

December 16, 2002

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-009453**

Dear Clerk:

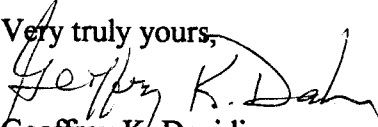
Enclosed for filing please find the original and one copy of the following submitted on behalf of the Plaintiff.

1. Plaintiff's Response in Opposition to Defendant's Motion Dismiss
2. Attachment A – Affidavit of Geoffrey Davidian, with Exhibits 1-10.

Copies of these documents have been hand delivered to Defendants through their attorneys, Raymond J. Pollen, Crivello, Carlson & Mentkowski, S.C.

Thank you for your attention to this matter.

Very truly yours,

  
Geoffrey K. Davidian, *pro se*  
4101 N. Prospect Ave.  
Shorewood, WI. 53211  
414-964-8871

Enclosures

Cc: Mr. Raymond J. Pollen

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

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GEOFFREY K. DAVIDIAN

Plaintiff,

V.

Case No. 02-CV-009453

Case Code:30106

30301

30704

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

Defendants

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Although this case raises an issue of first impression in Wisconsin and perhaps in the nation because of the still relatively new technology of the Internet, existing law establishes that the State of Wisconsin does provide a forum which can exercise personal jurisdiction over defendants who "hack" into a Wisconsin-based Web site even though such Defendants reach into Wisconsin from another state only via the Internet. Further, the due process protections of the Fourteenth Amendment to the United States Constitution are not offended by the exercise of personal jurisdiction where the defendants intended to access and interact with a Wisconsin-based Web site. In a nutshell this case addresses the following question: If one causes damage to a Website, should not that person expect to be held accountable in the jurisdiction where the

Website is owned and operated? Accordingly, the Defendants' Motion to Dismiss should be DENIED.

### **Relevant Factual Background**

All relevant facts are set forth in Affidavit of Geoffrey Davidian, attached hereto as Attachment A, with Exhibits.

### **Legal Analysis**

#### **I. WISCONSIN'S LONG-ARM STATUTE § 801.05 DOES PROVIDE FOR THE EXERCISE OF JURISDICTION WHERE A DEFENDANT USES AN INTERACTIVE SOFTWARE FROM TENNESSEE TO ALTER A WISCONSIN WEB SITE VIA THE ORDINARY USAGE OF THE INTERNET.**

The Wisconsin Supreme Court addressed the issue of personal jurisdiction recently in *Kopke v. A. Hartrodt S.R.L.*, 245 Wis.2d 408-09, 629 N.W.2d 667 (2001):

Every personal jurisdiction issue requires a two-step inquiry. *In re Liquidation of All-Star Ins. Corp.*, 110 Wis.2d 72, 76, 327 N.W.2d 648 (1983) (discussing personal jurisdiction pursuant to Wis. Stat. §645.04(5)(a)); *Lincoln v. Seawright*, 104 Wis.2d 4, 10-11, 310 N.W.2d 596 (1981). It must first be determined whether defendants are subject to jurisdiction under Wisconsin's long-arm statute. *See Lincoln*, 104 Wis.2d at 10. If the statutory requirements are satisfied, then the court must consider whether the exercise of jurisdiction comports with due process requirements. *Id.*

#### **A. Analysis of Long-Arm Statute**

To resolve Defendants' Motion to Dismiss in the present case, the Court must first determine whether Wis. Stat. §801.05(4)(b) subjects the Defendants to jurisdiction in a Wisconsin court where a foreign act causes a local injury act. Wis. Stat. §801.05(4)(b) reads as follows:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

...

(4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

...

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

Application of Wis. Stat. §801.05(4)(b) presents a question of law. *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis.2d 42, 52, 505 N.W.2d 162 (Ct. App. 1993). Wisconsin's long-arm statute is liberally construed in favor of jurisdiction. *Id.* (citing *Lincoln*, 104 Wis.2d at 9). Furthermore, “[f]actual doubts are to be resolved in favor of the plaintiff.” *Kopke*, 245 Wis.2d at 410, 629 N.W.2d 688 (citing *Ammon v. Kaplow*, 468 F. Supp. 1304, 1309 (D. Kan. 1979))(emphasis added).

