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 9 SUSAN SIMON and the putative class

10 **UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN FRANCISCO DIVISION**

13  
 14 SUSAN SIMON, individually, on behalf of  
 herself and all others similarly situated,

15 **Plaintiffs,**

16 v.

17 ADZILLA, INC.; CONDUCTIVE  
 CORPORATION; CONTINENTAL VISINET  
 18 BROADBAND, INC.; CORE  
 COMMUNICATIONS, INC. d/b/a CORETEL  
 19 COMMUNICATIONS, INC. et al.

20 **Defendants.**

Case No.: C09-00879-MMC

**PLAINTIFF’S NOTICE OF MOTION AND  
 MOTION FOR LEAVE TO CONDUCT  
 JURISDICTIONAL DISCOVERY;  
 MEMORANDUM IN SUPPORT**

Date: July 31, 2009  
 Time: 9:00 a.m.  
 Judge: The Hon. Maxine M. Chesney

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**NOTICE OF MOTION**

NOTICE IS HEREBY GIVEN that Plaintiff will move the Court, pursuant to Federal Rules of Civil Procedure 26(b)(1) and 26(d), for the entry of an order permitting Plaintiff to engage in discovery for the limited purpose of discerning whether the Court may exercise personal jurisdiction over defendant Core Communications, Inc. d/b/a CoreTel Communications, Inc. (“CoreTel”), on July 31, 2009 at 9:00 a.m., or at such other time as may be set by the Court, located at 450 Golden Gate Avenue, San Francisco, California, before the Hon. Maxine M. Chesney, Courtroom 7, 19th Floor.

Plaintiff seeks leave to conduct immediate jurisdictional discovery and to stay the CoreTel Motion to Dismiss until the Court rules on the instant motion. The Motion is based on this Notice of Motion, the Memorandum of Points and Authorities in Support of the Motion, and the authorities cited therein, oral argument of counsel, and any other matter that may be submitted at the hearing.

**STATEMENT OF ISSUES TO BE DECIDED**

1. Whether Plaintiff may conduct jurisdictional discovery of defendant Core Communications, Inc. and Adzilla, Inc. (New Media).
2. Whether the CoreTel Motion to Dismiss should be stayed pending completion of jurisdictional discovery.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 In June of 2007, Plaintiff Susan Simon (“Plaintiff” or “Ms. Simon”) discovered that her  
4 internet communications were being tapped. Specifically, an entity entirely unknown to the  
5 plaintiff was observing, monitoring, and recording her every keystroke, browsing activity, and  
6 movement on the internet. No permission had been requested, and no notice had been provided.  
7 Only because Plaintiff was highly computer literate was she even able to discover that this  
8 unauthorized and unwarranted tapping of her communications was even occurring. The device  
9 that was doing the intercepting was something called a “Zillacaster,” manufactured by a company  
10 called Adzilla. The device was a “transparent proxy” – meaning it was *designed* to intercept  
11 communications and be invisible to the user being monitored.

12 Plaintiff’s connection to the internet—the connection that was being monitored—was  
13 provided by defendant Continental Visinet, which, in order to provide internet service to its  
14 customers, had purchased wholesale internet access from CoreTel Communications (“CoreTel”),  
15 the party that has brought the instant Motion to Dismiss.

16 CoreTel’s motion to dismiss is predicted upon an assertion of lack of personal jurisdiction.  
17 In support of its motion, CoreTel has submitted a declaration from its President, Brett L. Mingo,  
18 which (1) details CoreTel’s limited contacts with California, (2) details CoreTel’s limited  
19 involvement with Adzilla (the company that provided the device that did the wiretapping of the  
20 plaintiff’s internet account), and (3) asserts that all contacts and communications with Adzilla took  
21 place via and through Adzilla’s Canadian location.

22 Plaintiff’s complaint alleges substantial and detailed grounds for the proper exercise of  
23 jurisdiction of this matter in California. *See*, Complaint, ¶¶ 73-83. The thrust of the allegations in  
24 Plaintiff’s Complaint is not that CoreTel provided services for ISP customers in California, as  
25 CoreTel’s motion takes great pains to disavow. Rather, the basis for California jurisdiction lies in  
26 the fact that the specific activities that comprise the violations alleged in the Complaint—the  
27 processing and analysis of the wiretapped data, the storage and alteration of that data, the

1 transmission of the data, and, most importantly, the profiting and monetizing of the entire  
2 wiretapping scheme—all took place in and were coordinated in and from California.

3 By this motion, Plaintiff seeks leave to conduct jurisdictional discovery to ascertain the  
4 extent of CoreTel’s knowledge, participation, and/or profit from the scheme—a scheme that  
5 plaintiff alleges was implemented, orchestrated, and overseen from California—to tap the internet  
6 communications of unsuspecting internet users for profit.

7 Plaintiff seeks leave to conduct limited discovery so that she can demonstrate that this  
8 Court may properly exercise personal jurisdiction over CoreTel.

