

EXHIBIT A

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON DEPT.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOEL HODGELL, an individual,

Plaintiff,

v.

MEMOLINK, INC., a New York corporation,
TRIFECTA ADVERTISING, LLC, a
Colorado Limited Liability Company,
MINDSHARE DESIGN, INC., a California
corporation, TOPICA, INC., a California
corporation,

Defendants.

No. C02-2183Z

ORDER

This matter comes before the Court on Defendants' motion to dismiss for lack of personal jurisdiction, docket no. 4. For the reasons stated herein, the motion is DENIED.

Background

Defendants Memolink and Trifecta are nonresident businesses that market their goods and services through unsolicited commercial email ("spam" or "email") through the internet. See Defendants' Motion to Dismiss, docket no. 4, at 4. Defendants Mindshare and Topica, also nonresident businesses, assist customers in the transmission of commercial email. See id.

ORDER -1-

etc, etc, etc
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1 Defendant Memolink is a New York corporation with its principal and only place of
 2 business in Colorado. See Asseoff Decl., docket no. 6, at 1. Memolink has an ownership
 3 interest in Defendant Trifecta and these two companies share office space and have the same
 4 President. See Hodgell Decl., docket no. 11, at 3. However, Trifecta's business is separate
 5 and distinct from Memolink's business. See Asseoff Decl., docket no. 6, at 1-2. Defendant
 6 Trifecta is a Colorado Limited Liability Company with its principal and only place of
 7 business in Colorado. Trifecta is a customer of defendant Mindshare. Memolink and
 8 Trifecta contend that "they have not purposefully sent any electronic mail" to plaintiff or
 9 "ever targeted any bulk e-mails or other advertisements to the state of Washington," Asseoff
 10 did at p. 2. However, neither defendant controverts plaintiff's allegations that unsolicited e-
 11 mails reached plaintiff in Washington via the internet.

12 Defendant Mindshare is a California corporation with its principal and only place of
 13 business in California. Mindshare is in the business of providing infrastructure to allow its
 14 customers to manage their databases and send commercial email. See Bernard Decl., docket
 15 no. 7, at 1. Mindshare does not cause transmissions of its customers' commercial email
 16 itself. See id. Rather, Mindshare provides the technical means for its customers to transmit
 17 spam to various recipients at the same time. See id. at 1-2. Defendant Trifecta is a former
 18 customer of Mindshare. Memolink is not a customer of Mindshare. See id. at 2. Mindshare
 19 also contends that it has not purposefully sent any spam to plaintiff or any other Washington
 20 resident. See id. Mindshare also contends it has not targeted any spam, advertisements, or
 21 other communications to the state of Washington. See id. Defendant Mindshare disputes
 22 plaintiff's allegations that it conducts business in the state of Washington through spam
 23 solicitations and Internet websites.

24 Defendant Topica is a Delaware corporation with its principal place of business in
 25 California. See Hostalley Decl., docket no. 9, at 1. Topica has two business practices with
 26 respect to email: (1) Topica offers free email list hosting for email list publishers (known as

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1 "list server" or "ListServ") and (2) Topica sends email advertisements on behalf of paying
 2 customers. With respect to Topica's first email business practice, its free ListServ service
 3 allows individuals to discuss various topics and interests via email. See id. at 1-2. This
 4 service handles subscription requests for mailing lists and distributes new messages and other
 5 postings from the list's members to the entire list of subscribers. See id. at 2. After
 6 subscribing to a particular ListServ, an individual will then receive all email sent from
 7 members of that ListServ. See id. Plaintiff has declared that he did not subscribe to such a
 8 ListServ; See Hodgell Decl., docket no. 11, at 8. Regarding its second email business
 9 practice, Topica has customers who pay it to send email advertisements on their behalf.
 10 Topica maintains that it has never purposefully sent any spam to Plaintiff. See Hostelley
 11 Decl., docket no. 9, at 1-2. However, Topica doesn't declare that it hasn't sent bulk spam or
 12 targeted spam, advertisements, or other communications to the state of Washington. Nor has
 13 defendant Topica disputed plaintiff's allegations that Topica conducts business in the state of
 14 Washington through spam solicitations and Internet websites.

15 Plaintiff alleges that defendants Memolink and Trifecta used defendant Mindshare's
 16 Postmaster General and Topica's Email Publisher email list management services to send
 17 their spam to the plaintiff. See Notice of Removal, docket no. 1, Ex. A, at 4. Plaintiff also
 18 alleges that the true origin of dozens of Memolink's spam were sent from an unknown
 19 Internet location, but were eventually sent through Mindshare's Postmaster General servers.
 20 See id. at 5. However, plaintiff asserts that in dozens of the spam sent by or through
 21 defendants, there was no way for the recipient to know the true identity and origin of the
 22 customer sending the spam from either the email header or their spam's content. See id.
 23 Defendants Memolink and Trifecta also sent spam from the domain name
 24 "justforyounewsletter.com," which is registered to defendant Trifecta. See Notice of
 25 Removal, docket no. 1, Ex. A, at 7. The spam sent to plaintiff from the
 26 "justforyounewsletter.com" domain name were sent from untraceable, unassigned and

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1 This case does not require the Court to issue a ruling as to whether sending
2 commercial electronic mail over the Internet is sufficient to establish personal jurisdiction.
3 There is evidence before the Court that plaintiff received spam from the defendants even
4 after he informed them he was a Washington state resident, that he believed they were
5 violating Washington state laws, and requested they stop sending him spam. Despite
6 plaintiff's efforts, defendants continued to send spam to plaintiff even after being served with
7 the Complaint in this lawsuit. By ignoring plaintiff's requests, defendants purposefully
8 availed themselves to jurisdiction in Washington state.