Applying the facts of this case to the language of Wis. Stat. §801.05(4)(b), the Court should liberally construe the facts in favor of jurisdiction. The process used by the Defendants in this case was Defendant Steve Corder accessing, through the Internet, the plaintiff's Web site, www.putnampit.com. Corder was acting as the agent of Defendant Jim Shipley's agents, namely Shipley's attorneys, Defendants T. Michael O'Mara and John C. Duffy. The Microsoft FrontPage software is also a process used by the Defendants to cause damages to Plaintiff Davidian's Web site.

The broad interpretation of “process” as used in Wis. Stat. §801.05(4)(b) was discussed extensively in *Kopke* and resolved appropriately in favor of allowing jurisdiction. The use of Web page altering software with the capability of transforming, adding or removing elements of a Web page is clearly a process alleged and acknowledged to have been used by Defendants.

The Defendants acknowledged that the Defendants were seeking the Wisconsin-based Web site. Of course, whether the subsequent uploading to the Plaintiff's Web site was negligent or accidental as Defendants contend or whether the upload was an intentional and malicious act to shut down www.putnampit.com as Plaintiff contends goes to the merits of the underlying case. The allegations in the Complaint and Steve Corder's affidavit make it quite clear that he accessed www.putnampit.com in the ordinary usage of the Internet.

Since Defendant Corder intentionally visited the Wisconsin Website with interactive software, it is a reasonable inference that he intended to interact not with a Florida server, a defense to personal jurisdiction for which the Defendants grasp desperately, but rather to interact with a Website known to be operated in Wisconsin by a Wisconsin resident. The Defendants software thus was used in Wisconsin via the Internet and the requirements of §801.05(4)(b) are met.

### **B. Policy Considerations**

Should the Court decide otherwise, the Court would be setting a rule that Wisconsin Web sites have no protection in Wisconsin courts from hackers who operate outside Wisconsin's physical borders. This case does not involve defendants who passively visited a Wisconsin Web site on the Internet. This case involves defendants who actively sought to interact with a Wisconsin-based Website. The allegations of the Amended Complaint make it clear that the Defendants had improper motives to retaliate against the Web site for past stories critical of the Defendants Duffy, Shipley, and O'Mara. Wisconsin law and courts provide a forum that protects Wisconsin residents.

The long-arm statute should be liberally construed to permit jurisdiction to protect

Wisconsin Web sites. Failure to provide a forum for protection of property rights that have come into being as the result of technology would leave subject every Wisconsin-based Web site to attacks and vandalization by business competitors, hackers on a lark, individuals motivated by revenge or a desire to shut down a site with an opposing message.

Wisconsin's long-arm statute protects Wisconsin residents' Web site from a local injury caused by a foreign act. The statute must be read to protect against outside acts that a party knows will have consequences in Wisconsin. The facts of this case, and any other civil case involving a deliberate hacking, fall within the reach of the long-arm statute.

**II. BECAUSE DEFENDANTS PURPOSELY INTERACTED WITH THE WISCONSIN WEB SITE INTER (RATHER THAN JUST PASSIVELY VISIT THE WEB SITE), THIS COURT HAS SPECIFIC JURISDICTION OVER ISSUES RELATED TO THE CONTACT ARISING OUT OF THE HACKING INCIDENT. SUCH EXERCISE OF SPECIFIC JURISDICTION IS IN COMPLIANCE WITH THE REQUIREMENTS OF DUE PROCESS.**

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S., at 475. "**Jurisdiction**

is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." *Id.*, quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 22378 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957) (emphasis added).

The Supreme Court decision in *Calder v. Jones*, 465 U.S. 783 (1984) found minimum contacts with California where journalist wrote defamatory article in Florida that he knew would affect plaintiff in California. In *Calder*, the defendants directed the libel at the plaintiff causing an injury in her home state of California. The facts of that case are similar to the present in that the defendants intended to, and did, cause injury in the forum state.

The United Supreme Court has stated that personal jurisdiction can be established based on specific jurisdiction as well as general jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984), n. 8 and 9.

