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12 STEVE EASTON

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 GLOBAL INNOVATIONS, INC., a Maryland
16 corporation, and RAMSEY LAMERSON, an
17 individual,
18 Plaintiff,
19 vs.
20 ALS Scan, Inc., a Maryland corporation, WAYNE
21 KIRN, an individual, APIC WORLD-WIDE,
22 INC., a Florida corporation and STEVE EASTON,
23 an individual,
24 Defendants.

Case No.: C03-1277 JSW

**REPLY TO OPPOSITION TO MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION (F.R.C.P 12(b)(2)), OR, IN
THE ALTERNATIVE TO DISMISS
PURSUANT TO THE COURT’S
DISCRETION UNDER 28 U.S.C. §2201, OR,
IN THE ALTERNATIVE TO TRANSFER
FOR CONVENIENCE (28 U.S.C. §1404(a));**

Date: August 1, 2003
Time: 9:00 a.m.
Courtroom 2, 17th Floor
Honorable Judge Jeffrey S. White presiding

25 Comes now, defendants ALS Scan, Inc., and Alex Kirn, and file this Reply Brief in Support of
26 their Motion to Dismiss for Lack of Personal Jurisdiction (F.R.C.P 12(b)(2)), or, in the alternative to
27 Dismiss Pursuant to the Court’s Discretion under 28 U.S.C. §2201, or, in the alternative to Transfer for
28 Convenience (28 U.S.C. §1404(a)).

1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN REPLY TO OPPOSITION TO MOTION TO DISMISS**

3 **1. Statement Of The Issues To Be Decided**

4 a. Whether the Court must require discovery to determine whether it has personal
5 jurisdiction over the defendants before considering and ruling on defendants' Motion for Transfer on
6 forum non conveniens grounds and Motion to Dismiss pursuant to the Court's discretion under the
7 Declaratory Judgments Act.

8 b. Whether this action as against ALS Scan, Inc. and Alex Kirn should be dismissed
9 Pursuant to F.R.C.P 12(b)(2) for lack of personal jurisdiction.

10 c. Whether, in the Court's discretion under the Declaratory Judgment Act (28 U.S.C. §
11 2201), the Court should entertain this request for declaratory relief.

12 d. Whether, pursuant to 28 U.S.C. Section 1404(a), for the convenience of parties, witnesses
13 and in the interest of justice, the Court should transfer this action to the Maryland District.

14 **2. Statement Of The Relevant Facts**

15 The relevant background facts are stated in defendants' moving papers and will not be restated
16 here. However, with the filing of plaintiffs' Opposition to this Motion, plaintiffs propounded discovery
17 upon defendants with the request that the Court Order jurisdictional discovery and a continuance of this
18 motion for almost two months pending responses to that discovery. While moving defendants argue that
19 such discovery and delay is not necessary for the grant of relief requested, defendant ALS, in good faith,
20 submits herewith the Reply Declaration of Sarah Kiwak providing evidence responsive to the gist of
21 plaintiff's relevant discovery requests. Accordingly, the Court may, if it wishes, rule on the Motion to
22 Dismiss for Lack of Personal Jurisdiction based on the evidentiary record sought by plaintiffs.

23 **3. Argument**

24 Defendants, by this Motion, move to dismiss for lack of personal jurisdiction pursuant to F.R.C.P
25 12(b)(2), or, in the alternative to dismiss pursuant to the Court's discretion under 28 U.S.C. §2201, or, in
26 the alternative to transfer for convenience pursuant to 28 U.S.C. §1404(a). Plaintiffs' Opposition to this
27 Motion speaks only to the F.R.C.P. 12(b)(6) motion and essentially disregards and concedes defendants'
28 motion to decline this request for declaratory relief or transfer this matter to the Maryland District Court
on forum non conveniens grounds. Plaintiffs' disregard of the compelling evidence favoring transfer on

1 forum non conveniens grounds or discretionary dismissal under the Declaratory Judgment Act seems to
2 be based on the assertion that these issues must be deferred until the issue of personal jurisdiction is
3 determined. However, plaintiffs' cite no authority in support of this proposition and the authority
4 alluded to by plaintiffs – Harris Rutsky & Co. v. Bell & Clements Limited, 328 F.3d 1122 (2003) -- says
5 nothing of the sort.

6 Further, the precedents cited by plaintiffs in support of their assertion of personal jurisdiction are
7 entirely inapplicable to the present scenario. Among other significant differences, the cases cited by
8 plaintiffs involved residents of the State of California seeking a finding of personal jurisdiction in this
9 state. Here, the plaintiffs are not even residents of this State. Instead, plaintiffs seek California
10 jurisdiction based on general business relationships and on the attenuated assertion that plaintiffs have
11 an agreement with a third party, a Delaware corporation, not a party to this action, which contains a
12 California choice of law clause and indemnity provision.