### 9 STATEMENT OF FACTS

10 On February 27, 2009, Plaintiff Susan Simon (“Plaintiff” or “Ms. Simon”) filed the present  
11 class action complaint alleging violations of the federal Electronic Communications Privacy Act  
12 (“ECPA”) and Computer Fraud and Abuse Act (“CFAA”), as well as state law claims under the  
13 California Invasion of Privacy Act (“CIPA”) and California Computer Crime Law (“CCCL”),  
14 among other claims against Adzilla, Inc. [New Media] (“Adzilla”), Conducive Corp.  
15 (“Conducive”), Continental Visinet Broadband, Inc. (“Continental”), and Core Communications,  
16 Inc., d/b/a CoreTel Communications, Inc. (“CoreTel”). (Complaint, Dkt. 1).

17 Plaintiff alleges that Adzilla is a California-based online advertising company. (Compl.  
18 ¶¶ 10, 18). Defendant Conducive is or was the parent company of Adzilla and is headquartered in  
19 New York. (Compl. ¶¶ 9, 17). CoreTel is a competitive local exchange carrier (“CLEC”) based in  
20 Maryland (Compl. ¶¶ 2, 20) while Continental is an internet service provider (“ISP”) based in  
21 Virginia (Compl. ¶¶ 2, 19). Plaintiff Susan Simon is a citizen of Virginia and customer of  
22 Continental. (¶ 16).

23 The basis of Plaintiff’s complaint is that Adzilla contracted with CLECs and ISPs to  
24 monitor and intercept—without notice or consent—the online communications of CLEC and ISP  
25 customers using an intrusive and invidious technology known as Deep Packet Inspection (“DPI”).  
26 (Compl. ¶¶ 84-88). By utilizing DPI, Defendants are able to examine every search term entered,  
27 every item viewed, every email sent, every credit card number entered—in short, every click the



1 users of ISP Defendants make online. (Compl. ¶ 88). To do so, Adzilla installed devices directly  
2 in the data hubs of CLECs and ISPs (Compl. ¶ 57), which then transmitted all of the collected data  
3 to Adzilla’s headquarters in California (Compl. ¶ 73).

4 CoreTel filed its Rule 12(b)(2) motion to dismiss on May 29, 2009 (Dkt. 32), which is  
5 based on the premise that this Court lacks personal jurisdiction over it. As alleged, CoreTel is not  
6 a citizen of California, but Plaintiff alleges that substantially all of the wrongdoing in this matter  
7 occurred in California, thus providing the Court with personal jurisdiction over all defendants.  
8 (Compl. ¶¶ 73-83).

9 The crux of CoreTel’s jurisdictional argument is that it does not do any business or  
10 maintain any contacts in California, thus it is not subject to personal jurisdiction in California  
11 courts. (Mtn. to Dismiss, p. 1, lines 15-22). But as alleged, CoreTel transmitted or facilitated the  
12 transmission of its customers’ Personal Information in and out of California where the intercepted  
13 data was analyzed and monetized to the benefit of CoreTel. (Compl. ¶¶ 73-83). Additionally,  
14 upon information and belief, all class members communicated with websites based in California,  
15 meaning that the communications of California citizens were subject to the same interceptions.  
16 (Compl. ¶ 79). As a result, CoreTel has created a jurisdictional issue—whether it availed itself of  
17 the benefits and protections of California law by engaging in revenue-generating electronic  
18 activities in California—that requires immediate discovery to resolve.

### 19 LEGAL STANDARD

20 The Court is “vested with broad discretion to permit or deny [jurisdictional] discovery.”  
21 *Laub v. U.S. DOI*, 342 F.3d 1080, 1093 (9th Cir. 2003). But “[j]urisdictional discovery should  
22 ordinarily be granted where jurisdictional facts are contested or more facts are needed.” *MMCA*  
23 *Group, Ltd. v. Hewlett-Packard Co.*, No. C-06-7067 MMC (EMC), 2007 WL 1342586, \*4 (N.D.  
24 Cal. May 8, 2007) (citing *Laub*, 342 F.3d at 1093) and *Wells Fargo & Co. v. Wells Fargo Express*  
25 *Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977)).

26 More specifically, jurisdictional discovery “should be granted where pertinent facts  
27 bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing

1 of the facts is necessary.” *Wells Fargo*, 556 F.2d at 430 n. 24 (internal quotation marks omitted).  
2 Only when “it is clear that further discovery would not demonstrate facts sufficient to constitute a  
3 basis for jurisdiction” should the Court deny a request for jurisdictional discovery; at minimum,  
4 Plaintiff must supply “at least an arguable claim” of jurisdiction. *Laub*, 342 F.3d at 1093 (internal  
5 quotation marks omitted).

## 6 ARGUMENT

7 Plaintiff’s goal is clear: to gain leave to conduct jurisdictional discovery in order to  
8 demonstrate that this Court may exercise personal jurisdiction over defendant CoreTel. Plaintiff’s  
9 burden is equally clear: demonstrate that either “pertinent facts bearing on the question of  
10 jurisdiction are controverted” or that “a more satisfactory showing of the [jurisdictional] facts is  
11 necessary.” *Wells Fargo*, 556 F.2d at 430 n. 24 (internal quotation marks omitted). Both factors  
12 are present here.