Footnote 8. It has been said that when a State exercises personal jurisdiction over a defendant in a **suit arising out of or related to the defendant's contacts with the forum**, the State is exercising "specific jurisdiction" over the defendant. See Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-1164 (1966).

Footnote 9. When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant. See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. Ct. Rev. 77, 80-81; Von Mehren & Trautman, 79 Harv. L. Rev., at 1136-1144; *Calder v. Jones*, 465 U.S., at 786 .

"When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414, 104 S.Ct. at

1872 (citing *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)). See also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) (Specific jurisdiction existed and Due Process requirements satisfied where the defendant has “purposefully directed” his activities at resident of the forum by selling magazines with alleged libel in forum state of New Hampshire). Specific jurisdiction should be exercised in the case *sub judice* as the litigation concerns the Defendants’ intentional contact with a Wisconsin-based Web site. Defendants Duffy and O’Mara, on behalf of their client, Jim Shipley, directed Corder to the Web page with the purpose to interact with the Website.

The Defendants correctly point to the lack of facts which would establish *general* jurisdiction in this case, but the Defendants do not address the issue of specific jurisdiction. General jurisdiction does not exist in the present case. The Defendants clearly do not have sufficient, continuous contacts with Wisconsin for the exercise of general jurisdiction. However, the substance of this case involving a trespass on to a Wisconsin Website arises directly out of Defendants’ activities directed at the Website. Specific jurisdiction is appropriate.

Jurisdiction can not be avoided merely because the Defendants did not *physically* enter the forum State, yet Defendants go to great lengths to divert the Court’s focus from specific jurisdiction by alleging numerous facts showing that all Defendants have no physical relationship to Wisconsin with the exception of some cheese Mr. Duffy may have eaten. “[A]n inescapable fact of modern commercial life [is] that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are “purposefully directed” toward residents of another State, [the United States Supreme Court has]



consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.” *Burger King*, 471 U.S. at 476, 474, 105 S.Ct. at 2184-85. This dicta from *Burger King* is even more inescapable today with rising prevalence of the internet and other advances in telecommunications. The caselaw is only beginning to develop for issues that arise out of the new technology yet jurisprudence has anticipated the issue by directing courts to look at whether the defendant purposefully directed his actions toward the resident’s home jurisdiction.

The Defendants’ effort to reach and interact with Plaintiff’s Web site is the act of one who purposely avails oneself of the jurisdiction for any tortious conduct associated with that interaction with the Web site. A key fact in the analysis is that the Defendants sought out the Web site with an intent to do more than just passively read the pages. FrontPage software is used for editing/altering/modifying Web pages.

The Defendants try to create the impression with the Court that the Defendants did not know the Plaintiff operated and maintained the Web site in Wisconsin. (See Affidavit of John Duffy, p. 4, ¶ 6 (“Mr. Davidian never maintained during the course of [the federal court] litigation that his Website was about or had anything to do with Wisconsin.”) The Defendants are clearly engaged in misleading the Court. The reason for creating confusion and misleading the Court is to detract from the fact that Defendants’ knowledge of the operation of the Website from Milwaukee County, Wisconsin obviously creates a contact sufficient in nature to justify the jurisdiction of Wisconsin courts to protect intrusions against the property of Wisconsin residents.

On January 26, 2000, John Duffy asked a leading question in a deposition of Geoff Davidian regarding whether Geoff Davidian operated www.putnampit.com out of Mr. Davidian’s residence in Wisconsin. (See Attachment A, Affidavit of Geoff Davidian, pp.5-6, ¶ 14 , and

Exhibit 7 attached thereto (Davidian deposition, p. 5). Mr. Davidian answered affirmatively. The fact that the question was leading suggests that Defendant Duffy knew over a year and half before the September 2001 hacking incident that www.putnampit.com was operated and maintained out of Wisconsin.

