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VIA HAND DELIVERY

January 7, 2003

Clerk to the
Honorable Dominic S. Amato
Milwaukee County Courthouse
901 N. 9th Street, Room 104
Milwaukee, Wisconsin 53233

Re: Davidian v. Corder, et al.
Case No. 02-CV-9453

Dear Clerk:

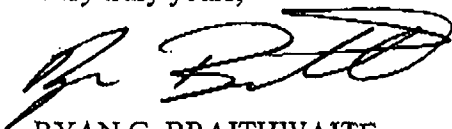
Enclosed please find the original and one copy of the Reply Brief In Support Of Motion To Dismiss submitted by the defendants in the above matter.

Please file the original and return a file-stamped copy to me in the enclosed postage-paid envelope.

By copy of this letter, a copy is being served upon the plaintiff.

Thank you for your attention to this matter.

Very truly yours,



RYAN G. BRAITHWAITE
RGB/gbb

Cc: Mr. Geoffrey K. Davidian (via facsimile and U.S. Mail)

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

GEOFFREY K. DAVIDIAN,

Plaintiff,

v.

Case No. 02-CV-9453

Case Code: 30106

30301

30704

STEVE CORDER,
T. MICHAEL O'MARA,
JIMMY DALE SHIPLEY and
JOHN C. DUFFY,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The defendants, STEVE CORDER, T. MICHAEL O'MARA, JIMMY DALE SHIPLEY and JOHN C. DUFFY, by their attorneys, CRIVELLO, CARLSON & MENTKOWSKI, S.C., submit the following Reply Brief in Support of their Motion to Dismiss:

LEGAL ANALYSIS

I. § 801.05(4)(b) Does Not Provide A Basis For Jurisdiction.

As an initial matter, the plaintiff has conceded that the only potential source of jurisdiction is found in § 801.05(4)(b) of the Wisconsin Statutes, and has made no argument that other provisions of § 801.05 are applicable.

The plaintiff argues that § 801.05(4)(b) confers jurisdiction based on the meaning of 'process'. Plaintiff's Brief at 3. Under this expansive definition, the plaintiff states that alleged actions taken to access the plaintiff's website through the internet and the use of Microsoft FrontPage software constitute a 'process' under § 801.05(4)(b). *Id.*

The plaintiff relies upon *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, 235 Wis. 2d 396, 629 N.W.2d 662, with minimal discussion of the facts or legal conclusions found in the opinion. Plaintiff's Brief at 3. *Kopke* involved the question of whether a defendant's actions in moving pallets into a cargo container and securing the pallets in the container constituted "processing of a product" such that the defendant was subject to personal jurisdiction under § 801.05(4)(b). *Id.* at ¶¶ 6-7, 245 Wis. 2d at 407-08.

In determining that the defendant was subject to personal jurisdiction, the Court adopted the following definition of "process":

The verb "to process" certainly may refer to the narrower concept of preparing something in the sense of manufacturing it. However, it also has the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process. See Webster's Third New International Dictionary of the English Language (1963). We think these broader definitions include the actions of a distributor such as [the defendant], i.e., purchasing and selling goods in the ordinary course of trade in a distribution system.

Id. at ¶¶ 11-15, 245 Wis. 2d at 410-12; discussing *Nelson by Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983).

In *Nelson v. Bulso*, 939 F.Supp. 1239 (ED WI 1997), the District Court examined the purpose and scope of § 801.05(4). *Nelson* involved a claim brought by a Wisconsin resident against a Tennessee attorney for malicious prosecution, abuse of process, and defamation. *Id.* at 1240. The plaintiff argued that the actions taken in Tennessee resulted in a local injury and that jurisdiction was proper under §§ 801.05(3) and (4). *Id.* at 1242 and 1248. The court noted the "case law interpreting § 801.05(4) illustrates how the statute was designed to encompass only out-of-state defendants who actively solicit business from persons in Wisconsin and who attempt to receive financial gain from such

solicitation." *Id.* at 1248.

Central to the holding in *Nelson, supra*, was the absence of commercial activity for financial gain. After noting that the Wisconsin Court of Appeals has required that a defendant direct business activities or expect a financial benefit from the activities in Wisconsin, the court continued:

Like the defendants in these cases cited above, [the defendant] cannot be said to have engaged in the solicitation of business or the providing of services within Wisconsin. He admits in his affidavit that he did come to Wisconsin three times in connection with the underlying litigation and that he had a "small number" of telephone conversations with the local counsel in Wisconsin. There is no evidence, however, to suggest that these activities were for the purpose of soliciting business from Wisconsin residents, or even more specifically, from [the plaintiff].

Id. at 1249.

