

PH

1 William Silverstein
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FILED
NOV. 5, 2007
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MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF ILLINOIS**
8 **EASTERN DIVISION**

9 E360INSIGHT, LLC,
10 DAVID LINHARDT,
11 Plaintiffs,

Case No.: 1:06-CV-03958

**AFFIDAVIT OF WILLIAM
SILVERSTEIN SUBMITTED IN
REGARDS TO DAMAGES**

11 vs.
12 THE SPAMHAUS PROJECT aka
13 THE SPAMHAUS PROJECT LTD,
14 Defendant.

1 State of California)
2) SS
3 County of Los Angeles)

4 **Affidavit of William Silverstein**

5 I, William Silverstein, under oath states as follows:

6 1. I am an individual over 18 years of age and am competent to testify. I have personal
7 knowledge of the matters stated in this affidavit and can and will truthfully testify as to
8 those matters.
9

10 2. I am the Plaintiff in Case No.CV07-02835, Silverstein v. e360Insight, et al.
11 (“Silverstein action”) which is pending in the Federal District Court for Central
12 California.
13

14 3. In the Silverstein action, in my opposition to oppose David Linhardt’s 12(b)(2)
15 motion (“the opposition”), I cited Linhardt’s affidavit, filed in 06-cv-03958 (“the
16 Spamhaus case”), document number 20-2. (“the Spamhaus declaration.”)
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18 4. I specifically referred to paragraphs 32 and 33 of the Spamhaus declaration, where
19 Linhardt stated “e360 and I” in regards to lost contracts and lost opportunities.
20

21 5. In the opposition I provided undisputed evidence that four of the seven companies
22 referenced in the Spamhaus declation have principal places of business in California.
23

24 6. In Linhardt’s reply brief to the opposition, Linhardt submitted a declaration which
25 stated, under oath, that he did not personally suffer harm in the Spamhaus case.
26

27 7. A true and accurate copy of the reply brief, including the aforementioned declaration
28 is attached as “Exhibit A.”

1 8. Linhardt's motion to dismiss for lack of personal jurisdiction was granted. A true
2 and accurate copy is attached as "Exhibit B."

3
4 9. Linhardt's dismissal for lack of jurisdiction, in the Silverstein case was granted in
5 part based on his declaration that he did not personally suffer any harm in the Spamhaus
6 case. Please see Exhibit B, pages 12, 13.

7
8 10. I never affirmatively consented to receive any e-mail from e360Insight, LLC. or any
9 related company.

10 11. I received unsolicited commercial e-mail ("spam") from e360Insight or its related
11 companies, each of which violated both California and Federal law..

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14 I declare that the foregoing is true and correct to the best of my knowledge under the
15 pains and penalty of perjury under the laws of the United States of America. Executed on
16 October 26, 2007 in Los Angeles, California.

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William Silverstein

State of California

County of Los Angeles

} ss.

CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGMENT

On 10/26/07, before me, Evelyn J. Abasi

personally appeared William Silverstein

- personally known to me or
- proved to me on the basis of satisfactory evidence:
 - form(s) of identification TX ID: 17369021
 - credible witness(es) _____

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Evelyn J. Abasi
Signature of Notary Public

(Seal)

OPTIONAL INFORMATION

Although the information in this section is not required by law, it could prevent fraudulent removal and reattachment of this acknowledgment to an unauthorized document and may prove useful to persons relying on the attached document.

Description of Attached Document

The preceding Certificate of Acknowledgment is attached to a document titled for the purpose of Affidavit of William Silverstein containing 2 pages, and dated Oct. 24, 2007

The signer(s) capacity or authority is are as:

- Individual
 - Attorney-in-fact
 - Corporate Officer(s) _____ Title(s) _____
- Guardian/Conservator
- Partner - Limited/General
- Trustee(s)
- Other: _____

representing: _____
Name(s) of Person(s) or Entity(ies) Signer is Representing

Additional Information	
<input type="checkbox"/> Additional Signer(s)	Signer(s) Thumbprint(s)
<input type="checkbox"/> Other	

EXHIBIT A

EXHIBIT A



Joseph L. Kish
Phone: 312.454.0015
jkish@synergylawgroup.com

August 3, 2007

VIA FACSIMILE (213)-894-8555

Hon. Christina A. Snyder
c/o of Catherine Jeang
Courtroom 5, 2nd Floor
312 N. Spring Street
Los Angeles, CA. 90012

Dear Judge Snyder:

Attached per your clerks request please find David Linhardt and Moniker Online Services, LLC's Response To Plaintiffs Supplemental Brief On Defendant's Motion to Dismiss for Lack of Jurisdiction and Defendant's Supplemental Disclosure Statement. The Court requested the Supplement Disclosure Statement during the hearing on June 25, 2007 in order to clarify the Linhardt entities. We are filing with the clerk identical copies to those being provided to you, and will provide Plaintiff counsel with copies of this letter and the attached filings via e-mail (plaintiff's counsel has requested that we not deliver anything via facsimile) and US mail. Please contact me if you have any questions regarding these filings.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joseph L. Kish", is written over a printed name. The signature is fluid and cursive, with a large initial 'J' and 'K'.

Joseph L. Kish

JLK:kms

Attachments
cc: F. Bari Nejadpour

1 Joseph L. Kish (SBN 136429)
2 Synergy Law Group
3 730 West Randolph, 6th Floor
4 Chicago, IL 60661
5 Telephone: 312.454.0015
6 Facsimile: 312.454.0261
7 E-Mail: jkish@synergylawgroup.com

8 Attorney for e360Insight, Bargain Depot
9 Enterprises, LLC, a.k.a. Bargaindepot.net,
10 David Linhardt and Moniker Online Services,
11 LLC

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

13 WILLIAM SILVERSTEIN, an
14 individual,

15 Plaintiff,

16 vs.

17 E360INSIGHT, LLC *et. al.*

18 Defendants

) Case No.: cv07-2835 CAS (VBKx)
)
) **DEFENDANTS' RESPONSE TO**
) **PLAINTIFF'S SUPPLEMENTAL**
) **BRIEF ON DEFENDANT'S**
) **MOTION TO DISMISS FOR LACK**
) **OF JURISDICTION**

) Date: August 6, 2007
) Time: 10:00 a.m.
) Location: Courtroom 5

21 Honorable Christina A. Snyder

22
23 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

24 PLEASE TAKE NOTICE that Defendants e360Insight, LLC, Bargain Depot
25 Enterprises, LLC, AKA Bargaindepot.net, Dave Linhardt and Moniker Online
26 Services, LLC caused to be filed their Response to Plaintiff's Supplemental Brief
27 on Defendants' Motion to Dismiss for lack of jurisdiction on August 3, 2007, a
28

Defendants' Response To Plaintiff's Supplemental Brief On Jurisdiction

1 copy of which is attached hereto. The Motion will be heard on August 6, 2007 at
2
3 10:00 a.m. in Courtroom 5 on the 2nd floor, located at 312 N Spring St., Los
4 Angeles, CA 90012.
5
6

7 Dated August 2, 2007

8 

9 Joseph L. Kish
10 Attorney for Defendants e360 Insight,
11 Bargain Depot Enterprises, LLC, a.k.a.
12 Bargaindepot.net, Moniker Online
13 Services, LLC and David Linhardt
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1 2003). *Gator.com* was vacated by 366 F.3d 789 (9th Cir. 2004). In vacating the
2 ruling, the Chief Justice of the Ninth Circuit held that the “opinion [341 F.3d 1072]
3 shall not be cited as precedent by or to this court or any district court of the Ninth
4 Circuit...” *Id.* Therefore, any reliance on *Gator.com* is at best misplaced and
5 should not be considered by this Court.
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8 Plaintiff also relies heavily on the fact that a certain percentage of the
9 domain names registered through Moniker happen to be from California and that
10 Moniker has customers in California. What Plaintiff ignores is that every customer
11 of Moniker’s agrees to be subject to the laws and venue of Florida. *See* Moniker’s
12 Terms of Service attached hereto as Exhibit A. Moniker has explicitly not
13 subjected itself to this Court’s general jurisdiction.
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17 **2. Specific Jurisdiction over Moniker does not exist.**

18 Plaintiff’s attempt to have this Court exercise specific jurisdiction is based
19 on a pleading fiction. Specifically, without any factual basis, Plaintiff claims that
20 Moniker owns the domain used to send the allegedly offending e-mails. As
21 demonstrated through the declaration attached to Moniker’s Reply in support of its
22 motion to dismiss, Moniker *does not* own the subject domains. (*See* ¶ 2-3 of the
23 Declaration of Monte Chan attached as Exhibit B to Defendants’ Reply in support
24 of their Motion to Dismiss and attached hereto as Exhibit B). Moreover, the
25 declaration of David Linhardt affirmatively states that Bargaindepot Enterprises
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owns the subject domain. (See ¶ 6 of the Declaration of David Linhardt attached hereto as Exhibit C). Plaintiff ignores the only admissible evidence currently before the Court on this issue and inexplicably, and inappropriately, alleges just the opposite.

To be subject to personal jurisdiction based on specific jurisdiction, “(1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some transaction with the forum by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and(3) the exercise of jurisdiction must be reasonable.” *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).

Plaintiff fails to demonstrate any causal relationship between Moniker's contacts with California and the harms alleged in the First Amended Complaint. As discussed in Section D, the factors considered in determining the reasonableness of exercising jurisdiction weigh in Moniker's favor.