13 Plaintiffs seek, more than anything else, to involve defendants in California discovery and
14 litigation for as long as possible. The Court should not allow this to occur and should grant dismissal or
15 transfer of this action on the grounds requested.

16 A. The Court Should Transfer this Matter on Forum non Conveniens Grounds

17 It is uncontested that all four of the parties involved in this Motion (and plaintiffs' Motion to
18 Enjoin Prosecution of the Maryland Action) live and work in the State of Maryland. With this Motion,
19 defendants have offered extensive evidence showing that the majority, if not all, of the witnesses and
20 relevant evidence are located in the State of Maryland. Plaintiffs have offered none. Plaintiffs do not
21 contest the forum non conveniens argument in any manner except to claim that the issue must be put
22 aside until after the parties undertake discovery to determine personal jurisdiction¹.

23 Plaintiffs cite the Harris case for the apparent proposition that forum non conveniens is not to be
24 considered until after jurisdictional discovery is completed and the personal jurisdiction question is ruled
25 upon (Plaintiffs' Opposition, Page 8, lines 22-24). The Harris case says no such thing. The Court in
26 Harris simply ruled that, in that instance, the District Court should have allowed jurisdictional discovery
27 prior to dismissal for lack of personal jurisdiction. The Harris Court specifically notes that the forum
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¹ In fact, on its very face, plaintiffs' Opposition addresses only defendants' Motion to Dismiss.

1 non conveniens issue was not addressed by the parties in the appeal. (328 F.2d at 1136). Significantly,
2 the Harris Court states that “[e]ven if personal jurisdiction is established, a district court may decline to
3 exercise jurisdiction on the basis of forum non conveniens if an adequate alternative forum exists, and
4 the balance of public and private factors favors dismissal. “ (328 F.2d at 1135-1136). Thus, a finding of
5 personal jurisdiction is not a prerequisite to consideration and ruling on forum non conveniens grounds.
6 Here an adequate alternative forum exists in the Maryland District Court, the resources of a California
7 Court should not be used to resolve a dispute between four Maryland residents, and the parties,
8 witnesses and evidence are in Maryland.

9 Even assuming, for the sake of argument, that personal jurisdiction exists in this matter, it is
10 entirely within the Court’s discretion to transfer this case to the Maryland District Court at this time on
11 forum non conveniens grounds. The Court has uncontradicted evidence before it supporting such a
12 transfer and this matter should be transferred on that basis alone.

13 The proposition that extensive jurisdictional discovery must take place, with further hearings
14 thereon, prior to consideration of all other grounds for dismissal or transfer is without support and flies
15 in the face of all principles of judicial economy and defeats the very purpose of the forum non
16 conveniens doctrine. It is clear that plaintiffs’ primary goal is to entangle defendants in a legal matter
17 entirely across the country for as long as possible. There is no reason why the Court cannot and should
18 not consider and rule on the forum non conveniens balance of public and private factors at this time.

19 Finally, on this issue it is important to note that defendants are not seeking dismissal on forum
20 non conveniens grounds, they are merely seeking a transfer of this action to the Maryland District where
21 a matter is pending involving these parties including the issues asserted by plaintiffs here and the
22 broader claims and additional parties involved in this dispute. Thus, defendants do not seek to deny
23 plaintiffs the opportunity to pursue their claims, they simply seek transfer to a Court ready, willing and
24 able to resolve this dispute comprehensively.

25 B. Plaintiffs’ Argument and Case Authority in Favor of Personal Jurisdiction in
26 California Disregard One Crucial Fact – Not Even the Plaintiffs are Residents of This
27 State

28 Plaintiffs’ citation to Calder v. Jones, 465 U.S. 783 (1984) and Bancroft & Masters, Inc. v.
Augusta Nat. Inc., 223 F.3d 1082 (9th Cir., 2000) for the proposition that ALS is subject to the specific

1 jurisdiction of this Court fails to consider a crucial difference between the present case and those cited –
2 here, neither plaintiff is a resident of the State in which jurisdiction over the defendants is sought. In
3 Calder, the plaintiff, the entertainer Shirley Jones, a California resident, filed a libel action against the
4 National Enquirer, a Florida-based publication in a California court. As the Calder Court notes:

5 The allegedly libelous story concerned the California activities of a
6 California resident. It impugned the professionalism of an entertainer
7 whose television career was centered in California. The article was drawn
8 from California sources, and the brunt of the harm, in terms both of
9 respondent's emotional distress and the injury to her professional
10 reputation, was suffered in California. In sum, California is the focal point
11 both of the story and of the harm suffered. (Calder at Page 1486).
12 (emphasis added).