From the above it is clear that the alleged actions of the defendants do not fall within the scope of § 801.05(4)(b). That section states that jurisdiction exists in an action "claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant," provided that "Products, materials or things processed, serviced, or manufactured by the defendant were used or consumed within this state in the ordinary course of trade."

Absent from the allegations of the complaint and the Affidavits submitted by both parties is support for an argument that the alleged actions were taken "in the ordinary course of trade". The plaintiff's only mention of this requirement is found in the conclusion that Steve Corder's actions were taken "in the ordinary usage of the Internet." Plaintiff's Brief at 4.

To accept the plaintiff's logic, one must eliminate any distinction between the course of trade in a commercial setting and mere Internet usage. This is contrary to fact

and law. While the Internet is certainly a useful tool for conducting commercial activities, this does not entail that all Internet usage has commercial implications.

This distinction is reflected in the growing body of law regarding personal jurisdiction and the Internet. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (WD PA 1997), established a "sliding scale" for analyzing Internet contacts; passive, interactive, and commercial. This scale

reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the **knowing and repeated transmission of computer files over the Internet**, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. **The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.**

Id. at 1124 (emphasis added).

Importantly, the alleged actions of the defendants do not fall within the definition of commercial Internet contacts. Commercial Internet contacts involve a "direct commercial transaction" with Internet users in the forum district. *GTE New Media Services Inc. v. Ameritech Corp.*, 21 F.Supp.2d 27, 38, (DDC 1998). This is in contrast to "interactive contacts", which include the sending of information to a computer hosting a web site. *Id.* This case involves interactive contacts that allegedly occurred when Steve Corder accidentally uploaded a file onto the plaintiff's website. Indeed, the

plaintiff concedes the interactive nature of the alleged contact. Plaintiff's Brief at 10 (emphasis added). ("Defendant Corder in the process intentionally used Microsoft FrontPage software to *interact* with the Wisconsin Website.")

That the alleged contacts were interactive and not commercial is clear from the allegations and the affidavits of the parties. The complaint alleges a single isolated occurrence, not repeated transactions. The motive for the contact is alleged to be intentional and malicious, or, in the alternative, negligent. Plaintiff's Brief at 4. This is a far cry from the repeated commercial contacts necessary for jurisdiction to exist. *Blumenthal v. Drudge*, 992 F.Supp. 44, 55-56; *Zippo*, 952 F.Supp. at 1124 ("the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet").

"[S]omething more than isolated and fleeting encounters with the state of Wisconsin are necessary to come within the statutory language." *Housing Horizons, LLC v. Alexander Company, Inc.*, 2000 WI App 9, ¶ 9, 232 Wis.2d 178, 185, 606 N.W.2d 263. § 801.05(4) "is not satisfied when a defendant's contacts with Wisconsin are connected with a single, isolated transaction." *Id* at ¶ 12, 232 Wis. 2d at 186.

Contrary to the plaintiff's assertions, the location of the servers for www.putnampit.com in Florida is relevant to the personal jurisdiction inquiry. Plaintiff's Brief at 4. The location of the servers where data is uploaded is an important part of the personal jurisdiction inquiry. *CompuServe Inc. v. Patterson*, 89 F.3d 1257, 1260 and 1264 (6th Cir. 1996) (finding personal jurisdiction existed in Ohio based on upload of shareware to CompuServe system in Ohio in conjunction with contractual relationship

between defendant and CompuServe relating to shareware licensing and distribution.)

II. Public Policy Is Not Implicated

The plaintiff has argued that public policy demands that personal jurisdiction be exercised over these defendants. Plaintiff's Brief at 4. Public policy is simply not a relevant consideration in a personal jurisdiction inquiry, which is limited to the analysis of the long-arm statute and due process. Questions of public policy are better left to the legislature, which can determine whether advances in technology require amendment of § 801.05. In any event, the issue is the question of whether a forum exists in Wisconsin, not whether a forum exists at all.

Other states, such as Arkansas and Indiana, have adopted statutes that permit their courts to maintain personal jurisdiction "to the maximum extent permitted by the due process of law clause." *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp 1356 (WD AR 1997); *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, 1997 WL 148567 (SD IN 1997). In contrast, a review of § 801.05 does not support an all-encompassing approach to personal jurisdiction.

III. The Exercise Of Jurisdiction Over The Defendants Is Contrary To The Requirement Of Due Process.

The question of whether personal jurisdiction satisfies the constitutional requirement of due process is separate from the question of whether jurisdiction exists under § 801.05(4)(b). Both must be satisfied for this Court to exercise jurisdiction over the defendants. *Bushelman v. Bushelman*, 2001 WI App 124, ¶ 7, 246 Wis. 2d 317, 323, 629 N.W.2d 795; citing *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981).