13 To meet her burden, Plaintiff will focus on issues relating to specific jurisdiction, including  
14 how Plaintiff can satisfy the three-prong test for specific jurisdiction that CoreTel cited in its  
15 Motion to Dismiss.

### 16 I. JURISDICTIONAL DISCOVERY IS NECESSARY FOR PLAINTIFF TO 17 RESPOND PROPERLY TO CORETEL’S MOTION TO DISMISS.

#### 18 A. This Court possesses jurisdiction to determine whether it may exercise 19 personal jurisdiction over CoreTel.

20 The threshold issue for this Court to determine given it faces a jurisdictional dispute is  
21 whether it possesses the jurisdiction necessary to rule on Plaintiff’s present motion. Fortunately,  
22 the Ninth Circuit has spoken clearly and explicitly to this matter: “a trial court does have  
23 jurisdiction to determine its own jurisdiction.” *Id.* “And it is clear that a court may allow  
24 discovery to aid in determining whether it has *in personam* or subject matter jurisdiction.” *Id.*  
25 (citing *Ziegler Chem. & Mineral Corp. v. Standard Oil Co. of Cal.*, 32 F.R.D. 241, 243 (N.D. Cal.  
26 1962)).

1 Furthermore, failing to allow jurisdictional discovery may constitute reversible error. In  
2 *K-Swiss Inc. v. GTFM, Inc.* 278 Fed. Appx. 772, 773 (9th Cir. 2008), the district court failed to  
3 grant or deny K-Swiss’s motion for jurisdictional discovery. Instead, it simply granted the  
4 defendant’s motion to dismiss without allowing K-Swiss to conduct jurisdictional discovery. *Id.*  
5 As a result, the Ninth Circuit reversed and remanded and directed the district to allow K-Swiss to  
6 conduct for jurisdictional discovery. *Id.*

7 **B. CoreTel has introduced a jurisdictional dispute that demands**  
8 **immediate resolution.**

9 CoreTel argues that it is not subject to this Court’s exercise of personal jurisdiction over it  
10 because, as it states, it does not conduct substantial business in California. But Plaintiff’s  
11 allegations demonstrate that CoreTel actually does conduct business in California via its  
12 relationship with Adzilla sufficient for this Court to exercise specific jurisdiction over it. Because  
13 of this dispute, Plaintiff needs to conduct immediate jurisdictional discovery in order to resolve  
14 this matter and adequately respond to CoreTel’s Motion to Dismiss.

15 Although discovery is generally not permitted before the parties have conferred pursuant to  
16 Rule 26(f) of the Federal Rules of Civil Procedure, Rule 26(d) provides that parties may be  
17 permitted to engage in discovery before that time when authorized by the rules or by court order.  
18 FED. R. CIV. P. 26(d). In accordance, Rule 26(b)(1) provides that “[p]arties may obtain discovery  
19 regarding any nonprivileged matter that is relevant to any party’s claim or defense . . . .” FED. R.  
20 CIV. P. 26(b)(1). Accordingly, the court may order discovery on jurisdictional issues.  
21 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Such discovery is available to  
22 ascertain facts bearing on issues of jurisdiction. *Id.* at 350-51. “Where pertinent facts bearing on  
23 the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts  
24 is necessary courts should allow for discovery.” *Wells Fargo*, 556 F.2d at 430 (internal quotation  
25 marks omitted); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir.  
26 1989).

1           Jurisdictional discovery is necessary to resolve the jurisdictional issues raised in CoreTel's  
2 Motion to Dismiss. Upon information and belief, CoreTel has availed itself of the benefits and  
3 protections of California laws by way of activities related to its business relationships with co-  
4 Defendant Adzilla, such that this Court may exercise personal jurisdiction over CoreTel.  
5 Therefore, at minimum, there are questions regarding the details of CoreTel's relationship with  
6 Adzilla that impacts whether this Court may exercise personal jurisdiction over it.

7           **C.       Jurisdictional Discovery will allow Plaintiff to resolve this matter.**

8           Allowing immediate jurisdictional discovery will allow Plaintiff the opportunity to obtain  
9 all information necessary to resolve the parties' jurisdictional dispute. Among other telling items  
10 Plaintiff may obtain through discovery (and without limiting access to additional items), Plaintiff  
11 seeks information relating to the location of Adzilla's servers—the servers to which Plaintiff  
12 alleges CoreTel transmitted the personal information of Continental's internet customers. Plaintiff  
13 also seeks information regarding where Adzilla made deals to use the acquired customer data for  
14 advertising, where Adzilla served those advertisements, the amount of data CoreTel transmitted to  
15 Adzilla, and whether, when, and where Adzilla operated from in conducting its contracted work  
16 with CoreTel. Additionally, review of the actual data transmitted from CoreTel to Adzilla in  
17 California may reveal the extent of CoreTel's customers' electronic communications with  
18 businesses and persons in California. By gaining access to this information, Plaintiff and the  
19 Court will be able to determine whether CoreTel is subject to the exercise of personal jurisdiction  
20 in the U.S. District Court for the Northern District of California in this matter.