C. Defendant Linhardt Is Not Subject To The Jurisdiction Of This Court.

1. General Jurisdiction over Linhardt does not exist.

Plaintiff contends that Linhardt is subject to general jurisdiction because he maintains an office in Laguna Hills, California. The evidence demonstrates otherwise. A separate entity, Bay City Hosting, utilized a commercial mail

1 receiving agency in California. (See Exhibit B at ¶ 3). Bay City Hosting is not a
2 party to this suit, however, and its connection to California in no way subjects
3 Linhardt to this Court's jurisdiction. A review of Bay City Hosting's contract
4 signed by Linhardt clearly demonstrates that the document was executed by him
5 solely on behalf of Bay City Hosting. Moreover, under the section designated
6 "name of firm or corporation", Bay City Hosting is the listed entity. Plaintiff's
7 reliance on the application is entirely specious as it reveals at most that Linhardt,
8 acting on behalf of Bay City Hosting, established the account for Bay City
9 Hosting, and nothing more. This application is not sufficient for this Court to
10 exercise personal jurisdiction over Linhardt.
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15 Plaintiff also argues that because Linhardt asserted in another case that he
16 lost business opportunities with California businesses, he is subject to general
17 jurisdiction in this case. (See Plaintiff's Supplemental Brief at p. 8). Linhardt's
18 reference to lost business and lost opportunities were in reference to losses suffered
19 by e360. (See Exhibit C at ¶ 7-9). The lost contract referenced was between
20 e360Insight and Vendare Media. *Id.* at ¶ 10. Linhardt was not a party to the
21 contract. *Id.* at ¶ 11. Moreover, this statement by itself is not sufficient to base
22 personal jurisdiction on Linhardt because the "standard for establishing general
23 jurisdiction is fairly high". *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223
24 F.3d 1082, 1086 (9th Cir. 2000). General jurisdiction "exists where it is
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1 established that the defendant has continuous and systematic contacts with the
2 forum that the exercise of jurisdiction does not offend traditional notions of fair
3 play and substantial justice." *Phillips v. Worldwide Internet Solutions*, 2006 U.S.
4 Dist. LEXIS 44152 at p. 9 (N. D. Cal 2006) *See also: Harris Rutsky & Co. Ins.*
5 *Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003). Here,
6 Linhardt's reference to lost business only related to a single California company.
7 Such minimal contact with this forum, even ignoring that e360 was the contracting
8 party, is insufficient to subject Linhardt to this states general jurisdiction.
9

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12 **2. Specific Jurisdiction over Linhardt does not exist.**
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14 Plaintiff's claim that Linhardt is subject to specific jurisdiction because of
15 his acts as an officer or director of e360Insight and Bargain Depot are similarly
16 misplaced¹. In the context of establishing jurisdiction, the acts of officers and
17 directors of an entity are considered the acts of the entity exclusively and are not
18 material for purposes of establishing minimum contacts as to the officers and
19 directors. *Shearer v. Superior Court*, 70 Cal.App.3d 424, 430, 138 Cal.Rptr. 824
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23
24 ¹ Plaintiff's First Amended Complaint inappropriately raises new allegations
25 against Linhardt, which Plaintiff did not have leave of court to file. Linhardt will
26 be moving to dismiss Count VI based on libel, among other Counts and this Court
27 should not consider those allegations in making its determination as to specific
28 jurisdiction over Linhardt.

1 (Cal. App. 2d 1977). Under California law, corporations are separate legal entities
2 that cannot act on their own and therefore must act through their agents. *Mihlon v.*
3 *Superior Court*, 169 Cal.App.3d 703, 713, 215 Cal.Rptr. 442 (Cal. App. 2d 1985).
4 Acts performed by corporate agents in their official capacity cannot establish
5 personal jurisdiction over the agent. *Colt Studio, Inc. v. Badpuppy Enterprises*, 75
6 F.Supp.2d 1104, 1119 (C.D. Cal. 1999). Plaintiff does not dispute this fact and
7 specific jurisdiction clearly does not exist over Linhardt.
8

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11 **D. Additional Factors Regarding Jurisdiction.**

12 In determining the reasonableness of asserting specific jurisdiction over a
13 defendant, this Court should consider the following seven factors: (1) the extent of
14 the defendant's purposeful availment; (2) the burden on the defendant; (3)
15 conflicts of law between the forum state and the defendant's state; (4) the forum's
16 interest in adjudicating the dispute; (5) judicial economy; (6) the plaintiff's interest
17 in convenient and effective relief; and, (7) the existence of an alternative forum.
18 *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1996). When applying these
19 factors to Moniker and Linhardt, it is clearly unreasonable to exercise specific
20 jurisdiction.
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1 **1. Extent of the defendant's purposeful availment.**

2 Neither Moniker nor Linhardt has done anything to purposefully avail
3 themselves of this forum. On the contrary, Moniker has taken overt steps to *not*
4 subject itself to this state's forum by including a venue provision with all of its
5 customers, establishing Florida as the forum for any disputes arising from that
6 relationship. Linhardt has only acted in his capacity as an officer or director of the
7 Bargain Depot Enterprises. This factor weighs heavily in Defendants' favor.
8
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10 **2. The burden on the defendants.**

11 The burden on Moniker and Linhardt to litigate this matter in California is
12 onerous. The defendants may have to retain local counsel in addition to the
13 expense of having out of state counsel travel to this forum. This factor weighs
14 heavily in favor of the defendants.
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18 **3. Conflicts of law between the forum state and the defendant's state.**

19 Holding Defendants Linhardt and Moniker to the California Business and
20 Professions Code § 17529 et seq. would expose them to greater liability than either
21 would face under the respective electronic mail acts in their home forums. The
22 California Business and Professions Code § 17529.5(b)(1)(B)(ii) provides that
23 liquidated damages in the amount of one thousand dollars (\$1,000) for each
24 unsolicited commercial e-mail advertisement transmitted in violation of this
25 section, up to one million dollars (\$1,000,000) per incident may be recovered by a
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1 plaintiff against a violating defendant. In contrast, Linhardt, under the Illinois
2 Electronic Mail Act (the counterpart to the California Business and Professions
3 Code § 17529) would only be liable for the lesser of ten dollars (\$10) for each and
4 every unsolicited electronic mail advertisement transmitted in violation of this
5 Section, or twenty-five thousand (\$25,000) per day. 815 ILCS 511/10(c).
6

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8 Moniker, under the Florida Electronic Mail Communications Act, would only be
9 liable for liquidated damages of five-hundred dollars (\$500) for each unsolicited
10 commercial electronic mail message in violation of that Act. Fla. Stat. §
11 668.606(3)(b). Improperly holding Linhardt and Moniker to the California
12 Business and Professions Code would expose both to greater financial penalty than
13 either would be exposed to under the corresponding laws of their home forums.
14

15 This factor weighs heavily in favor of the defendants.
16

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18 **4. The forum's interest in adjudicating the dispute.**

19 This forum has no greater interest in adjudicating the dispute than does the
20 courts of Illinois and Florida. Illinois and Florida courts have an interest in
21 adjudicating allegations against its citizenry. This factor weighs heavily in favor of
22 the defendants.
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1 **5. Judicial economy.**

2 It is in the interest of this Court to have the allegations against Moniker and
3 Linhardt heard where they belong, rather than burden this Court's docket. This
4 factor weighs in favor of the defendants.
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6 **6. The plaintiff's interest in convenient and effective relief.**

7 Plaintiff has an interest in convenient and effect relief but that relief can be
8 obtained in the proper forum without litigating this dispute in California.
9
10 Moreover, Plaintiff will have to travel to Illinois and Florida to conduct oral
11 discovery. The only additional burden on the Plaintiff would be attending trial in
12 an out of state forum. This factor is neutral.
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15 **7. The existence of an alternative forum.**

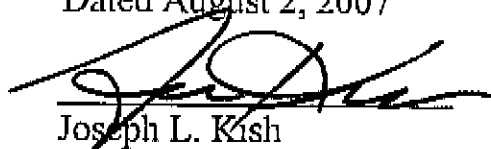
16 The alternative forum to California is Illinois and Florida. The substituted
17 claims against Moniker are specious and will not withstand a motion to dismiss.
18 This factor is neutral.
19

20 **E. Conclusion.**

21 Linhardt and Moniker have not had systematic and continuous contact with
22 this forum and are therefore not subject to the general jurisdiction of this Court.
23 Likewise, any contact they have had with this forum is unrelated to this litigation
24 and therefore insufficient to assert jurisdiction based on specific jurisdiction.
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1 Linhardt and Moniker should be dismissed from this lawsuit regardless of what
2 else remains.
3

4 Dated August 2, 2007

5 

6 Joseph L. Kish
7 Attorney for Defendants e360 Insight,
8 Bargain Depot Enterprises, LLC, a.k.a.
9 Bargaindepot.net, David Linhardt and
10 Moniker Online Services, LLC
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EXHIBIT A



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Email: su

HOME | REGISTER DOMAINS | TRANSFER DOMAINS | ORDER PRODUCTS | WEB HOSTING/EMAIL | BACKORDER DOMAINS | PROMOTI
 Domain Name Services | My Account | My Domains | Fund Account | Status Center | Shopp
 Help

REGISTRATION AGREEMENT

For domain escrow terms, please click here
 For domain appraisal terms, please click here

MONIKER REGISTRATION AGREEMENT (REGISTRAR SERVICES)

MONIKER ONLINE SERVICES, LLC / MONIKER IS AN ACCREDITED REGISTRAR WITH THE INTERNET (ASSIGNED NAMES AND NUMBERS ("ICANN") FOR VARIOUS GENERIC TOP-LEVEL DOMAIN NAMES INCLL .ORG, .INFO, AND .BIZ ("TLD'S").

YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTOOD AND AGREE TO BE BOUND BY ALL TERMS AN ICANN'S UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (THE "UDRP"), AS AMENDED FROM TIME TO TIME HEREBY INCORPORATED AND MADE A PART OF THIS AGREEMENT BY REFERENCE FOR ALL TLD DOMAIN NAME REGISTRATIONS OR RENEWALS.