Davidian also has also taken phone calls at his Shorewood, Wisconsin residence from Defendants Shipley and Corder. (Affidavit of Geoff Davidian, ¶ 10, 11 ). Corder may not have known the exact village in Milwaukee County, Wisconsin, but he was very much aware that Geoff Davidian lived in Wisconsin (Affidavit of Steve Corder, p. 1, ¶3

Furthermore, whether Defendant Corder knew which village in Milwaukee County Plaintiff Davidian lived in is irrelevant because Corder knew that Plaintiff lived in postal Zip Code 53211, all of which is in Milwaukee County. Defendant Corder knew this very well since he mailed illegally reproduced Microsoft computer software to Plaintiff at Zip Code 53211.(Attachment A, Affidavit of Geoffrey Davidian, pp. 11-12, ¶ 32.)

Perhaps the most telling evidence of the Defendants' knowledge that the Website was based out of Wisconsin is the fact that the Website states Mr. Davidian's address for www.putnampit.com as being 4104 N. Prospect Avenue, Milwaukee, WI 53211 and the phone number is given in the masthead with a 414 area code. (Affidavit of Geoff Davidian, ¶ 12, Exhibit 8 ) Indeed the documents attached to Corder's affidavit indicate that the Website is operated out of Wisconsin. It would be disingenuous for the Defendants to assert that the *Putnam Pit* Website is not operated out of Wisconsin or that Defendants did not know that alterations of the Website by the FrontPage software would have consequences in Wisconsin. Nonetheless, the Defendants try to misdirect the focus on the home of the Website by pointing out that its content is about

Cookeville, Tennessee. Ironically, in the federal lawsuit, *Putnam Pit v. City of Cookeville*<sup>1</sup>, the Defendants O'Mara, Duffy, and Shipley argued that the Website was not exclusively about Cookeville, Tennessee. Now the Defendants change their tune to suit their immediate purposes. Davidian, in fact, owns and operates a Wisconsin Website that acts as a watchdog over the politicians of Cookeville, Putnam County, Tennessee which is consistent with the First Amendment rights of Wisconsin citizens to speak out on whatever subject they wish. That a Wisconsin resident such as Geoff Davidian would choose to speak and write about a small town hundreds of miles away in Tennessee is the ordinary activity of the average citizen in no way changes Davidian's right to do so.

The Defendants also address the merits of the case by arguing that they did not commit an intentional act even though it is clear from their statements that (1) Defendant Corder, acting as an agent for all of the other Defendants, intentionally went on the Internet, (2) in so doing Defendant Corder intentionally accessed [www.putnampit.com](http://www.putnampit.com), and (3) Defendant Corder in the process intentionally used Microsoft FrontPage software to interact with the Wisconsin Website. While the Defendants may wish to argue the merits of the case as being an "accidental" upload, Defendants clearly were reaching out of their own volition to a Wisconsin-based Website.

Defendants argument that the server for the Website is based in Florida does not negate

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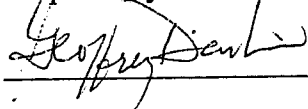
<sup>1</sup> The Court could be led to a false conclusion that the issues raised in this present case were the subject matter of the federal court case referred to in John Duffy's Affidavit, ¶ 6. The hacking incident of September 26, 2001 occurred approximately two weeks before the jury trial. Mr. Duffy, for reasons known only to him, chose to question Defendant Corder about the issue at trial. (See Attachment A, Affidavit of Geoffrey Davidian, Exhibit 9, Testimony of Steve Corder, pp. 68-71.) Neither Duffy's affidavit (which does not support the argument asserted in the Defendants' brief) nor any other evidence supports any assertion that res judicata or collateral estoppel applies to this present case.

the fact that the Defendants intentionally reached out to a Wisconsin-based Website. The server was merely a toll booth on the information superhighway. Surely, the Defendants would not suggest that their intention was to merely contact a server in Florida when it is clear that the Defendants sought to interact with *The Putnam Pit* Website. Defendants drove the information superhighway straight into Wisconsin, vandalized a stop they knew was in Wisconsin, and then leave and hide out in Tennessee.

### Conclusion

The Defendants purposely availed themselves of a Wisconsin jurisdiction by directing page altering software at a Wisconsin Website, and it would not violate due process to have them answer for such conduct in Wisconsin. The Motion to Dismiss should be DENIED.

Respectfully submitted



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