

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

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Omega World Travel, Inc. et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:05CV122
	)	
Mummagraphics, Inc. et al.,	)	
	)	
Defendants	)	
	)	
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**DEFENDANTS’ BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS  
FOR LACK OF PERSONAL JURISDICTION AND VENUE**

**I. INTRODUCTION**

Defendant Mummagraphics, Inc. d/b/a/ Web Guy Internet Solutions (“Mummagraphics”) is an Internet service provider with its sole office in Oklahoma City, Oklahoma. Declaration of Mark W. Mumma,<sup>1</sup> (“Mumma Decl.”), Exhibit 1 hereto, ¶ 1. Defendant Mark Mumma is its president. *Ibid.* As shown below, defendants have no presence in, and do not have a continuing and systematic relationship to, the Commonwealth of Virginia.

Mummagraphics operates WebGuy.net, an Internet site through which it advertises its web-based services. It also operates OptOutByDomain.com and SUEaSpammer.com, sites related to assisting clients to eliminate spam emails and deter spammers from sending emails. Because Mr. Mumma had received unwanted spam commercial e-mails from plaintiff Cruise.com, Inc., a wholly owned subsidiary of

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<sup>1</sup> Mr. Mumma’s Declaration in Exhibit 1 bears his electronic signature. Defendants will file with the court an original Declaration signed in pen by Mr. Mumma when it is received by defendants’ counsel.

plaintiff Omega World Travel, Inc, Mr. Mumma telephoned Omega's legal department in Virginia to complain. When the spam continued, there ensued exchanges of communications between defendant Mumma and plaintiff Omega Travel and its co-owner, plaintiff Daniel Bohan.

When Mr. Mumma threatened to sue under Oklahoma's anti-spam statute unless plaintiffs agreed to his settlement terms, plaintiffs responded by filing this lawsuit in the Commonwealth of Virginia, whose only connection to the controversy and the parties is that three of the four plaintiffs are residents of Virginia and the fourth (Cruise.com, Inc.) has an office in Virginia, but upon information and belief is headquartered in Florida.

As shown below, this Court lacks in personam jurisdiction over the defendants and venue is improper in this forum. Therefore, defendants respectfully ask the Court to dismiss this action in its entirety.

## **II. STATEMENT OF FACTS**

### **A. Mummagraphics**

Mummagraphics d/b/a WebGuy Internet Solutions is an Internet service provider (ISP) which advertises its services locally in Oklahoma and also over its Internet site accessible at WebGuy.net. Mumma Decl., ¶ 5 and Exhibit A thereto. Neither Mummagraphics nor its president Mr. Mumma have any continuous and systematic contacts with the Commonwealth of Virginia. Mummagraphics has no employees or agents present in the Commonwealth of Virginia, has no telephone listings in Virginia, does not advertise in Virginia, and neither owns nor leases real or personal property in Virginia. It also has performed no contracts in Virginia. *Id.*, ¶ 3. Over the past five years, WebGuy Internet Solutions has had no clients located in Virginia. *Id.*, ¶ 6. The

company does not attempt to solicit business specifically from individuals and companies residing in Virginia. *Ibid.*

Mr. Mumma personally has not resided in or traveled in the Commonwealth of Virginia and he does not have business associates or friends or family who reside in Virginia. Mumma Decl., ¶ 4.

The WebGuy.net web site describes Web Guy Internet Solutions various services, including registering domain names, designing logos and web sites, hosting web sites, and setting up servers. *Id.*, ¶ 5 and Exhibit A thereto. For non-clients, the web site is not interactive and non-client users, including all residents of Virginia, may not download documents from it, nor upload any documents to it. *Ibid.* The site does not allow users to purchase goods or services, or to make contributions, online. *Ibid.* The content of the site is not directed to persons in any particular state or region of the country. *Ibid.*