1. INTRODUCTION

This AGREEMENT between Moniker Online Services, LLC Inc. (hereinafter referred to as "Moniker") a (hereinafter referred to as "Client", "you" and "your")

WHEREAS Moniker provides the services including but not limited to Domain Name Registration Service, DN: Sales & Escrow Services, Domain Traffic Monitoring & Monetization Services, Web Hosting, Email Service (the "Services"); and

WHEREAS Client desires to subscribe to the Service(s) on the terms and conditions contained herein;

By selecting Moniker's service(s) you have agreed to establish an account with us for such services. When you or permit someone else to use your account to purchase or otherwise acquire access to additional Moniker services, modify or cancel your Moniker service(s) (even if we were not notified of such authorization), this Agreement shall be deemed to be accepted and you shall be bound by the terms and conditions of our service(s) and the performance of our service(s) at our principal place of business in Pompano Beach, Florida.

2. SECURITY

When you register a domain name with us through our e-mail, web, or wholesale application process, you shall be responsible for selecting and continuously managing your password and security settings to protect your domain name (including your contact records and host records) from unauthorized changes.

Client is entirely responsible for maintaining confidentiality of the password and account security settings; any and all activities that occur under Client's account.

3. FEES, PAYMENT AND TERM OF SERVICE

As consideration for the services you have selected, you agree to pay Moniker the applicable service(s) fee at the time of your selection unless otherwise contracted. All fees are due immediately and include the pre-funding of your account. Initial domain name registrations & services and domain name

services that have passed the registration agreement's anniversary date, must be in a paid status to be modified in any way, including modifications to request Moniker to affect the domain name record to provide services. Domain name registrations & services in an unpaid status will be manually or automatically renewed. Moniker may take all remedies available to collect fees owed including using your credit card/cards on account, or assume ownership of your domain names if they are in unpaid status. Any renewal of your domain name is subject to our then current terms and conditions and payment of all applicable service fees at the time of renewal. In the case of domain name re-registration, the domain name registry's acceptance of your domain name registration you may not transfer your domain name registration to another domain name registrar during the first sixty days of the effective date of your initial domain name registration or change of ownership with us. We will attempt to notify you by email and/or phone call, to the listed account contacts prior to the renewal date of your domains. You agree to use your credit card for any services provided hereunder, Moniker is authorized, but not obligated, to automatically debit your credit card and renew the applicable service(s) on or before their renewal date using the credit card information you provide us, unless you have notified us (as provided herein) that you do not wish to participate in our automatic renewal process. You may "opt out" of our automatic renewal process in accordance with the instructions on our Web site and you are solely responsible for the credit card information you provide to Moniker and must promptly inform Moniker thereof (e.g., change of expiration date or account number, security code, or billing address). In addition, you are responsible for ensuring the services are renewed. Moniker shall have no liability to you or any third party for the renewal, including, but not limited to, any failure or errors in renewing the services.

4. ACCURATE INFORMATION

As further consideration for the Moniker service(s), you agree to:

Provide certain true, current, complete and accurate information about you as required by the application process and update this information as needed to keep it current, complete and accurate. We rely on this information as important information and notices regarding your account, legal matters, and our services. Our privacy statement on our Web site at <http://www.moniker.com/help/privacy.jsp> and incorporated herein by reference sets forth our policies and responsibilities with regard to your personal information. You agree that we, in our sole discretion, may modify this statement. We may or may not post such revised statement on our Web site at least thirty (30) calendar days before it becomes effective. You agree that, by using our services after modifications to the privacy statement become effective, you have agreed to these modifications. You acknowledge that if you do not agree to any such modification, you may terminate your Agreement. We will not refund any fees paid by you if you terminate your Agreement with us. We will not process or use your personal data in a way incompatible with the purposes and other limitations described in our privacy statement and we will take reasonable precautions to protect your personal data from loss, misuse and unauthorized alteration or destruction. You represent and warrant that you have provided notice to, and obtained consent from, any third party individuals whose personal data you supply to us as part of our services with regard to:

- a. the purposes for which such third party's personal data has been collected,
- b. the intended recipients or categories of recipients of the third party's personal data,
- c. which parts of the third party's data are obligatory and which parts, if any, are voluntary; and
- d. how the third party can access and, if necessary, rectify the data held about them.

You further agree to provide such notice and obtain such consent with regard to any third party personal data in the future. We are not responsible for any consequences resulting from your failure to provide notice or rectify such individuals nor for your providing outdated, incomplete or inaccurate information. Even if you license your domain name registration services to a third party, you remain responsible for complying with all terms and conditions of this Agreement, and you accept liability for harm caused by such licensee's wrongful use of our domain name registration services unless you promptly disclose the identity of such licensee upon request by any person who provides reasonable and actionable harm. Subject to the requirements of our privacy statement, in order for us to comply with the current requirements for the domain name system, you hereby grant to Moniker the right to disclose to third parties through an accessible registration database the following mandatory information that you are required to provide when reserving a domain name:

- a. the domain name(s) registered by you;
- b. your name and mail address;
- c. the name(s), mail address(es), e-mail address(es), voice telephone number and where available title of the technical and administrative contacts for your domain name(s);
- d. the Internet protocol numbers of the primary nameserver and secondary nameserver(s) for such domain name;
- e. the corresponding names of those nameservers;
- f. the original creation date of the registration; and
- g. the expiration date of the registration.

We, as are all accredited domain name registrars, are also required to make this information available in parties who agree not to use it to (a) allow, enable or otherwise support the transmission of mass unsolicited advertising or solicitations via e-mail (spam) or (b) enable high volume, automated, electronic processes or systems to register domain names.

a. Disclosure and Use of Information

You acknowledge and agree that, pursuant to Moniker.com's Privacy Policy (please click here to Privacy Policy), Moniker.com may make available information you provide or that we otherwise obtain from public or private third parties as applicable laws require or permit, including, but not limited to, information that is publicly available, or directly available, some or all of such information: (i) for inspection by law enforcement (including in the case of potential criminal activity); (ii) to respond to criminal and civil subpoenas that reasonably appear to be valid; (iii) in connection with the sale of all or certain of our assets that apply the terms of this Agreement; and (iv) to protect the rights, property, or safety of Moniker.com or others, whether during or after the term of your use of the Service.

You further acknowledge and agree that Moniker.com may make publicly available, or directly disclose to third parties, some, or all, of the information you provide, for purposes of inspection (such as through a search engine) or for targeted marketing and other purposes as required or permitted by applicable laws. On Moniker.com may make some or all of the information you provide available to the public or third parties through bulk WHOIS data access provided to third parties who enter into a bulk WHOIS data access agreement with Moniker.com. Please click here to refer to Moniker.com's bulk WHOIS data policies and click here to refer to your WHOIS information made available for bulk access. Moniker.com reserves the right to discontinue bulk WHOIS data access to third parties.

You hereby consent to any and all such disclosures and use of, guidelines, limits and restrictions concerning, information provided by you in connection with the registration of a domain name or use of our Services (including any updates to such information), whether during or after the term of your registration or other Services. You hereby irrevocably waive any and all claims and causes of action you may have against Moniker.com arising from such disclosure or use of information provided by you to Moniker.com.

We will not process data about any identified or identifiable natural person that we obtain if such processing is incompatible with the purposes and other limitations which we describe in this Agreement.

Moniker.com will take reasonable precautions to protect the information it obtains from you from unauthorized access or disclosure or use, or alteration or destruction, of that information. Moniker.com will not be liable to you or any third party to the extent such reasonable precautions are taken.

b. Communications

You acknowledge and agree that communications with Moniker.com are not private and may be disclosed in their entirety or in edited form at any time, at the sole discretion of Moniker.com.

5. MODIFICATIONS TO AGREEMENT

Except as otherwise provided in this Agreement, you agree, during the term of this Agreement, that we may:

- a. revise the terms and conditions of this Agreement; and/or
- b. change part of the services provided under this Agreement at any time. Any such revision or change shall be effective immediately upon posting of the revised Agreement or change to the service(s) on Moniker.com or upon notification to you by e-mail or mail.
- c. You agree to periodically review our Web sites, including the current version of this Agreement available on our Web sites, to be aware of any such revisions. If you do not agree with any revision to the Agreement, you may terminate this Agreement at any time by providing us with notice by e-mail or mail addressed as follows, Attention: Business Affairs, 20 SW 27th Ave. Suite 201, Pompano Beach, Florida 33069. Notice of your termination shall be effective on receipt and processing by us. Any fees paid by you if you terminate your Agreement will be nonrefundable, but you will not incur any additional fees unless they are owed to us for any services rendered in unpaid status. By continuing to use Moniker.com's services after any revision to this Agreement or change to the Agreement, you agree to abide by and be bound by any such revisions or changes. We are not bound by nor liable for any representation by:
 - d. any agent, representative or employee of any third party that you may use to apply for our services;
 - e. any information posted on our Web site of a general informational nature. No employee, contractor, representative of Moniker.com is authorized to alter or amend the terms and conditions of this Agreement.