The Seminole case of *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (DC NY 1996) involved a similar attempt to exercise

personal jurisdiction over any non-domiciliary for tortious acts committed outside the state that cause injury in the state if the non-domiciliary 'expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.'"

Id. at 299.

In rejecting a claim that a Missouri based website was subject to jurisdiction in New York State for trademark infringement, the court stated that

allegations of foreseeability, which are based solely on the fact that King knew that Bensusan's club is located in New York, [are] insufficient to satisfy the requirement that a defendant expects or should reasonably expect the act to have consequences in the state. That prong of the statute requires that a defendant make a discernable effort ... to serve, directly or indirectly, a market in the forum state.

Id. at 300 (internal quotations omitted). In this case, the plaintiff relies upon similar allegations of the defendants' knowledge of his Wisconsin domicile.

Notably, the court opined that even if jurisdiction under the long-arm statute were present, due process considerations would not allow the exercise of personal jurisdiction, based on the following factors.

- 1) whether the defendant purposefully availed himself of the benefits of the forum state;
- 2) whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there; and
- 3) whether the defendant carries on a continuous and systematic part of its general business within the forum state.

Id. at 300-01 (internal quotations omitted).

Applying the above analysis to the allegations of the complaint and the facts contained within the parties' affidavits, the defendants did not purposefully avail themselves of any benefit of the forum state, and the defendants do not carry on a continuous and systematic part of their general business in Wisconsin. Duffy Affidavit at

¶¶ 3 and 4.

Perhaps most importantly, it is apparent that the defendants did not anticipate being haled into court in Wisconsin. As demonstrated by the moving affidavits, O'Mara and Duffy asked Corder to create trial exhibits and believed that this would be done from the archived articles and images contained on a CD-Rom provided by the plaintiff during the discovery process. O'Mara Affidavit at ¶¶ 4 and 5; Duffy Affidavit at ¶¶ 7 and 8. In the process of creating those exhibits, Corder accessed the plaintiff's website using Microsoft's FrontPage software. Corder Affidavit at ¶ 5. During his editing of downloaded pages for trial exhibits, Corder believes he may have accidentally uploaded an edited page. Corder Affidavit at ¶ 5.

The plaintiff concedes that no general jurisdiction exists over the defendants. Plaintiff's brief at 7. Contrary to the plaintiff's assertions, the issue of whether specific jurisdiction exists is not separate from the facts contained within the defendants' affidavits. *Id.* The absence of a commercial relationship with Wisconsin is directly related to whether jurisdiction is present under § 801.05(4)(b) and whether the exercise of personal jurisdiction is based on sufficient contacts to satisfy due process. If § 801.05(4) did not require the additional contacts in (a) or (b), there would be an argument that personal jurisdiction exists over the defendants. Instead, the legislature chose to impose additional requirements beyond the allegation of a foreign act that results in a local injury.

As for the contacts between the plaintiff and the defendants that are highlighted in the plaintiff's affidavit, there is no evidence of a commercial relationship with the plaintiff or Wisconsin. The contacts demonstrate a lengthy history of public records

requests and civil litigation initiated in Tennessee¹ by the plaintiff against the defendants, and the defendants' responses to those contacts. Davidian Affidavit at ¶¶ 3, 6, 8, 9, and 15.

The plaintiff's affidavit demonstrates that his website was in existence since December of 1996, yet was not published from Milwaukee until 1998. Davidian Affidavit at ¶ 3. With the potential to modify and maintain a website from any location, the logical conclusion of the plaintiff's position would result in the exercise of personal jurisdiction without boundaries. Due process requires that personal jurisdiction cannot be dependent upon the location of the plaintiff at any particular moment.

Due process requires sufficient contact between the defendant and Wisconsin to make the exercise of jurisdiction over the defendant comport with the concept of fairness. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The exercise of personal jurisdiction over these defendants is abhorrent to the most fundamental notions of due process, which remain despite the technical complexity of the present era.

¹ The defendants have not made and are not making an argument in support of this motion that issue preclusion or claim preclusion apply as a result of the previous action heard in the United States District Court for the Middle District of Tennessee. However, the connection to the previous litigation is relevant to whether a Wisconsin forum is proper.

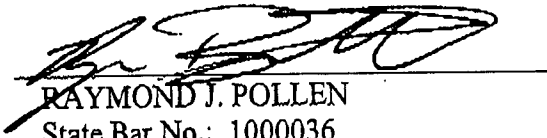
CONCLUSION

Based on the above argument and authorities, the defendants respectfully request that this Court dismiss the plaintiff's complaint, in its entirety, for lack of personal jurisdiction.

Dated this 7th day of January, 2003.

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MENTKOWSKI, S.C.
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