9 3) **Harm Suffered in Forum State:**

10 **B. Claims Arising out of Defendants' Activities**

11 The Ninth Circuit has adopted a "but for" test for determining whether a plaintiff's
12 claim arises out of a defendant's forum related activities. Doe v. American Nat. Red Cross,
13 112 F.3d 1048, 1051 (9th Cir. 1997). The "arising out of" requirement of the specific
14 jurisdiction test is met if "but for" the contacts between the defendant and the forum state, the
15 cause of action would not have arisen. See Terracom v. Valley Nat. Bank, 49 F.3d 555, 560
16 (9th Cir. 1995).

17 The Washington Supreme Court has held that deceptive spam harms individual
18 Internet users. See Heckel, 143 Wn.2d at 835. The Heckel court stated:

19 When a spammer distorts the point of origin or transmission path of the
20 message, email recipients cannot promptly and effectively respond to
21 the message (and thereby opt out of future mailings); their efforts to
22 respond take time, cause frustration, and compound the problems that
Internet Service Providers face in delivering and storing bulk messages.
And the use of false or misleading subject lines further hampers an
individual's ability to use computer time most effectively.

23 See id.

24 The parties agree that defendants sent spam that was received by plaintiff in
25 Washington. 'But for' defendant's efforts, plaintiff would not have been harmed. Plaintiff
26 can meet the 'but for' test.

1 **C. Reasonableness**

2 Once it has been determined that a defendant purposefully established minimum
3 contacts with a forum state, the burden shifts and the defendant must "present a compelling
4 case that the presence of some other consideration would render jurisdiction unreasonable."
5 Dole Food Co., Inc., 303 F.3d at 1114. In determining whether the exercise of jurisdiction
6 comports with fair play and substantial justice, and is therefore reasonable, seven factors are
7 considered:

- 8 (i) the extent of the defendant's purposeful injection into the forum
9 state's affairs; (ii) the burden on the defendant of defending in the
10 forum; (iii) the extent of conflict with the sovereignty of the
11 defendant's state; (iv) the forum state's interest in adjudicating the
12 dispute; (v) the most efficient judicial resolution of the controversy;
13 (vi) the importance of the forum to the plaintiff's interest in
14 convenient and effective relief; and (vii) the existence of an
15 alternative forum. Burger King, Corp. v. Rudzewicz, 471 U.S. 462,
16 477-478 (1985); Dole Food Co., Inc., 303 F.3d at 1114.

17 No one factor is dispositive, and the district court must balance all seven. Core-Vent Corp.,
18 11 F.3d at 1488.

19 The Ninth Circuit has held that "[t]he degree to which a defendant interjects himself
20 into the state affects the fairness of subjecting him to jurisdiction." Data Disc. Inc., 557 F.2d
21 at 1288.

22 i) *Purposeful Interjection Into Forum State's Affairs*: Plaintiff alleges defendants
23 sent, or caused to be sent, more than 550 spam messages for the purpose of conduct business.
24 See Hodgell Decl., docket no. 11, at 2-5. Plaintiff received this spam at his email address
25 registered to him as a Washington state resident. See *id.* As a result, defendants purposefully
26 interjected themselves into Washington state affairs by sending, or causing to be sent, email to
Washington residents.

27 **D. Conclusion of Jurisdictional Analysis**

28 Because defendants were put on notice that they were sending spam to plaintiff and
29 were informed that the spam may be in violation of Washington law, and because defendants

1 continued to send spam to the plaintiff, plaintiff has met the jurisdictional standards set out
2 above. Defendants' motion to dismiss is DENIED

3 IT IS SO ORDERED.

4 DATED this 20th day of December, 2002.

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7 THOMAS S. ZILLY
8 UNITED STATES DISTRICT JUDGE
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WESTERN DISTRICT OF WASHINGTON DEPUT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOEL HODGELL and ED KONEK,

Plaintiffs,

v.

SAMSON DISTRIBUTING, INC., SDI,
LEGALSTEROIDS.COM and SDI-
LABS.COM,

Defendants.

No. C02-2184Z

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Defendants' Samson Distributing Inc., SDI, Legalsteroids.com and SDI-LABS.com, motion to dismiss for lack of personal jurisdiction, docket no. 3, is DENIED. Because defendants were put on notice that they were sending spam to plaintiff in Washington and were also informed that the spam may be in violation of Washington law, and because defendants continued to send spam to plaintiff, the Court has jurisdiction to consider the merits of plaintiff's complaint. See Order dated December 20, 2002, entered in the related case of Hodgell v. Memolink, Inc., et al., C02-2183Z, which is incorporated herein by reference.

(2) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 28 day of December, 2002.

BRUCE RIFKIN, Clerk

By C. Sedona
Deputy Clerk

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