6. GRACE PERIOD; IP ADDRESS CHANGES; RENEWAL AND TRANSFER OF EXPIRED DOMAIN NAME ON OUR BEHALF.

[Click here to review the Domain Deletion and Auto-Renew Policy](#)

You agree that we may, but are not obligated to, allow you to renew your domain name after its expiration. You agree that after the expiration date of your domain name registration and before it is deleted or renewed, we may change your domain name to an IP address designated by us, including, without limitation, to an IP address which is under construction, or other temporary page that may include promotions and advertisements for, and links to, our site, Moniker product and service offerings, third-party Web sites, third-party product and service offerings, search engines and/or advertisements, and you agree that we may place our contact information in the Web page of the expired domain name. Should you not renew your domain name during any applicable grace period, you agree to notify us to the contrary; otherwise, we may, in our sole discretion, renew and transfer the domain name to our control, on your behalf (such a transaction is hereinafter referred to as a "Post Term Renewal and Transfer"), and your consent to such a Post Term Renewal and Transfer after the domain name expiration date shall constitute your consent to such a Post Term Renewal and Transfer. If we are able to identify such a third party and effectuate such a Post Term Renewal and Transfer, we may, in our discretion, receive a portion of the Net Proceeds received by us as a result of a Post Term Transfer of your domain name. These Net Proceeds will be added to your account and are to be used for Moniker related services only. For purposes of this paragraph, "Net Proceeds" shall mean the amount received to us by another party or our third party vendor as a result of a Post Term Renewal and Transfer, less any card charge-backs, processing and check fees, and other costs or fees associated with the Post Term Renewal and Transfer of the domain name. If we do pay you a portion of the Net Proceeds, they will be added to your Moniker account and used for domain related services only. You agree that we shall have no obligation to pay you, and you shall have no right to receive a percentage of the Net Proceeds unless, within ninety (90) days after the date of our notification to you, you file with us the name, address and related information requested by us (including, but not limited to, a Form W-9, if applicable), in writing, and you agree to our notification. We cannot guarantee, and we make no representation or promise, that any Post Term Renewal and Transfer will occur with respect to your domain name or that we will pay you any Net Proceeds.

7. NEW CUSTOMERS THROUGH A BACKORDER SERVICE.

[Click here to review the Domain Deletion and Auto-Renew Policy](#)

If you are registering a domain name through a backorder service and that domain name was registered and subsequently deleted by, Moniker at the time of your purchase, you acknowledge and agree that the term of your registration will be for a period of one year from the original expiration date, (not the date in which you took control of the domain name immediately prior to your purchase, as the registration is the result of a Post Term Renewal and Transfer). If you are registering a domain name through a backorder service and the domain name was not registered with us at the time of your purchase but was deleted by the applicable top-level domain registry at the time of your purchase, you acknowledge and agree that the term of your registration will be for a period of one year from the date it is initially registered with another registrar by the provider of the backorder service.

8. MODIFICATIONS TO YOUR ACCOUNT

In order to change any of your account information with us, you must use your Account Number or User ID and Password. Please safeguard your Account Number and Password from any unauthorized use. In no event shall we be liable for the unauthorized use or misuse of your Account Number or Password.

9. DOMAIN NAME DISPUTE POLICY

If you reserved or registered a domain name through us, you agree to be bound by our current domain name dispute policy that is incorporated herein and made a part of this Agreement by reference. You also agree to submit any dispute to be commenced under the Uniform Domain Name Dispute Resolution Policy ("UDRP") and that these may be modified from time to time. The current version of this dispute policy may be found at <http://www.moniker.com/help/disputepolicies.jsp>. Please take the time to familiarize yourself with that policy.

10. DOMAIN NAME DISPUTE POLICY MODIFICATIONS

You agree that we, in our sole discretion, may modify our dispute policy. We may post any such revised policy on our website at least thirty (30) calendar days before it becomes effective. You agree that, by maintaining the reservation of your domain name after modifications to the dispute policy become effective, you have agreed to these modifications. You acknowledge that if you do not agree to any such modification, you may terminate this Agreement. We will not be liable for any domain name fees paid by you if you terminate your Agreement with us.

loss or liability resulting from the development or interruption of your Website;

loss or liability from your inability to use our dot com mail service;

loss or liability that you may incur in connection with our processing of your application for our services, our authorized modification to your domain name record or your agents failure to pay any fees, including the in or re-registration fee; or

loss or liability as a result of the application of our dispute policy.

15. INDEMNITY

You agree to release, indemnify, defend and hold Moniker, in our capacities as the registry and a registrar, registry for any top-level domain in which you are applying for services hereunder, and any of our or their employees, officers, directors, shareholders, affiliates and assigns harmless from all liabilities, claims, damages and expenses, including reasonable attorneys' fees and expenses, of third parties relating to or arising under the Moniker services provided hereunder, your domain name registration, or your use of the Moniker services limitation infringement or dilution by you, or someone else using our service(s) from your computer, of any intellectual property or other proprietary right of any person or entity, or a violation of any of our operating rules or policies relating thereto. When we are threatened with suit or sued by a third party, we may seek written assurances from you to promise to indemnify us; your failure to provide those assurances may be considered by us to be a material breach of this Agreement.

You agree to defend, indemnify and hold harmless Moniker Online Services, LLC and Moniker Online Service and business partners, and any applicable domain name registry, including without limitation VeriSign, Inc., NeuLevel, Inc., NeuStar, Inc., SITA and Public Interest Registry, and their respective subsidiaries and directors, officers, employees and agents, subcontractors and shareholders of each of them, from and against all claims, actions, losses, damages, expenses and costs, including reasonable attorneys' fees and expenses relating to (i) your domain name registration, (ii) any breach by you of this Agreement, including the Dispute Resolution third party claim, action, or demand related to your domain name or the use thereof. This indemnification shall survive the termination or expiration of the registration agreement.

If we are notified that a complaint has been filed with a judicial or administrative body regarding your use of our registration services, you agree not to make any changes to your domain name record without our prior approval or to allow you to make changes to such domain name record until (i) we are directed to do so by the judicial or administrative body or (ii) we receive notification by you and the other party contesting your registration and use of our domain name registration services that the dispute has been settled. Furthermore, you agree that if you are subject to litigation regarding your domain name registration and use of our domain name registration services, we may deposit control of your domain name registration with the registry of the judicial body by supplying a party with a registrar certificate from us. You agree that we will comply with all court orders, domestic or international, directed against you and/or the domain name registration.

16. ADDITIONAL REGISTRY REQUIREMENTS

The following provisions apply to any domain names that you register through Moniker in the relevant registry (.INFO) With respect to any registration of a .INFO second level domain name, you agree to the following terms:

You consent to the use, copying, distribution, publication, modification, and other processing of your Personal Information by the .INFO Registry Operator, and its designees and agents in a manner consistent with the purposes specified in the .INFO Registry Operator's contract.

You agree to submit to proceedings under ICANN's Uniform Domain Name Dispute Policy (UDRP) and the requirements set forth by Afilias for domain names registered during the Sunrise Period, including the Sunrise Dispute Resolution Policy. These policies are subject to modification by Afilias in its discretion.

You agree to immediately correct and update the registration information for the .INFO domain name registered during the Sunrise Period for such domain name; failure to correct this information shall constitute a breach of this Agreement.

You acknowledge that Afilias, the registry operator for .INFO, will have no liability of any kind for any loss from the proceedings and processes relating to the Sunrise Period or the Land Rush Period, including, without limitation, the inability of a registrant to obtain a given domain name during these periods, and (b) the results of Sunrise Registration.

Moniker and Afilias, the registry operator for .INFO, expressly reserve the right to deny, cancel or transfer a domain name either shall deem necessary, in its discretion, to protect the integrity and stability of the .INFO registry, including the Sunrise Period.

suspend, cancel or transfer your domain name registration services in order to: (i) correct mistakes made in registering your chosen domain name, or (ii) to resolve a dispute under our dispute policy. We will not refund you if we terminate your services.

22. RIGHT OF REFUSAL

We, in our sole discretion, reserve the right to refuse to register your chosen domain name or register you for other Moniker service(s), or to delete your domain name within the first thirty (30) calendar days from receipt of your services. In the event we do not register your domain name or register you for other Moniker service(s), domain name or other Moniker service(s) within five (5) calendar day period, we agree to refund any application fee paid. You agree that we shall not be liable to you for loss or damages that may result from our refusal to register your domain name or refusal to register you for other Moniker service(s).

23. SEVERABILITY

You agree that the terms of this Agreement are severable. If any term or provision is declared invalid or unenforceable, that term or provision will be construed consistent with applicable law as nearly as possible to reflect the original intent of the parties, and the remaining terms and provisions will remain in full force and effect.

24. ENTIRETY

You agree that this Agreement, the rules and policies published by us, the dispute policy and the privacy policy constitute the complete and exclusive agreement between you and us regarding our services. This Agreement, our rules and policies, dispute policy and the privacy statement supersede all prior agreements and understandings, whether oral or written, practice, policy or precedent.

25. TRANSFER AND ASSIGNMENT

You may transfer your domain name registration to a third party of your choice, subject to the procedures at <http://www.moniker.com/help/dtc.jsp>, incorporated herein by reference. You understand that you may not transfer your domain to another Registrar until the 61st day after initial registration or transfer of the domain to Moniker. Moniker reserves the ownership of the domain within the Moniker system. When requesting to transfer your domain to (or from) Moniker or another Registrar, Moniker must receive authorization by you in advance of such transfer request. This authorization must be in the form of an email from the account holder and/or registrant, or via authorized fax showing proof of ownership of the domain. When transferring a domain name to Moniker, your registration will be extended for one year, provided that the total unexpired term of the registration does not exceed ten (10) years.

You agree to maintain accurate records appropriate to document and prove the initial domain name registration to the number of Registrars with which you entered into a contract for registration services.

Your rights under this Agreement are not assignable and any attempt by your creditors to obtain an interest in this Agreement, whether by attachment, levy, garnishment or otherwise, renders this Agreement voidable at the option of Moniker.

26. GOVERNING LAW

This Agreement is governed by and construed in accordance with the applicable laws of the State of Florida and the United States. For all matters arising from this Agreement or your use of Moniker's services, including claims in which your use of our domain name registration services is challenged by a third party, Client agrees to the exclusive subject matter jurisdiction, personal jurisdiction and venue of the United States District Court for the Southern District of Florida, Miami Division. If there is no jurisdiction in the United States District Court for the Southern District of Florida, Miami Division, for any disputes between us under or arising out of this Agreement or your use of our services, you and we agree that jurisdiction shall be in the courts of Miami-Dade County, Florida. THE PARTIES HEREBY WAIVE THE RIGHT TO JURY TRIAL WITH RESPECT TO ANY ACTION BROUGHT IN CONNECTION WITH THIS AGREEMENT. THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IS EXPRESSLY EXCLUDED. NO COURTS SHALL EXERCISE OR ENFORCE ANY RIGHT OR PROVISION OF THIS AGREEMENT SHALL NOT CONSTITUTE A WAIVER OF SUCH RIGHT OR PROVISION, UNLESS ACKNOWLEDGED AND AGREED TO BY MONIKER BY WRITING;

Client and Moniker agree that any cause of action arising out of or related to this Service must commence after the cause of action arose; otherwise, such cause of action is permanently barred.