21           If jurisdictional discovery reveals to Plaintiff's satisfaction that CoreTel is not subject to  
22 personal jurisdiction in this Court, then Plaintiff will not oppose CoreTel's motion to dismiss.

1 **II. IF JURISDICTIONAL DISCOVERY VALIDATES PLAINTIFF’S CLAIMS, THEN**  
 2 **THIS COURT WILL BE ABLE TO EXERCISE PERSONAL JURISDICTION**  
 3 **OVER CORETEL.**

4 **A. CoreTel has established sufficient “minimum contacts” for this Court to**  
 5 **exercise specific jurisdiction.**

6 To satisfy due process, a defendant must have “minimum contacts” with the forum state so  
 7 as not to “offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v.*  
 8 *Washington*, 326 U.S. 310, 315 (1945). In *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987), the  
 9 Ninth Circuit articulated a three-part test designed to analyze whether a defendant has the requisite  
 10 “minimum contacts”:

- 11 (1) The non-resident defendant must purposefully direct his activities or  
 12 consummate some transaction with the forum or resident thereof; *or* perform some  
 13 act by which he purposefully avails himself of the privileges of conducting  
 14 activities in the forum, thereby invoking the benefits and protections of its laws;  
 15 (2) the claim must be one which arises out of or relates to the defendant’s  
 16 forum-related activities; and  
 17 (3) the exercise of jurisdiction must comport with fair play and substantial  
 18 justice, i.e. it must be reasonable.

19 *See also Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). Satisfying this  
 20 test requires a plaintiff to “make only a prima facie showing of jurisdictional facts . . .” (*Doe v.*  
 21 *Unocal*, 248 F.3d 915, 922 (9th Cir. 2001) (internal citations omitted)) and “courts are to resolve  
 22 all disputed facts in favor of the plaintiff” (*Pebble Beach Co. v. Caddy*, 453 F.3d 1151 (9th Cir.  
 23 2006) (citing *Unocal*)).

24 “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to  
 25 the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be  
 26 reasonable.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)  
 27 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

28 **B. By engaging in DPI with Adzilla in California, CoreTel has purposefully**  
**availed itself of California law.**

Purposeful availment analysis gets to the heart of Plaintiff’s request for jurisdictional  
 discovery. Plaintiff seeks to discover whether Adzilla was operating in California during the time

1 of its co-operation with CoreTel. Plaintiff also seeks to determine the location of Adzilla's servers  
2 during the relevant time period, the location of Adzilla's advertising operations during the relevant  
3 time period, and whether and how much CoreTel internet traffic was routed into and out of  
4 California. Plaintiff seeks this information because, upon information and belief, CoreTel  
5 transmitted or facilitated the transmission of customer data into and out of California. After  
6 transmission into California, Adzilla, per its contract with CoreTel, analyzed and stored the data,  
7 both for itself and on behalf of CoreTel. CoreTel profited from the analysis and storage of this  
8 data in California. Thus, facts relating to the execution and performance of these contracts are  
9 critical to the requisite jurisdictional analysis.

10 Plaintiff contends that the information sought will reveal that CoreTel purposefully availed  
11 itself of California law. This information will reveal the extent of CoreTel's contractually  
12 obligated contacts with California. In contract cases, a court "typically inquire[s] whether a  
13 defendant purposefully avails itself of the privilege of conducting activities or consummates a  
14 transaction in the forum, focusing on activities such as delivering goods or executing a contract."  
15 *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (citation and  
16 internal quotation marks omitted). As the Ninth Circuit has further explained:

17 A showing that a defendant purposefully availed himself of the privilege of doing  
18 business in a forum state typically consists of evidence of the defendant's actions in  
19 the forum, such as executing or performing a contract there. By taking such actions,  
20 a defendant purposefully avails itself of the privilege of conducting activities in the  
forum state, thus invoking the benefits and protections of its laws. In return for  
these benefits and protections, a defendant must-as a quid pro quo-submit to the  
burdens of litigation in that forum.

21 *Schwarzenegger*, 374 F.3d at 802 (internal citations and quotation marks omitted).

22 While there is no evidence that CoreTel executed its contract in California, Plaintiff alleges  
23 that most of the wrongdoing occurred in California and that it occurred repeatedly and frequently.

24 The case of *Boschetto v Hansing*, 539 F.3d 1011 (9th Cir. 2008) is particularly instructive  
25 to the present circumstances. The court in *Boschetto* found that a single contract for sale of an  
26 automobile by an Idaho resident to a California resident did not suffice to establish jurisdiction:

27 [Defendants] did not create any ongoing obligations with Boschetto in California;  
28 once the car was sold, the parties were to go their own ways. Neither Boschetto's

1 complaint nor his affidavit in opposition to dismissal point to any continuing  
2 commitments assumed by the Defendants under the contract. *Id.* Nor did  
3 performance of the contract require the Defendants to engage in any substantial  
4 business in California. On Boschetto's version of the facts, funds were sent to  
5 Wisconsin and arrangements were made to pick up the car there and have it  
6 delivered to California. This was, as the district court observed, a "one-shot affair."