13 Likewise, Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082 (9th Cir., 2000) is not
14 supportive of the proposition advanced by plaintiffs because, unlike the present situation, the plaintiff
15 there was a California resident. In fact, the Bancroft & Masters case, rather than supporting plaintiffs'
16 proposition entirely supports the defendants' assertion that personal jurisdiction does not exist. As noted
17 in defendants' opening brief, the standard for establishing general jurisdiction require that defendants'
18 contacts be of the sort that approximate physical presence in the State. (See Bancroft & Masters, 223
19 F.3d at 1086). After concluding that general jurisdiction did not exist, the Bancroft & Masters Court
20 moved on to specific jurisdiction and its discussion on that subject is most supportive of a finding of
21 lack of specific jurisdiction in the present case:

22 Subsequent cases have struggled somewhat with Calder's import,
23 recognizing that the case cannot stand for the broad proposition that a
24 foreign act with foreseeable effects in the forum state always gives rise to
25 specific jurisdiction. We have said that there must be "something more,"
26 but have not spelled out what something more must be. We now
27 conclude that "something more" is what the Supreme Court described as
28 "express aiming" at the forum state. Express aiming is a concept that in
 the jurisdictional context hardly defines itself. From the available cases,
 we deduce that the requirement is satisfied when defendant is alleged to
 have engaged in wrongful conduct targeted at a plaintiff whom the
 defendant knows to be a resident of the forum state. (Bancroft & Masters,
 Page 1087, citations omitted, emphasis added).

 The court does not need jurisdictional discovery and a hearing thereon to conclude that neither
 general nor specific jurisdiction exists. It is uncontradicted that plaintiffs are not residents or

1 domiciliaries of California thus, to the extent that defendants “targeted” plaintiffs, they were not
2 targeting a resident of the forum State.

3 1. The Global-Equinix Contract Has No Relevance to the Court’s Determination of
4 Personal Jurisdiction

5 In a desperate effort to find a connection with California and prolong litigation here plaintiffs
6 extend the following argument: Since Global, a Maryland corporation that is not a resident and is not
7 qualified to do business in California, has a contract with a Delaware corporation with offices in
8 California and that agreement contains a California choice of law provision and an indemnity and
9 defense clause, this Court has personal jurisdiction over the Maryland defendants. In response to this
10 argument, defendants say the following:

11 a. Equinix is not a party to this action, is not before the Court, and this
12 alleged contract between Global and Equinix is not at issue here.

13 b. A choice of law provision between plaintiff and a third party who is not a
14 party to this action has no bearing on the appropriate jurisdiction in a dispute between plaintiffs and non-
15 signatories to that agreement;

16 c. The fact that, in a private contract, plaintiffs have agreed to defend and
17 indemnify Equinix against infringement claims made by third parties does not mean that any third party
18 making such claims is subject to personal jurisdiction in California. This is an agreement between
19 Global and Equinix. The fact that Global has contractually agreed to indemnify and defend Equinix is
20 all the more reason to litigate this dispute in Maryland, since Maryland is the residence of Global and,
21 according to the contract alleged, Global alone is liable for the defense and liability resulting from such a
22 claim.²

23 2. Plaintiff’s “Evidence” of California Residence is Transparent

24 A review of the Complaint and the declarations submitted by plaintiffs will establish that no
25 claim is made or evidence is provided showing that plaintiff Ramsey Lamerson is a resident of the State
26 of California. That same review will also show that the bases for Global’s connection to this State,
27 much less the connection of defendants, are thin at best. Global broadly claims to “have both a physical
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² Plaintiffs’ argument that, as a result of its contract with Equinix it may “stand in the shoes” of Equinix is entirely misguided.

1 presence and solid business relationships in California, particularly in the large ISP operation centers in
2 San Jose and Palo Alto” (Lamerson Declaration, Paragraph 4). But does Global have any employees in
3 California? Is it registered with the Secretary of State to do business in California? Does it have a
4 California telephone number or checking account? Does it even have a mailing address in California?
5 After sifting through all of the “peering relationships” and “collocation facilities” and claims of revenue
6 generation for California high tech workers, the Court will see that plaintiffs are grasping at straws.
7 Plaintiffs’ connection to the State of California are no more substantial than any random technology
8 company anywhere in the country, if not the world. Plaintiffs should not be allowed to burden the
9 California courts with this dispute between parties all living and working within a fifty mile radius – in
10 Maryland.