27. LANDING PAGES & PARKING PAGES

All domain names registered through Moniker and/or DomainSystems that are pointed to a "Coming Soon," "Under Construction" or "Special Idle Web" page which informs visitors that the registrant has recently registered their domain name through Moniker and/or DomainSystems. These Web pages may be modified at any time by Moniker and/or DomainSystems without notice to the registrant.

and may include such things as, without limitation (i) links to additional products and services offered by DomainSystems, (ii) advertisements for products and services offered by third-parties, and (iii) an interface. You agree that DomainSystems and/or Moniker has the right to point names as set forth herein with or without remuneration to you. If for any reason you do not wish to have the domain name you have registered placed on For Sale, Search, or special Idle Web page, please notify our Customer Support team at support@domain.com, or use Moniker and/or DomainSystems's Domain Manager utility to forward your domain to

28. PROHIBITED CONDUCT

You agree that the following is a non-exclusive list of actions that are not permitted:

the uploading, posting or otherwise transmitting of any content on our Web Site that is unlawful, harmful, threatening, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or otherwise objectionable;

the impersonation of any person or entity, including, but not limited to, a Moniker official, forum leader, guide or otherwise misrepresent your affiliation with a person or entity;

the uploading, posting or other transmittal of any content that you do not have a right to transmit under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned in part of employment relationships or under nondisclosure agreements);

the uploading, posting or other transmittal any content that infringes any patent, trademark, trade secret, or other proprietary rights of any party;

the uploading, posting or other transmittal of any unsolicited or unauthorized advertising, promotional material, "spam," "chain letters," "pyramid schemes," or any other form of solicitation;

the uploading, posting or other transmittal of any content that contains software viruses or any other computer programs designed to interrupt, destroy or limit the functionality of any computer software or hardware or telecommunications equipment;

intentionally or unintentionally violating any applicable local, state, national or international law, including, without limitation, regulations promulgated by the U.S. Securities and Exchange Commission, any rules of any national securities exchange, including, without limitation, the New York Stock Exchange, the American Stock Exchange or the regulations having the force of law;

"stalking" or otherwise harassing another;

collecting or storing personal data about other users;

promoting or providing instructional information about illegal activities, promoting physical harm against an individual, or promoting any act of cruelty to animals.

29. AGREEMENT TO BE BOUND

By applying for a Moniker service(s) through our online application process or by applying for and registering part of our web or e-mail template application process or by using the service(s) provided by Moniker you acknowledge that you have read and agree to be bound by all terms and conditions of this Agreement and any rules or policies that are or may be published by Moniker at any time. These terms will continue to apply to you and your Service(s) by You, even if You are no longer using the Service(s). You acknowledge and agree that Moniker may block Your use of all or part of the Service without prior notice for any reason, including, without limitation, if You have engaged in conduct prohibited by these terms. You agree that upon termination or discontinuation of the Service, Moniker may delete all information related to You on the Service and may bar Your access to and use of the Service.

Registered Name Holder shall:

Indemnify to the maximum extent permitted by law, defend and hold harmless Registry Operator, and its employees and agents from and against any and all claims, damages, liabilities, costs and expenses, including reasonable legal fees and expenses, arising out of or relating to the Registered Name Holder's domain name registration and use, and indemnification obligation survive the termination or expiration of the registration agreement; (3.7)

Indemnify, defend and hold harmless Registry Services Provider, its subsidiaries and affiliates, and the employees and agents of each of them, from and against any and all claims, damages, liabilities, costs and reasonable legal fees and expenses, arising out of or relating to the Registered Name Holder's domain name registration and use, and indemnification obligation survive the termination or expiration of the registration agreement; (3.7)

Acknowledge and agree that notwithstanding anything in this Agreement to the contrary, mTLD Top ("dotmobi"), the Registry Operator of the .mobi TLD, is and shall be an intended third party beneficiary of such, the parties to this Agreement acknowledge and agree that the third party beneficiary rights of dotmobi that dotmobi has relied on its third party beneficiary rights under this Agreement in agreeing to Moniker, be the .mobi top-level domain. Additionally, the third party beneficiary rights of dotmobi shall survive any term of this Agreement. (3.8.3)

Comply with ICANN requirements, standards, policies, procedures, and practices for which Registry Operator responsibility in accordance with the Registry Agreement or other arrangement with ICANN; (3.8.1)

Comply with operational standards, policies, procedures, and practices for the Registry TLD established for Registry Operator in a non-arbitrary manner as Registry Policies, applicable to all registrars and/or Registrants and consistent with the Registry Agreement shall be effective upon thirty days notice by Registry Operator to

Consent to the use, copying, distribution, publication, modification and other processing of Registered Name Data by Registry Operator and its designees and agents in a manner consistent with the purposes set forth in Subsection 2.6 and with relevant mandatory local data protection, laws and privacy; (3.8.4)

Submit to proceedings commenced under ICANN's Uniform Domain Name Dispute Resolution Policy ("UDRP")

Immediately correct and update the registration information for the registered Name during the registration of the Registered Name; (3.8.6)

Acknowledge and agree to be bound by the terms and conditions of the initial launch and general operation of the TLD, including without limitation the Limited Industry Launch, the Sunrise Period, the Land Rush Period, the Dispute Resolution Policy, the Premium Name Allocation Process, and the General Registration Period, and further to the Registry Operator and the Registry Service Provider has no liability of any kind for any loss or liability arising from proceedings and processes relating to the Limited Industry Launch, the Sunrise Period, the Land Rush Period, the Dispute Resolution Policy, the Premium Name Allocation Process, and the General Registration Period. Limitation: (a) the ability or inability of a registrant to obtain a Registered Name during these periods, and (b) any dispute made during the limited industry launch or over a Sunrise Registration. (3.8.7)

Acknowledge and agree that the Registry and Registry Services Provider, acting in consent with the Registry Operator, may deny, cancel or transfer any registration that it deems necessary, in its discretion (i) to protect the integrity of the registry; (ii) to comply with all applicable laws, government rules or requirements, requests of law enforcement or compliance with any dispute resolution process; (iii) to avoid any liability, civil or criminal, on the part of the Registry Operator, its affiliates, subsidiaries, officers, directors, representatives, employees, and stockholders; (iv) for violation of the conditions herein; or (v) to correct mistakes made by the Registry or any registrar in connection with registration, and the Registry also reserves the right to freeze a Registered Name during resolution of a dispute.

Acknowledge and agree that they must comply with the requirements, standards, policies, procedures and practices set forth in the dotmobi Style Guide (www.mtld.mobi) and consent to the monitoring of the website as described in the content monitoring guidelines (www.mtld.mobi) for compliance with the Style Guide. Furthermore, Registrant acknowledges that this Style Guide is subject to modification by the Registry with any such changes appearing at the primary URL, and that Registrant must promptly comply with any such changes in the time allotted. (3.8.9)

Acknowledge and agree that Proxy or Proxy Registrations will not be allowed during the Sunrise Period, the Limited Industry Launch and the Premium Name Allocation and Auction Period, and in such an instance will constitute a material breach of this contract. (3.9.1)

All site contents (c) 2005-2006, Moniker Online Services, LLC. Moniker will be a subsidiary of Seavast, Corp. All rights reserved.

[About Us](#) | [Site Map](#) | [DomainNowz](#) | [Contact Us](#) | [Privacy Policy](#) | [Terms & Conditions](#)

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EXHIBIT B

DECLARATION OF MONTE CAHN

MONTE CAHN declares and states as follows:

1. I am the CEO of DomainSystems, Inc., which is the sole member of Moniker Online Services, LLC, a Defendant in this action. I make this declaration in support of Defendants' Response to Plaintiff's Opposition to Defendants' Motion to Dismiss. The facts set out below are known to me personally, and if called on I could testify to those facts, under oath.
2. Moniker does not own or control bargaindepot.net
3. Moniker does not own any domain names that are at issue in this lawsuit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on June 14, 2007.

A handwritten signature in black ink, appearing to read 'Monte Cahn', with a long horizontal flourish extending to the right.

Monte Cahn, CEO

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EXHIBIT C

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DECLARATION OF DAVID LINHARDT

DAVID LINHARDT declares and states as follows:

1. I am the President of e360Insight ("e360") and a Defendant in this action. I make this declaration in support of Defendants' Response to Plaintiff's Supplemental Brief on Jurisdiction. The facts set out below are known to me personally, and if called on I could testify to those facts, under oath.
2. I am the President of Bay City Hosting.
3. Bay City Hosting utilized a commercial mail receiving agency in California.
4. The commercial mail receiving agency was solely for the business use of Bay City Hosting and not for my personal use.
5. Bay City Hosting is not a party to this litigation and does not have a pecuniary interest in the outcome of this litigation.
6. BargainDepot Enterprises owns the domain name bargaindepot.net.
7. The references I made to myself, in the affidavit Plaintiff references, were not meant to suggest that I personally lost any business or business opportunities, but rather in my capacity as an officer and director of e360, I lost business and business opportunities.
8. I have never personally entered into a contract with a California entity or individual on my own behalf.