7 *Boschetto*, 539 F.3d at 1017.

8 In contrast with *Boschetto*, Plaintiff alleges that CoreTel engaged in a continuous,  
9 substantial, and ongoing relationship with the California entity—Adzilla—to engage in tortious  
10 and unlawful activity. The stream of individual ISP subscriber data was intercepted and diverted  
11 with the knowing aid and assistance of CoreTel. This continuous stream of intercepted data was  
12 transmitted from CoreTel's hubs to California on a second-by-second basis, twenty-four hours a  
13 day. This data stream was transmitted twice. First, the data was intercepted and transmitted to  
14 California, where it was recorded, stored, and altered (all for the benefit of both Adzilla and  
15 CoreTel). Second, it was then transmitted back from California (again, all for the benefit of both  
16 Adzilla and CoreTel), in an unremitting, incessant, ongoing stream of communication—all of  
17 which was in furtherance of criminal activity. This "substantial activity" is a far cry from the  
18 single car sale, or a "one shot deal" from which the parties would "go their separate ways." In the  
19 instant action, the activity that is the focus of the unlawful conduct was long term, continuous,  
20 substantial, and ongoing. These relationships more than meet the test for "substantial connection  
21 with the forum." *Burger King*, 471 U.S. at 476 n.18 (quoting *McGee v. Int'l Life Ins. Co.*, 355  
22 U.S. 220, 223 (1957)).

23 Accordingly, Plaintiff has identified substantial contacts with California by CoreTel,  
24 articulated specific facts she seeks that will demonstrate jurisdiction, identified possible locations,  
25 and articulated why she seeks these facts. Quite simply, Plaintiff has more than met her burden as  
26 it relates to the purposeful avilment prong of minimum contacts analysis.

27 **C. CoreTel purposefully directed conduct to California.**

28 Additionally and alternatively, CoreTel has purposefully directed conduct to the forum  
state, California, sufficient to satisfy the first prong of minimum contacts analysis.

Purposeful direction of conduct to a forum state "usually consists of evidence of the  
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1 defendant's actions outside the forum state that are directed at the forum, such as the distribution  
2 in the forum state of goods originating elsewhere." *Schwarzenegger*, 374 F.3d at 803 (citing  
3 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984).

4 In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), the U.S.  
5 Supreme Court stated that a "forum state does not exceed its powers under the Due Process Clause  
6 if it asserts personal jurisdiction over a corporation that delivers its products into the stream of  
7 commerce with the expectation that they will be purchased by consumers in the forum State."  
8 This is exactly what CoreTel did with its own products (subscriber data) with Adzilla. It  
9 transmitted, pursuant to contract and in exchange for money, one of its products—the raw data of  
10 users' online activities—into the forum state, California; it delivered the products (users'  
11 behavioral data) into the stream of commerce with the expectation that its products would be  
12 purchased by Adzilla in California. It received the California remanufactured product (the altered  
13 web pages) to deliver to internet users for which delivery CoreTel received compensation. This  
14 represents the modern day, though still quintessential, stream of commerce conduct.

15 CoreTel argues that it does not do business in California because it operates its CLEC  
16 network in Pennsylvania and Maryland, but operating its CLEC network is not the only service or  
17 revenue-generating activity in which it engaged. It also sold the behavioral data of internet users  
18 to Adzilla, from which CoreTel generated revenue. By doing so, CoreTel participated in the  
19 manufacture of a wholly new product: behaviorally targeted advertising. CoreTel assisted Adzilla  
20 in taking raw data and turning it into usable, targetable, and profitable behavioral snapshots of  
21 individual internet users for consumption and use by advertisers. Legally, practically, and  
22 effectively, this is indistinguishable from turning raw materials into building supplies or consumer  
23 goods. Either way, a defendant is selling information/goods to a buyer in the forum state where it  
24 is transformed into a new service/good and then resold for profit by the initial buyer.

25 Whether these activities satisfy the first prong of minimum contacts analysis can be seen  
26 more clearly through the lens of the *Calder Effects Test*. In *Calder v. Jones*, 465 U.S. 783, 788-90  
27 (1984), the Supreme Court stated that the purposeful availment prong may be satisfied when a



1 defendant (1) committed an intentional act (2) expressly aimed at the forum state (3) causing harm  
2 that the defendant knows is likely to be suffered in the forum state.

3 Looking to the first and second elements, there is no question that CoreTel committed  
4 intentional acts directed at California; it contracted to profit from the transmission of internet  
5 users' online behavioral data to Adzilla in California.

6 As to the third element, it is undeniably likely that the affected internet users would  
7 communicate with (and harm) persons, businesses, computers, and servers in California,  
8 especially given that such major sites as Facebook, Google, Yahoo!, eBay, MySpace, Craigslist,  
9 and Wikipedia are all based in California. Therefore, not only did CoreTel intercept the private  
10 information of Plaintiff, it intercepted the private information of California-based persons and  
11 businesses that was communicated online to Plaintiff. And the fact that these California-based  
12 persons and businesses are not class members is not relevant to *Calder* analysis; the only question  
13 is whether CoreTel knew that harm was likely to be suffered in California and the answer to that is  
14 a resounding "yes."

