1993). Accordingly, ALS is subject to this
5 Court’s jurisdiction, and its motion to dismiss for lack of personal jurisdiction should be
6 denied.

7 **2. Discovery Should Be Granted To Establish General Jurisdiction Over ALS**
8 **and to Determine The Issue of Jurisdiction over Kirn**

9 General jurisdiction is established when the defendant’s contacts with the forum
10 state are continuous and systematic. A defendant whose contacts are "continuous and
11 systematic" can be haled into court in that state in any action, even if the action is
12 unrelated to those contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.
13 408, 415 (1984). A defendant that makes sales, solicits or engages in business in the
14 state, or serves the state's markets may be subject to general jurisdiction. *Hirsch v. Blue*
15 *Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1478 (9th Cir. 1986).

16 ALS’s motion attempts to deny the types of contacts that will establish general
17 jurisdiction, but given what is commonly known about the prevalence of Internet usage in
18 California (it far exceeds that of the rest of the nation), and what the Court knows about
19 ALS (that Kirn has admitted its websites receive 150,000 Internet visitors daily, and that
20 its websites actively solicit pornography sales to all visitors), it is highly likely that
21 ALS’s contact are so continuous and systematic as to bind it to this Court’s general
22 jurisdiction.

23 Discovery is required here. As the Ninth Circuit opined less than two months ago
24 in *Harris Rutsky & Co. v. Bell & Clements Limited*, 328 F.3d 1122 (2003)(submitted as
25 Exhibit 9 hereto), when the record on jurisdiction is left undeveloped by discovery,
26 reversal is virtually obligatory upon the reviewing court.

27 Plaintiffs have submitted discovery that will thoroughly smoke out the issue of
28 ALS’s jurisdictional contacts. The Court is respectfully requested to approve the service

1 of discovery, to direct ALS to respond to the same within a reasonable time period, and to
2 schedule this matter for further argument on September 26, 2003. (Carreon Dec. ¶¶ 14 –
3 20.) Additionally, as the *Harris & Rutsky* opinion further noted, discovery is helpful to
4 resolve the claim that corporate alter-egos should be subjected to jurisdiction. (See
5 Exhibit 9, ¶¶ 68 – 69.) Accordingly, for both these reasons, jurisdictional discovery
6 should be allowed.

7 **3. The Court Should Exercise Its Discretion To Hear Plaintiffs’ Claims for**
8 **Declaratory Relief, and Place the Forum Non Conveniens “Cart” After the**
9 **Jurisdictional “Horse”**

10 ALS’s argument that this action should not be entertained because the action will
11 not resolve all disputes between all parties are simply meritless. This Court has authority
12 to do justice among all parties properly before it, and once the jurisdictional issue is
13 resolved, there will be no impediment to its exercise of adjudicative authority.

14 This action was commenced to resolve a festering dispute that had plagued
15 plaintiffs’ business activities for the entirety of year 2003. (Lamerson Dec. ¶¶ 12 -17.)
16 Far from being an action that will not put to rest the disputes of all parties in a single
17 action, it is the first-filed action, in the right jurisdiction, for resolving all disputes.
18 Equinix, which has no Maryland business presence, has been sued by ALS in Maryland,
19 which now insists that it will be most convenient for Equinix to be sued there. Equinix
20 does not agree with this proposition, and if it must be sued by ALS, would prefer that the
21 suit take place in its own state of residence. (Pletcher Dec. ¶ 10.)

22 As the Ninth Circuit observed in *Harris & Rutsky*, where jurisdictional issues have
23 not been resolved, and the record has not been developed through proper jurisdictional
24 discovery, forum non conveniens issues need not be considered. (Exhibit 9, ¶ 73.)