1 9. The only contracts that I have been a party to with California businesses or
2 individuals have been in my capacity as an officer or director of a business.
3

4 10. Plaintiff's quote of my affidavit in another case references the loss of a
5 contract between e360 and Vendare Media.
6

7 11. I was not personally a party to the contract between e360 and Vendare
8 Media.
9

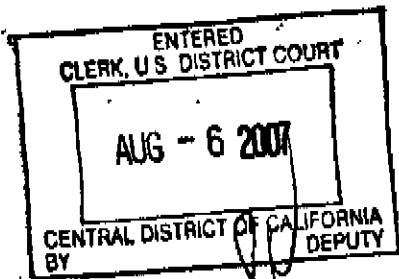
10 I declare under penalty of perjury under the laws of the United States that
11 the foregoing is true and correct and that this declaration was executed on June 8,
12 2007.
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15 DAVID LINHARDT
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EXHIBIT B

EXHIBIT B



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

Case No. CV 07-2835 CAS (VBKx) Date August 6, 2007
Title WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.

Present: The Honorable CHRISTINA A. SNYDER

<u>CATHERINE JEANG</u>	<u>LAURA ELIAS</u>	<u>N/A</u>
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiff:
Fari Nejadpour

Attorney Present for Defendants:
Joseph Kish

Proceedings: **DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**
(filed May 7, 2007)

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I. INTRODUCTION AND BACKGROUND

Plaintiff William Silverstein is an individual who provides internet web hosting and e-mail services as a sole proprietorship. Compl. ¶ 1. Plaintiff alleges that defendants E360Insight, LLC ("E360"), Bargain Depot Enterprises, LLC, aka bargaindepot.net ("Bargain Depot"), David Linhardt ("Linhardt"), and Moniker Online Services, LLC ("Moniker"), are engaged in the business of sending illegal, unsolicited commercial e-mail, otherwise known as "spam." On March 16, 2006, plaintiff filed a complaint in the Los Angeles County Superior Court, asserting claims against all defendants for: (1) violation of California Business and Professions Code § 17529.5 et seq.; and (2) violation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act"), pursuant to 15 U.S.C. § 7702. Plaintiff seeks injunctive relief, statutory damages of \$1,000 for each of the complained of e-mails in accordance with California Business and Professions Code § 17529.5, statutory damages of \$123 per e-mail under the CAN-SPAM Act, aggravated damages of \$375 per e-mail in accordance with 15 U.S.C. § 7706(g)(3)(C), general damages to be determined at trial, punitive damages in an amount no less than \$11,700,000, and attorneys' costs and fees. On April 30,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-2835 CAS (VBKx) Date August 6, 2007

Title WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DÉPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.

SCANNED

2007, defendants removed the action to this Court based on federal question jurisdiction under the CAN-SPAM Act and diversity jurisdiction.¹

On May 7, 2007, defendants Linhardt, Moniker, E360 and Bargain Depot filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). Defendants also requested that portions of the complaint be stricken pursuant to Federal Rule of Civil Procedure 12(f). Plaintiff filed an opposition to defendants' motion on June 12, 2007. Defendants filed a reply thereto on June 18, 2007.

A hearing was held on June 25, 2007. The Court continued the hearing on defendants' motion to dismiss for lack of personal jurisdiction until August 6, 2007, to enable the parties to conduct limited jurisdictional discovery.

On July 24, 2007, plaintiff filed a first amended complaint, adding claims for trespass to chattels, violation of California Penal Code § 502, negligence and libel.

On July 27, 2007, plaintiff filed a supplemental opposition to defendants' motion to dismiss. Defendants filed a reply thereto on August 23, 2007. A hearing was held on August 6, 2007. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. DEFENDANTS MONIKER AND LINHARDT'S MOTION TO DISMISS PURSUANT TO 12(b)(2)

A. Legal Standard for Motion to Dismiss Pursuant to Rule 12(b)(2)

1. General Jurisdiction

Depending on the nature of the contacts between the defendant and the forum state, personal jurisdiction is characterized as either general or limited. California's long-arm jurisdictional statute is coextensive with federal due process requirements, so that the jurisdictional analysis under state law and federal due process are the same. Roth, 942 F.2d at 620. In order for a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have "minimum contacts" with the forum

¹ The parties do not appear to object to this Court's jurisdiction based on diversity of citizenship. Even if the parties are not diverse, the Court would have subject matter jurisdiction because of plaintiff's claim under the CAN-SPAM Act.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-2835 CAS (VBKx) Date August 6, 2007
Title WILLIAM SILVERSTEIN v. E360INSIGHT, LLC, BARGAIN DEPOT
ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, and
individual, MONIKER ONLINE SERVICES, LLC, and DOES 1-50; inclusive.

SCANNED

state so that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). "The Supreme Court has bifurcated this due process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the assertion of jurisdiction be reasonable." Unocal, 248 F.3d at 925 (quoting Amoco Egypt Oil v. Leonis Navigation Co., Inc., 1 F.3d 848, 851 (9th Cir. 1993)(citations omitted)). A court may have general jurisdiction over a nonresident defendant when that defendant's activities within the forum state are "substantial" or "continuous and systematic," even if the cause of action is "unrelated to the defendant's forum activities." Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446-47 (1952); Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

2. Specific Jurisdiction

A court may assert limited jurisdiction over a cause of action that arises out of a defendant's forum-related activities. Rano v. Sipa Press, Inc., 987 F.2d 580, 588 (9th Cir. 1993). The test for limited personal jurisdiction has three parts:

- (1) the defendant must perform an act or consummate a transaction within the forum, purposefully availing himself of the privilege of conducting activities in the forum and invoking the benefits and protections of its laws;
- (2) the claim must arise out of or result from the defendant's forum-related activities;
- (3) exercise of jurisdiction must be reasonable.

Id.; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985).

The third prong, reasonableness, requires the Court to balance seven factors: (1) the extent of the defendant's purposeful availment, (2) the burden on the defendant, (3) the extent of conflict with the sovereignty of defendant's state, (4) the forum's interest in adjudicating the dispute, (5) judicial efficiency, (6) the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum. Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1996).

Where, as here, the court decides a motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995); Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998), aff'd, 248 F.3d 915 (9th Cir. 2001). Plaintiffs' version of the facts is taken as true for purposes of the motion if not directly controverted, and conflicts

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between the parties' affidavits must be resolved in plaintiffs' favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996).

B. Whether Moniker is Subject to Jurisdiction in California

1. General Jurisdiction

In his complaint, plaintiff alleges that Moniker is a limited liability corporation, duly organized in Florida, with its principal place of business in Florida. Compl. ¶ 2. Plaintiff further alleges that Moniker "operates highly interactive web sites that are specifically programmed to conduct business with California residents." Compl. ¶ 14.

Plaintiff argues that Moniker conducts regular and substantial business in California through its sale of domain names to California consumers. Pl.'s Suppl. Opp'n at 4. Plaintiff contends that Moniker has disclosed that 478,993 out of 2.3 million domain names registered through it are based in California. Pl.'s Suppl. Opp'n at 4 (citing Declaration of Monte Cahn, July 27, 2007 ("Cahn Decl.") ¶ 5. Plaintiff further contends that Moniker has stated that 5,195 of its 44,728 customers are in California. Id. (citing Declaration of Monte Cahn, July 27, 2007 ("Cahn Decl.") ¶ 5. Additionally, plaintiff relies on the declaration by plaintiff Silverstein, wherein he states that he has examined Moniker's web site and found that there is programming code that specifically includes California selection in the programming for some of its web pages. Declaration of William Silverstein, July 27, 2007 ("Silverstein Decl."), ¶¶ 9, 10. Based on his review of the website, and that he has more than twelve years of experience in web site programming, Silverstein states that he has found the website to be highly interactive. Id. ¶¶ 8-10.²

² Plaintiff relies on Gator.com v. L.L. Bean, Inc., 341 F.3d 1072, 1079 (9th Cir. 2003), wherein the Ninth Circuit Court of Appeals found that (1) the retailer had sufficient contacts with California to permit a finding of general jurisdiction, given its interactive web site and extensive marketing and sales in state, and that (2) exercise of jurisdiction was not unreasonable, given retailer's purposeful interjection in California and the absence of any undue burden in defending the action there. Id. at 1081. The Court concluded that, even if the only contacts they had with California were through its virtual store, a finding of general jurisdiction would be consistent with the "sliding scale" test that is applied to internet based companies. Id. at 1079. Plaintiff contends that the Court's holding in Gator.com is particularly relevant because in Gator.com, the retail store had only attributed six percent of its sales to California, whereas Moniker attributes twenty percent of its sales to California. Id. at 5.

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Moniker responds that each of the California customers to which plaintiff refers has contracted with Moniker to be subject to the laws and venue of Florida. Defs.' Response to Suppl. Opp'n at 2 ("Defs.' Response"). Therefore, Moniker argues that although a certain percentage of the domain names registered through Moniker happen to be with California customers, Moniker has made specific efforts to avoid a finding that it is subject to jurisdiction in this forum. *Id.* However, there is no evidence to suggest that plaintiff agreed to adjudicate controversies in Florida. Additionally, it is not clear to the Court why Moniker's forum-selection clause contracts with third parties would prevent it from being subject o jurisdiction in this forum under other circumstances. AstroPower Liquidating Trust v. Xantrex Tech., Inc., (In re AstroPower Liquidating Trust), 335 B.R. 309, 319-20 (Bankr. Del. 2005) (stating that while "[i]t is true that a valid forum selection clause is sufficient to *establish* personal jurisdiction over a defendants who otherwise lacks contacts with the forum . . . [it] does not explain why a forum selection clause would *negate* personal jurisdiction where the defendant's actions are otherwise sufficient to establish minimum contacts with the forum. Indeed, it appears from the cases that such a 'defensive' use
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Plaintiff's reliance on Gator.com is misplaced. The Ninth Circuit Court of Appeals agreed to rehear the case en banc, and vacated the decision relied upon by plaintiff. Gator.com Corp. v. L.L. Bean, Inc., 366 F.3d 789 (9th Cir. 2004). The parties subsequently informed the Ninth Circuit Court of Appeals that they had reached a settlement agreement, which led the en banc majority to find the appeal to be moot and state that "we must await another opportunity to resolve the important issues of personal jurisdiction originally raised by this appeal" because the panel decision "no longer has the force of law." Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1143 (9th Cir. 2005). Based on the foregoing, this Court concludes that Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1073 (9th Cir. 2003) is not precedent and may not be relied upon by plaintiff as authority binding this Court. See also Honor Plastic Indus. Co. v. Lollicup USA, Inc., 2006 U.S. Dist. LEXIS 73730 (E.D. Cal. September 28, 2006).