15 It is not necessary that the "brunt" of the harm be suffered in the forum state. *Yahoo!*, 433  
16 F.3d at 1207 ("[i]f a jurisdictionally sufficient amount of harm is suffered in the forum state, it  
17 does not matter that even more harm might have been suffered in another state.").

18 CoreTel and Adzilla intercepted all behavior and communications of Plaintiff and other  
19 internet users, including the communications of California persons and businesses generated in  
20 California. For CoreTel to suggest that it could not know that the communications of California  
21 persons and businesses would be intercepted is patently preposterous. The fact is that CoreTel and  
22 Adzilla's conduct would unavoidably impact (and harm) Californians. Accordingly, the third  
23 element of the *Calder* Effects Test is met by the instant case.

24 **D. Plaintiff's claims arise out of CoreTel's forum-related activities.**

25 The second prong of minimum contacts analysis—that the claim must arise out of a  
26 defendant's forum-related activities—requires even less analysis to conclude that Plaintiff's  
27 claims arise out of CoreTel's forum-related activities.

1 Plaintiff's claim is that internet users suffered harm from CoreTel and Adzilla's violations  
2 in California of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510, the  
3 Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, the California Invasion of Privacy  
4 Act ("CIPA"), Cal. Penal Code § 631, the California Computer Crime Law ("CCCL"), Cal. Penal  
5 Code § 502, as well as several common law violations, including Aiding and Abetting, Civil  
6 Conspiracy, and Unjust Enrichment. Plaintiff alleges that: "The geographic location from which  
7 the scheme to intercept, copy, obtain, analyze, store, and alter the data of internet subscribers was  
8 coordinated, launched, overseen, and implemented was the state of California." (Compl. ¶ 81).  
9 There can be no clearer case for claims arising out of forum-related activities.

10 California case law holds that intentional tortfeasors should be prepared to defend  
11 themselves in any jurisdiction where they direct their tortious activity. *Seagate Technology v. A.J.*  
12 *Kogyo Co.*, 219 Cal. App. 3d 696, 703 (Ct. App. 1990) (citing *Taylor-Rush v. Multitech Corp.*,  
13 217 Cal. App. 3d 103, 118 (Ct. App. 1990)).

14 CoreTel does not challenge personal jurisdiction over Adzilla. Since the case will proceed  
15 in California against this defendant, the most efficient judicial resolution would require trial in  
16 California against CoreTel, as opposed to piecemeal litigation elsewhere.

17 Accordingly, Plaintiff has satisfied the first and second prong of minimum contacts  
18 analysis. This places the burden on CoreTel to "present a compelling case" that the exercise of  
19 jurisdiction would be unreasonable despite Plaintiff's satisfaction of the first two prongs. *Burger*  
20 *King*, 471 U.S. at 476-78. CoreTel presented its case in its motion to dismiss, to which Plaintiff  
21 herein responds.

22 1. *CoreTel purposefully interjected itself into California.*

23 Purposeful interjection on the part of CoreTel is readily apparent from the record. "[T]he  
24 degree of interjection is a factor to be weighed in assessing the overall reasonableness of  
25 jurisdiction under the reasonableness prong." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482,  
26 1488 (9th Cir. 1993). This factor is analogous to purposeful direction. *Sinatra v. National*  
27 *Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988).

1 CoreTel purposefully interjected itself into California. It cannot be stated more simply: by  
2 partnering with Adzilla, CoreTel put the data of its ISP partners' internet customers up for sale,  
3 both *in* the state of California and *from* the state of California. This data was not put up for sale in  
4 any state other than California. The subscribers, through their clickstream data, were analyzed and  
5 turned into a marketing commodity in California. What advertisements the subscribers viewed  
6 was controlled from California. And when they viewed those advertisements or made purchase  
7 decisions based on those advertisements, the transactions were completed in and money was  
8 collected in California. On these facts, the Court must find purposeful interjection by CoreTel and  
9 weigh this factor in favor of Plaintiff.

10 2. *CoreTel faces no burden litigating in California.*

11 The burden on CoreTel in litigating in California is minimal. "A defendant's burden in  
12 litigating in the forum is a factor in the assessment of reasonableness, but unless the  
13 'inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear  
14 justification for the exercise of jurisdiction.'" *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316,  
15 1323 (9th Cir. 1998) (quoting *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128-29 (9th  
16 Cir. 1995)). In this era of email and discount air travel, the burden of litigating over distance is  
17 considerably lessened. *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990).