In recent years, Mummagraphics' Oklahoma servers have been overwhelmed by unsolicited spam e-mail. Mr. Mumma estimates that in 2004 from 150,000 to 250,000 spam e-mails were directed monthly on average to or through these servers. Mumma Decl., ¶ 7. In response to the spamming problem, Mummagraphics set up two additional web sites. *Id.*, ¶ 8. The first, OptOutByDomain.com, makes available a tool for email users to opt out of e-mail lists based on domain name rather than individual e-mail addresses, thus protecting their privacy. *Ibid.* The site does not allow users to download or upload documents. *Ibid.* At no time are users of OptOutByDomain.com requested to provide information concerning their physical location, their real names, their email addresses or any personal contact information. *Ibid.* The physical location of its users is

not relevant to the mission of OptOutByDomain. *See id.*, ¶ 8, and “Open Letter to Email Marketers,” Exhibit B thereto.

The second site, SUEaSpammer.com, attempts to ridicule and deter spammers by making public information about illegal spamming by specific companies. Mumma Decl., ¶ 8 and Exhibit D thereto. One part of the site provides detailed information on lawsuits against spammers filed in Oklahoma. *Ibid.* This includes downloadable information on the suits such as copies of alleged spam e-mails, and documents filed in the cases. *Ibid.* The site has an Oklahoma focus because all the alleged spamming occurred in Oklahoma on our company’s servers. *Ibid.*

While persons from states other than Oklahoma may access the information contained in the two sites, no attempt is made to direct the content to residents of particular states or regions. Mumma Decl., ¶ 9. There is nothing about the sites which would attract particular attention from residents of Virginia. *Ibid.*

## **B. The Present Controversy**

On December 29, 2004 Mr. Mumma received an e-mail from Cruise.com containing an advertisement for its cruises. Mumma Decl., ¶ 10. The e-mail falsely stated that he had “subscribed” to its e-mail list with the email address “inbox@webguy.net.” *Ibid.* Between January 1, 2005 and January 19, 2005, he received three additional spam e-mails from Cruise.com. *Ibid.* On January 19, he telephoned the legal department of Omega World Travel, Cruise.com, Inc.’s parent company and spoke with Omega’s General Counsel John Lawless. *Ibid.* Mr. Mumma informed Mr. Lawless that he was preparing a lawsuit against Omega, and offered to settle the suit. Mr.

Lawless assured him that any spam e-mails from Cruise.com would stop immediately.

*Ibid.*

Mr. Mumma received six additional spam e-mails from Cruise.com between January 19 and February 3, 2005. Mumma Decl., ¶ 11. On or about January 25, 2005, Mr. Mumma sent a demand letter to Daniel Bohan, one of the owners of Omega Travel offering to settle his claims against Omega Travel and Cruise.com. *Ibid.* Mr. Lawless telephoned him on February 3 to try to talk him out of his lawsuit, but Mr. Mumma told him he still intended to sue. *Ibid.*

Mr. Mumma received another spam e-mail from Cruise.com on February 9, 2005, after plaintiffs filed their Complaint in this action. Mumma Decl., ¶ 12.

Beginning in January, 2005, Mummagraphics featured Omega World Travel on SUEaSpammer.com as one of the companies it intended to sue, and placed copies of Cruise.com's spam e-mails on the site, including their attached images, and other digital information identifying the company and its owners. Mumma Decl., ¶ 13. All of this information was obtained from Mummagraphics' server in Oklahoma or publicly available press release images, and did not involve the use of any equipment, systems or personnel located in Virginia. *Ibid.*

During times relevant to this suit, aside from any electronic communication between Virginia residents and Mummagraphic's Internet sites, the only contacts Mr. Mumma or Mummagraphics had with any persons in Virginia were the telephone conversations with attorney John Lawless on January 19 and February 3, 2005, Mr. Mumma's demand letter to Daniel Bohan, and Mr. Mumma's contacts with lawyers in Virginia after Omega World Travel filed this lawsuit. Mumma Decl., ¶ 14.

### **III. Legal Analysis**

This motion is brought pursuant to Federal Rules of Civil Procedure, Rules 12(b)(2) and (3), and challenges the jurisdiction of the Court over the person of the two defendants, and also the existence of venue in this District.