Plaintiff also argues that Moniker has consented to personal jurisdiction in California because in its contract with the Internet Corporation for Assigned Names and Numbers ("ICANN"), Moniker agreed that it would accept liability for illegal use of the domain name if Moniker failed to identify the current lessor. The sole evidence of the alleged contract between ICANN and Moniker is an unsigned Registration Accreditation Agreement. See Silverstein Decl. Ex. C. However, there is no evidence submitted by plaintiff that Moniker signed, or is otherwise bound by, the Accreditation Agreement proffered by plaintiff. Thus, the Court declines to consider this as evidence of Moniker's purposeful availment of this forum.

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of a forum selection clause is a challenge to venue, not *in personam* jurisdiction." (citing Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996)).

In Bancroft & Masters, Inc. v. Augusta National, Inc., 223 F.3d 1082 (9th Cir. 2000), the Ninth Circuit Court of Appeals noted that "the standard for establishing general jurisdiction is 'fairly high,' Brand v. Menlove Dodge, 796 F.3d 1060, 1073 (9th Cir. 1986), and requires that the defendant's contact be of the sort that approximate physical presence." Bancroft & Masters, Inc. 223 F.3d at 1086 (citing also Gates Lear Jet Corp. v. Jensen, 743 F.2d 1325, 1331 (9th Cir. 1984). "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated in the state." Id. (citing Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1478 (9th Cir. 1986)).

Here, plaintiff has alleged that Moniker engages in substantial business in California by selling domain names to over 5,000 customers in California. Business transactions which are conducted via the Internet may subject the defendant to specific jurisdiction and are subject to the same analysis as traditional business transactions. Federal Civil Procedure Before Trial 3:235 (citing Zippo Mfg. Co. v. Zippo Dot. Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997) ("Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper . . . Different results should not be reached simply because business is conducted over the Internet."). However, plaintiff has not shown that Moniker holds a license or is incorporated in California. It is unclear to the Court, based on the evidence before it, that Moniker is subject to the general jurisdiction of California. The Court declines to decide the issue, as the Court finds that it may properly assert specific jurisdiction over Moniker, based on the analysis detailed below.

2. Specific Jurisdiction

Plaintiff asserts that because of its sale of domain names to over 5,000 California customers, Moniker has purposefully availed itself of this forum. Pl.'s Suppl. Opp'n at 4. Plaintiff also argues that Moniker has created continuing relationships with California, contending that, when Moniker registers a domain name, it is comparable to a lease agreement, thus creating a continuing relationship between the registrant and registrar. Pl.'s Suppl. Opp'n at 6.

Plaintiff further asserts that the claim against defendants arises out of defendants' activities within California. Pl.'s Suppl. Opp'n at 6. Plaintiff's allegations against Moniker are that "[m]any, if not all of [the] domain names advertised in the complained of e-mails are or were registered to Moniker." FAC ¶ 58. Additionally, plaintiff alleges that for a fee, Moniker "will tell the public that [it] is the owner of the

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domain name," a service that Moniker refers to as "Moniker Privacy Services." FAC ¶ 70. Plaintiff alleges that this provision of service to persons who send unsolicited e-mails is a violation of 18 U.S.C. § 1037(4), and that "the use of this service makes it more difficult, if not impossible to identify the true sender of the spam," and the "extent of the spamming operation by the user until after discovery has occurred in litigation." FAC ¶ 70-73. Plaintiff alleges that Moniker admits that it has control over domains which send spam, because Moniker can either suspend or cancel these domains. FAC ¶ 73. Further, plaintiff claims that Moniker is aware that domain names registered to them are being used for sending spam, therefore acknowledging the harm against plaintiff. Pl.'s Opp'n at 7; see Silverstein Decl. ¶¶ 12-14.

Moniker responds that it does not own the domain name used to send the allegedly offending e-mails to plaintiff, and thus the claim does not arise out of defendant's forum related activities. Defs.' Response at 2 and Ex. 2 (Decl. of Monte Cahn) ¶¶ 2-3. Conversely, Moniker contends that bargaindepot.net owns the domain name from which the allegedly infringing c-mails were sent, and that Moniker does not own or control bargaindepot.net. Defs.' Response at 2-3, Ex. C. (Decl. of David Linhardt (June 8, 2007), ¶ 6 (stating that "BargainDepot Enterprises owns the domain name bargaindepot.net)). As such, Moniker argues that plaintiff has failed to demonstrate any causal relationship between its contacts with California and the harms complained of in the First Amended Complaint.

The Court finds that Moniker has purposefully availed itself of this forum because out of a customer base of approximately 44,000, Moniker has disclosed that at least 5,000 of them are California customers. Additionally, Moniker's activities within this forum give rise to plaintiff's claims in this action. Plaintiff alleges that he has received the allegedly illegal c-mails from domain names which are, or at one time were, owned by Moniker and sold to California businesses. Moniker's argument that it does not own the domain name bargaindepot.com does not address plaintiff's claim that Moniker has violated the law by providing a privacy service which makes it nearly impossible for recipients and internet service providers to identify the true sender of the spam.

With respect to the factors the Court must balance to determine reasonableness, plaintiff asserts the following arguments.

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a. The Extent of the Moniker's Purposeful Availment

Plaintiff asserts that Moniker has availed itself of this forum by selling domain names to over 5,000 California businesses. Pl.'s Suppl. Opp'n at 3. Plaintiff argues that by creating continuing relationships with California residents, Moniker has purposely availed itself of California law. *Id.* at 5.

Moniker responds that it has not done anything to purposefully avail itself of this forum, and that on the contrary, "Moniker has taken overt steps to not subject itself to this state's forum by including a venue provision [in the contracts] with all of its customers, establishing Florida as the forum for any disputes arising from that relationship." Defs.' Response at 7.

As stated above, Moniker's use of a forum-selection clause in contracts with its customers does not entitle Moniker to avoid personal jurisdiction in California. The Court finds that, in selling domain names to over 5,000 California customers, Moniker has purposefully availed itself of this forum. As such, the Court finds that this factor weighs in favor of plaintiff.

b. The Burden on Moniker in Defending in California

Plaintiff contends that most of the discovery will be conducted in writing, so the litigation burden on Moniker would be minimal. Pl.'s Suppl. Opp'n at 5 (citing Affidavit of Bartly J. Loethen ¶ 9, Silverstein Decl Ex. B).³ Plaintiff further argues that since Moniker has sent representatives to trade shows within California, it would not cause undue burden for it to defend a case in California. *Id.* at 3. Declaration of James Joseph Wagner, June 12, 2007 ("Wagner Decl.") ¶ 4.

Moniker responds that the burden of litigating this case in California is "onerous" because it may have to retain local counsel "in addition to the expenses of having out of state counsel travel to this forum." Defs.' Response at 7.

Based on the foregoing, the Court finds that this factor does not weigh heavily in favor of either party.

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³ Plaintiff cites to the Silverstein declaration, which states that counsel for defendants, Joseph Kish, represents Linhardt and E360 in another case.

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c. The Extent of the Conflict With the Sovereignty of Defendant's State

Plaintiff contends that the CAN-SPAM Act has eliminated the conflict of laws between California and Florida. Pl.'s Suppl. Opp'n at 3. Plaintiff believes that by obeying federal law, defendants would be in compliance with all state laws. Id.

Moniker argues that holding it liable under California Business and Professions Code § 17529 et seq. would expose it to greater liability than it would face under the respective act in Florida. Dcf.'s Response at 7. Moniker notes that under California Business and Professions Code § 17529.5(b)(1)(B)(ii), it could be held liable for liquidated damages in the amount of \$1,000 for each unsolicited commercial e-mail advertisement transmitted in violation of the section, whereas under the Florida Electronic Mail Communications Act, it would only be liable for liquidated damages in the amount of \$500 per each unsolicited commercial electronic mail address. Id. at 7, 8 (citing Fla. Stat. § 668.606(3)(b)).

Moniker's argument regarding the differences in potential liability under the California Business and Professions Code § 17529.5(b)(1)(B)(ii) and the Florida Electronic Mail Communications Act does not address how the application of California law to persons who have purposefully availed themselves to jurisdiction in California offends the sovereignty of defendant's state Florida. This factor is typically relevant where defendant is a foreign national, such that "[t]he procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant would differ from case to case." Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S.102 (1987); see also Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981) ("We do not minimize the sovereignty of the states within our federal system when we conclude that foreign states present a higher sovereignty barrier than that between the states within our union.

This is only a recognition of what is obvious."). Based on the foregoing, the Court finds that this factor does not weigh heavily in favor of either party.

d. The Forum's Interest in Adjudicating the Dispute

Plaintiff asserts that California has an interest in adjudicating this claim because it has expressed a particular interest in protecting its citizens from illegal e-mails by passing three separate laws against spam. Pl.'s Suppl. Opp'n at 2 (citing California Business & Professions Code §§ 17538.4, 17538.45, and 17529.5).

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Moniker responds that California "has no greater interest in adjudicating the dispute" than does Florida, and that the Florida courts have an additional interest in adjudicating allegations against its citizenry. Defs.' Response at 8.