18 CoreTel cannot credibly claim that litigating in San Francisco, California poses a great  
19 burden. CoreTel has retained attorneys in California who are versed in this matter and in local  
20 civil practice. The California Northern District Court specifically allows electronic filing for all  
21 papers, which can be done from any location in the United States. The critical witnesses and  
22 documents relating to the violations complained of are located in Brisbane, California, making  
23 them readily available to CoreTel's counsel. To require this action to be filed in Virginia or  
24 Washington, D.C. would make no sense, as the causes of action arise directly from the conduct  
25 perpetrated here in California and involve actors, witnesses and documents that are located in  
26 California. This Court should weigh this factor in Plaintiff's favor accordingly.

27 CoreTel has availed itself of California law by conducting business in the state of

1 California through the monetization and sale of information about internet users. It has engaged in  
2 actual contracts with California businesses to display profitable advertising on the web pages  
3 viewed by its ISP partners' customers. The majority of harm that has been done—the promotion  
4 and marketing and sale of behavioral data that neither the ISPs nor Adzilla had the right to  
5 sell—occurred through CoreTel and Adzilla's acts in California.

6 3. *No Conflicts with Other Sovereigns.*

7 There exist no conflicts with any other sovereign with regard to litigating Plaintiff's claims  
8 against CoreTel in California. Plaintiff's federal claims will be resolved under well-settled federal  
9 law. The California claims will and would be litigated against defendants in any jurisdiction this  
10 matter is litigated in.

11 California's Computer Crime Law, Penal Code § 502 contains cross-jurisdiction  
12 application, such that, whatever location the act or acts are alleged to have occurred in, if any part  
13 of the unauthorized access involves California (which this case indisputably does), then the CCCL  
14 is implicated regardless. Further, primary liability is applicable against secondary actors under  
15 this statute: e.g., "(6) Knowingly and without permission *provides or assists in providing* a means  
16 of accessing a computer, computer system, or computer network in violation of this section."

17 (Emphasis added.)

18 California's Invasion of Privacy Act, Penal Code § 631 et seq., provides for primarily  
19 liability under the Act against secondary actors, ("or who aids, agrees with, employs, or conspires  
20 with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or  
21 things mentioned above in this section . . ."), and includes "communications . . . being sent from  
22 . . . this state." The complained of acts: a) took place in California; b) affected business and  
23 websites in California; and c) threatened the privacy rights of Californians.

24 The jurisdictional questions do not, therefore, raise any conflict issues with respect to the  
25 causes and conduct complained of. As such, this factor, like the others, leans towards Plaintiff.

26 4. *California's interest in adjudicating this matter is strong.*

27 This state has a powerful interest in providing a forum for Plaintiff's claims. The threats to

1 privacy that DPI holds for Californians, in general, are profound. Specifically, it was a  
2 California-based entity that developed and implemented the technology that permitted the  
3 complained-of DPI to occur on a wholesale scale—affecting thousands of users in what have been  
4 described as test runs. More specifically, however, the fruits of that unlawful activity were  
5 processed, packaged, marketed, sold, and profited from in California. Indeed, on information and  
6 belief, California companies, both local advertisers of products and services, as well as California-  
7 based internet webpage destinations owners were engaged in the trade and profit-making use of  
8 the unlawful data. In short, California is the situs of the Plaintiff's injuries. Thus, the effects of  
9 the venture created by Adzilla and CoreTel are felt most strongly here in California.

10           5.       *California offers the most efficient judicial resolution.*

11           Resolution of all claims in a single forum having jurisdiction over all parties would be the  
12 best and most efficient use of judicial resources. No other state or sovereign offers the efficiency  
13 of California. The predominant location of evidence and witnesses is the focus of this fifth factor  
14 in the analysis of whether the exercise of personal jurisdiction is reasonable. *Panavision*, 141 F.3d  
15 at 1323.

16           With Adzilla's headquarters, center of operations, and all associated documents, witnesses,  
17 and records here in California, this factor tips sharply in Plaintiff's favor. These individuals and  
18 materials will provide critical testimonial and documentary evidence in support of Plaintiff's  
19 claims. If CoreTel's motion to dismiss on jurisdictional grounds is granted, such a result would  
20 likely force Plaintiff to launch parallel litigation against it in multiple states, thereby dispensing  
21 with any notion of efficiency (since the conduct complained of is nearly identical with respect to  
22 all defendants). Compared to California, the multiple states suggested by the various pending  
23 motions to dismiss offer no judicial efficiencies, and would only result in the imposition of  
24 significant burdens on all concerned persons, including all of the third-party witnesses, many of  
25 whom are in California. See *Pacific Atlantic Trading, Co. v. M/V Main Express (Pacific)*, 758  
26 F.2d 1325, 1331 (9th Cir. 1985) ("The site where the injury occurred and where evidence is  
27 located usually will be the most efficient forum.").

1 This factor tips sharply in Plaintiff's favor. Local individuals and materials will provide  
2 critical testimonial and documentary evidence in support of Plaintiff's claims.

3 6. *Maintaining litigation outside California would greatly burden Plaintiff.*

4 Maintaining litigation in multiple jurisdictions would be prohibitively expensive and  
5 burdensome for Plaintiff, as it would require as many as four separate trials on the same set of  
6 facts, with testimony from the same witnesses needing to be rehashed multiple times, each in a  
7 different courtroom in a different state. CoreTel already has California Counsel and has availed  
8 itself of California jurisdiction by engaging in profit-making businesses and activities in this state.  
9 This factor greatly favors Plaintiff.