11 C. The Court Has the Necessary Evidence to Order Dismissal of ALS and Kirm for
12 Lack of Personal Jurisdiction

13 Plaintiffs note in the Opposition papers that they have “submitted discovery that will thoroughly
14 smoke out the issue of ALS’s [sic] jurisdictional contacts.” (Opposition, Page 7, lines 27-28). In the
15 event the Court feels it is necessary to consider discovery responses prior to ruling on any aspect of
16 defendants’ Motion, defendants have provided substantive responses to the bulk of the relevant
17 information sought by Plaintiffs’ Requests for Admissions in the Declaration of Sarah Kiwak, in support
18 of this Reply (referred to herein as “Kiwak Reply Dec.”). The evidence contained in the declaration of
19 Ms. Kiwak in addition to the other evidence provided in support of this motion, shows that personal
20 jurisdiction over ALS and Kirm does not exist.

21 ALS has no need to know the breakdown of the physical locations of its subscribers and it has
22 never performed such a study. ALS only refers to the email receipts generated by its third-party credit
23 card processor when a member has problems accessing the website, typically due a mismatch in the
24 postal zip code provided for the paying credit card (Kiwak Reply Dec., ¶¶ 6 and 11). The task of culling
25 out ALS’ California membership would be overburdensome, requiring in excess of 250 hours to
26 complete and it would be incomplete because these records are purged periodically. (Kiwak Reply Dec.
27 ¶ 6).

28 ALS advertises on the Internet and, undoubtedly, ads are seen by people located in California as
well as every other State in the country and many countries in the world. There is no way to determine

1 the physical location of those viewing ALS ads on the Internet. (Kiwak Reply Dec. ¶¶ 7, 10, 11). ALS
2 has never marketed directly to California residents (Kiwak Reply Dec. ¶ 8) and, upon review of
3 available records, ALS has not sold any advertisement space to a California business or resident in the
4 last six months (Kiwak Reply Dec. ¶ 9). ALS does not ship physical products such as CDs, videos or
5 DVD. In fact, ALS' distribution is entirely digital, available for download from its Maryland and
6 Virginia servers (Kiwak Reply Dec. Paragraph 12).

7 Several statements in the declaration of Charles Carreon are entirely untrue, including portions of
8 his paragraphs 14 and 15. ALS does not operate or have any interest in the website
9 www.heartbreakers.com (Kiwak Reply Dec. ¶ 5; Carreon Dec. ¶ 14). ALS does not offer DVDs via a
10 "distribution agreement with a Maryland company." (Kiwak Reply Dec. ¶ 15; Carreon Declaration ¶
11 14). The attack, in Mr. Carreon's declaration (Carreon Dec. ¶ 15), on the declaration of Sarah Kiwak in
12 support of the moving papers is an unsubstantiated twisting of the language of ALS's Terms of
13 Membership and a baseless smearing of the integrity of Ms. Kiwak. Despite Mr. Carreon's personal
14 assertions, ALS does not maintain records of where its members reside (Kiwak Reply Dec. Paragraph
15 18). The outrageous statements by Mr. Carreon, in an evidentiary declaration submitted to the Court,
16 that ALS is actively "concealing" evidence with "false averments" (Carreon Dec. ¶ 16) is indicative of
17 the underlying purpose of this action.

18 In short, ALS' ties to the State of California are no greater or more significant than any
19 successful website, located anywhere in the world, that is accessible by individuals located in California.

20 **4. Conclusion**

21 Plaintiff's desperate effort to continue to harass the defendants in this anticipatory declaratory
22 relief action is based solely on the assertion that the Court may not consider and rule on any basis for
23 dismissal or transfer prior to allowing extensive jurisdictional discovery and further delay. This position
24 is without support.

25 Plaintiffs do not contest or offer relevant counter-evidence to the request for transfer on forum
26 non conveniens grounds. The Court should transfer this matter to the Maryland District on that basis.
27 Likewise, plaintiffs offer no argument or substantial evidence in opposition to the evidence that this is
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1 an improper anticipatory suit, not worthy of the Court's discretion under the Declaratory Relief Act.
2 The Court should dismiss on that basis.

3 Finally, even if the Court determines that the issue of personal jurisdiction must be considered
4 and resolved before consideration of the other bases for this motion, the Court has a sufficient
5 evidentiary record to rule on personal jurisdiction and dismiss on that basis at this time.

6 For all of the above reasons alone, with those stated in defendants' moving papers, this matter
7 should be dismissed or transferred to the Maryland District Court.

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9 Dated: July 17, 2003

IDELL, BERMAN & SEITEL

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11 By: /s/ Owen Seitel
12 Owen Seitel, Esq.
13 Attorneys for Defendants ALS SCAN, INC. and ALEX
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