The Court finds that California has an interest in protecting its citizens, and that this factor weighs in favor of plaintiff.

e. Judicial Efficiency

Plaintiff further argues that judicial efficiency would be better served by litigating one action against all defendants, rather than as three separate cases. Pl.'s Suppl. Opp'n at 4. Plaintiff argues that the case against E360 and Bargain Depot will be decided by this Court, and in order to avoid the potential for inconsistent results, this case should be litigated in a single forum. Id.

Moniker responds that "[i]t is in the interest of this Court to have the allegations against Moniker . . . heard where they belong, rather than burden this Court's docket." Defs.' Response at 9.

In view of the Court's finding that it has jurisdiction over Moniker, the Court finds that this factor weighs in favor of plaintiff.

f. The Plaintiff's Interest in Convenient and Effective Relief

Plaintiff argues that if this Court finds that the e-mails are illegal, then this Court only has to determine the extent of Moniker's involvement. Pl.'s Suppl. Opp'n at 4. Plaintiff further contends that it would be more efficient if this Court were to decide the case against all defendants rather than only a few. Id. Plaintiff further argues that he has no contact or relationship with either Illinois or Florida, so California is the most convenient forum for him. Id. at 3.

Moniker responds that plaintiff's interest in convenient and efficient relief "can be obtained in the proper forum without litigating this dispute in California." Defs.' Response at 9. Additionally, Moniker asserts that plaintiff will nonetheless be required to travel to Florida to conduct oral discovery, and that therefore the only additional burden on plaintiff will be attending the trial in Florida. Id.

The Court finds that this factor weighs in favor of plaintiff who appears to have no contacts with Florida.

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g. The Existence of An Alternative Forum

Plaintiff contends that Moniker does not offer, nor is there, an alternative common forum. Pl.'s Suppl. Opp'n at 2. Plaintiff asserts that because Moniker is a Florida citizen and Linhardt is an Illinois citizen, granting Moniker's motion would force plaintiff to litigate this case in three separate courts. Id. Plaintiff contends that litigating this case in Florida would require that court to interpret California law. Id. at 3. Moniker responds that a proper alternative forum is Florida. Defs.' Response at 9. The Court finds that this factor does not weigh heavily in favor of either party.

Although Moniker has asserted that it may be burdened by having to defend itself in California, on balance, the Court finds that the extent of Moniker's purposeful availment to jurisdiction in this forum, judicial efficiency concerns, California's interest in protecting its citizens, and plaintiff's interest in obtaining convenient and effective relief, support a finding that jurisdiction lies in this forum and is reasonable.

C. **Whether Linhardt is Subject to Jurisdiction in California**

1. General Jurisdiction

Linhardt states that he is a resident of Illinois. Declaration of David Linhardt ("Linhardt Decl.") at 1. Additionally, Linhardt states that: his only place of business is in Cook County, Illinois; he does not own, use or possess any real property in California; he does not pay taxes in California; he does not maintain an account with a California bank; he is not registered to do business in California; he is not licensed or regulated by an government agency in California; he does not and never has had employees in California; he has no mailing address, post office box or telephone directory listing in California; he has never made a general appearance in an action in any state or federal court in California; he does not advertise in California; and he has never personally conducted business in California or, to the best of his knowledge, with a California resident. Linhardt Decl. ¶¶ 2-9.

Plaintiff responds that Linhardt personally maintains a mailing address in Laguna Hills, California. Pl.'s Suppl. Opp'n at 7. Additionally, plaintiff asserts that Linhardt has appointed an authorized a commercial mail receiving agent in Laguna Hills, California, through the United States Postal Service ("USPS"), and that pursuant to California Business & Professions Code § 17538.5(b)(2)(B), this commercial mail receiving agency also acts as that person's agent for service of

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process.⁴ Pl.'s Suppl. Opp'n at 7 (relying on Boyd Decl., Ex. 1 (Copy of USPS form, October 15, 2006)).⁵ Linhardt replies that the mail receiving agent is not used by him personally, but is used by Bay City Hosting, an entity for which he works and which is not involved in the present action. Defs.' Response at 4; Linhardt Decl. ¶ 3.

The only evidence offered by plaintiff that Linhardt personally maintains a mailing address and a commercial mail receiving agent is a copy of the USPS Application for Delivery of Mail Through Agent ("the USPS application"). Boyd Decl. Ex. 1. It appears that Linhardt completed the USPS application for Bay City Hosting. *Id.* The application designates Regus/HQ, located in Laguna Hills, California, as the receiving agent for Bay City Hosting. *Id.* Linhardt completed the authorization and extended it to include restricted delivery of mail for him, however, he identifies himself as a member and officer of Bay City Hosting. *Id.* Finally, Linhardt states on the USPS application that his home address is in Highland Park, Illinois. *Id.* Based on the foregoing, it is not clear that Linhardt personally maintains a mailing address or has personally authorized an agent to receive mail for him in California, thereby appointing an agent for service of process in California.

Plaintiff further argues that Linhardt has admitted in an affidavit that he personally lost significant business and contract opportunities with multiple California domiciled corporations. Silverstein Decl. Ex. A; see E360 Insight, LLC and David Linhardt v. The Spamhaus Project, Case No. 06-CV-03958 (N.D. of Ill.). Pl.'s Suppl. Opp'n at 8. Linhardt responds that the affidavit referred to the losses sustained by E360, and not to himself. Defs.' Response at 4, Ex. C (Linhardt Decl.) ¶¶ 7-9. Additionally, Linhardt

⁴ California Business & Professions Code § 17538.5(b)(2)(B) provides that person conducting business from that person's residence is not required to disclose the residence address if: (1) the person's current street or home address is contained within Form 1583, filed with the USPS; and (2) that person "has signed an acknowledgment form . . . which, among other things, authorizes the commercial mail receiving agency to act as that person's agent for service of process."

⁵ Plaintiff asserts in its opposition filed on June 12, 2007, that because Linhardt has been served at his Laguna Hills office, he is subject to jurisdiction in California. Opp'n at 6 (citing Burnham v. Superior Court of California, 495 U.S. 604, 624 (U.S. Cal. 1990)) (holding that exercise of personal jurisdiction based on service on the defendant while in the state comports with traditional notions of fair play and substantial justice).

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states that the "lost contract" referenced by plaintiff did not involve him personally, but was a contract between E360 and Vendaire Media. Defs.' Response at 4, Ex. C (Linhardt Decl.) ¶¶ 7-9.⁶

Finally, plaintiff further argues that Linhardt utilizes two Google accounts, and that because Google is California based, he has a jurisdictional connection to California. Pl.'s Suppl. Opp'n at 8.

The Court finds that plaintiff has failed to establish that Linhardt has substantial, continuous or systematic contacts with California such that he can be subject to the general jurisdiction of this forum. Linhardt's statements in his affidavit filed in E360 Insight, LLC and David Linhardt v. The Spamhaus Project, Case No. 06-CV-03958 (N.D. of Ill.), do not establish that Linhardt has personally conducted substantial, continuous or systematic business in California. Additionally, the allegations pertaining to Linhardt's use of e-mail addresses, hosted by Google, a California corporation, is not persuasive evidence of purposeful availment. If use of an e-mail address hosted by a California corporation was persuasive evidence, any person who has used an e-mail address hosted by Google could be subject to jurisdiction in California. This proposition is too broad to comport with the traditional notions of fair play and substantial justice. Based on the foregoing, the Court declines to find that Linhardt is subject to general jurisdiction in California.

2. Specific Jurisdiction

Linhardt states that he was not personally involved in the acts complained of in the complaint, and therefore argues that he has not purposefully availed himself of this forum. Linhardt Decl. ¶ 9. Linhardt contends that he is not subject to this Court's jurisdiction because of his acts as President of E360 and Bargain Depot, because for jurisdictional purposes, "the acts of officers and directors of an entity are considered the acts of the entity exclusively and are not material for purposes of establishing minimum contacts as to the officers and directors." Mot. at 8 (citing Shearer v. Superior Court, 70 Cal. App. 3d 424, 430 (Cal. Ct. App. 1977)). Because corporations must act through agents, Linhardt argues that "[a]cts performed by the corporate agents, in their official capacity, cannot reasonably [be] attributed to the agent creating personal jurisdiction." Id. at 8-9 (citing Colt Studio, Inc. v. Badpuppy Enterprises, 75 F. Supp. 2d 1104, 1119 (C.D. Cal. 1999)).

⁶ In his affidavit, Linhardt states, "[E]360 and I have suffered disastrous consequences as a result of being placed on the Spamhaus lists . . . [E]360 and I also have had active and pending contracts cancelled as a result of Spamhaus' conduct . . . [E]360 and I also have lost numerous opportunities to obtain future work as a result of Spamhaus' conduct . . ." Silverstein Decl. Ex. A ¶¶ 31-33.

PROOF OF SERVICE

STATE OF CALIFORNIA,)
COUNTY OF LOS ANGELES)

I am a resident of the County of Los Angeles, State of California and I am over the age of 18 and not a party to the within action. My work address is **3540 Wilshire Blvd. Suite 715, Los Angeles, CA 90010.**

On ~~September~~ **October 26, 2007**, I served the foregoing document(s) entitled: **Affidavit of William Silverstein Submitted in Regards to Damages"**

on the interested parties in this action by placing a true and correct copy of such document(s) in a sealed envelope(s) addressed as follows:

Joseph L. Kish
Synergy Law Group
730 West Randolph, 6th Floor
Chicago, IL 60661

Carrie A. Fino
Jenner & Block
330 N. Wabash Avenue
Chicago, IL 60611-7603

(the "Addressee") and serving such document(s) as follows:

 X REGULAR MAIL. On the service date set forth hereinabove in the County of Los Angeles, I deposited such envelope(s) with postage thereon fully prepaid in the United States mail.

Executed on **October 26, 2007**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Karla Roque