10 7. *No alternative forum.*

11 The final factor, the availability of an alternate forum, likewise weighs in Plaintiff's favor.  
12 Although CoreTel presumably believes that this lawsuit should have been filed in a myriad of  
13 alternative jurisdictions, "whether another reasonable forum exists becomes an issue only when  
14 the forum state is shown to be unreasonable." *Sinatra*, 854 F.2d at 1201 (citation omitted). In this  
15 case, CoreTel cannot show that exercise of jurisdiction in this forum would be unreasonable.

16 Taking all of the factors as a whole, CoreTel has failed to make "a compelling case" that  
17 the exercise of specific jurisdiction is so unreasonable as to violate due process.

18 CoreTel contracted to profit from the operations of, sales from, and monetizing activities  
19 with Adzilla, which operates out of its office in Brisbane, California. It would be inconsistent for  
20 CoreTel to avail itself of all of the benefits of the activities that took place in California, but  
21 disengage itself from the consequences of abusing and/or misusing the conduit by which it  
22 committed the acts giving rise to this action.

23 What should now be clear is that Plaintiff has fully met her burden to demonstrate the  
24 reasonableness and propriety of jurisdictional discovery. As a result, Plaintiff has demonstrated  
25 everything necessary—and then some—to allow this Court to exercise its broad discretion to  
26 allow Plaintiff to engage in limited jurisdictional discovery.

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully asks that the Court: 1) grant Plaintiff leave to conduct immediate jurisdictional discovery for the limited purpose of determining whether the Court may exercise personal jurisdiction over defendant CoreTel; 2) stay CoreTel's Motion to Dismiss; and, 3) grant such further relief the Court deems reasonable and just.

Dated: June 19, 2009

Michael J. Aschenbrener  
KAMBEREDELSON, LLC

By: s/ Michael J. Aschenbrener  
Attorney for Plaintiff

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**PROOF OF SERVICE**

The undersigned certifies that, on June 19, 2009, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party, listed below:

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9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13 SUSAN SIMON, individually, on behalf of  
14 herself and all others similarly situated,

15 Plaintiffs,

16 v.

17 ADZILLA, INC.; CONDUCTIVE  
CORPORATION; CONTINENTAL VISINET  
18 BROADBAND, INC.; CORE  
COMMUNICATIONS, INC. d/b/a CORETEL  
19 COMMUNICATIONS, INC. et al.

20 Defendants.

Case No.: C09-00879-MMC

**[PROPOSED] ORDER GRANTING  
PLAINTIFF'S MOTION FOR LEAVE TO  
CONDUCT JURSDICTIONAL  
DISCOVERY**

Date: July 31, 2009

Time: 9:00 a.m.

Judge: The Hon. Maxine M. Chesney

1 On February 27, 2009, Plaintiff filed the present class action complaint alleging violations  
 2 of the federal Electronic Communications Privacy Act (“ECPA”) and Computer Fraud and Abuse  
 3 Act (“CFAA”), as well as state law claims under the California Invasion of Privacy Act (“CIPA”) and California Computer Crime Law (“CCCL”), among other claims against Adzilla, Conducive  
 4 Corp., Continental Visinet Broadband, and CoreTel Communications, Inc.  
 5

6 For the following reasons, the Court finds that Plaintiff may conduct immediate  
 7 jurisdictional discovery to determine whether defendant CoreTel is subject to this Court’s exercise  
 8 of personal jurisdiction over it. The Court also hereby stays the CoreTel Motion to Dismiss the  
 9 parties complete jurisdictional discovery.

10 “Where pertinent facts bearing on the question of jurisdiction are controverted . . . or where  
 11 a more satisfactory showing of the facts is necessary courts should allow for discovery.” *Wells*  
 12 *Fargo*, 556 F.2d at 430 (internal quotation marks omitted); *America West Airlines, Inc. v. GPA*  
 13 *Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989).

14 In the instant matter, defendant CoreTel submitted a motion to dismiss stating, in relevant  
 15 part, that it is not subject to personal jurisdiction in this Court because it does not conduct  
 16 substantial business in California. Plaintiff, though, alleges that CoreTel has conducted significant  
 17 business in California through its business dealings with co-defendant Adzilla.

18 Because CoreTel has introduced a factual dispute bearing on the matter of jurisdiction, this  
 19 Court finds that Plaintiff may conduct immediate written and oral discovery limited to determining  
 20 whether defendant CoreTel is subject to the exercise of personal jurisdiction over it in this Court.  
 21 The Court further finds that the CoreTel Motion to Dismiss is stayed pending the conclusion of  
 22 Plaintiff’s jurisdictional discovery.

23 Plaintiff’s motion for leave to conduct immediate jurisdictional discovery is granted.

24 DATED: \_\_\_\_\_

25 By: \_\_\_\_\_  
 26 Hon. Maxine M. Chesney  
 27 United States District Court