#### **A. Jurisdiction**

Plaintiffs have the burden to show that personal jurisdiction exists in Virginia over the out-of-state defendants. *Young v. FDIC*, 103 F.3d 1180, 1191 (4<sup>th</sup> Cir. 1997). This U.S. district court may exercise personal jurisdiction over the defendants in the manner provided by Virginia law. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4<sup>th</sup> Cir. 1997); Fed. R. Civ. P. 4(k)(1)(A). Virginia's long-arm statute extends personal jurisdiction to the extent permitted by the U.S. Constitution's Due Process clause. *English & Smith v. Metzger*, 901 F.2d 36, 38 (4<sup>th</sup> Cir. 1990). Therefore, "the statutory inquiry merges with the constitutional inquiry and the two inquiries essentially become one." *Stover v. O'Connell Assocs., Inc.*, 84 F.3d 132, 135-36 (4<sup>th</sup> Cir. 1996).

The question of personal jurisdiction reduces to whether the defendants have sufficient minimum contacts with the forum such that the maintenance of this suit in Virginia does not offend "traditional notions of fair play and substantial justice." See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A court may assume power over an out-of-state defendant either by finding specific jurisdiction based on conduct connected to the suit, or by finding general jurisdiction based on general, more persistent, but unrelated contacts with the forum. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711 (4<sup>th</sup> Cir. 2002), *cert. denied*, 123 S. Ct. 868 (2003).

To establish specific jurisdiction over the defendants, plaintiffs must demonstrate that (1) defendants purposefully availed themselves of the privilege of conducting activities in Virginia; (2) plaintiffs' claims arise out of those activities; and (3) the exercise of personal jurisdiction would be constitutionally "reasonable." *Id.* at 711-12; See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984). To establish general jurisdiction over the defendants, plaintiffs must show that defendants' contacts with the jurisdiction that are not connected to the suit have been "continuous and systematic," a more demanding standard than is necessary to establish specific jurisdiction." See *Helicopteros*, 466 U.S. at 414 & n.9 (1984); *ESAB Group*, 126 F.3d at 623.

Plaintiffs' alleged basis for personal jurisdiction over the defendants is that "they operate web sites that advertise and solicit business in Virginia and initiate communications with Virginia residents and companies for commercial purposes." Complaint, ¶ 7. Plaintiffs identify those web sites as WebGuy.net, OptOutByDomain.com and SUEaSpammer.com. *Id.*, ¶ 5. Plaintiff thus rely exclusively on defendants' electronic web site activity to establish personal jurisdiction.

To prove general jurisdiction over a defendant, plaintiff must show more than that the defendants' web sites regularly and systematically transmitted electronic signals into the forum state. *ALS Scan*, 293 F.3d at 716. Even if transmissions from the aforesaid Internet sites would have resulted in numerous and repeated electronic connections with persons in Virginia, these transmissions would "not add up to the quality of contacts necessary for the State to have jurisdiction over the person for all purposes." *Ibid.* Moreover, aside from Mummagraphics' Internet sites, Defendants clearly lack the type of

general, systematic and continuous activity in Virginia to warrant assertion of general jurisdiction over them. *See infra*, at 2-3; and Mumma Decl., ¶¶ 3-4.

Thus, plaintiffs must prove specific jurisdiction over the defendants. When Internet activity by a defendant is the sole alleged basis for specific personal jurisdiction, plaintiffs must prove that the defendant (1) directed electronic activity into the State; (2) with the manifested intent of engaging in business or other interactions within the State; and (3) that activity created in a person within the State, a potential cause of action cognizable in the State's courts. *ALS Scan*, 293 F.3d at 712.

Plaintiffs' case for personal jurisdiction is essentially that the alleged conduct of the defendants in placing alleged defamatory content, plaintiffs' trademarks and copyrighted photographs on SUEaSpammer.com caused injury to the plaintiffs in Virginia. However, this case fails because WebGuy.net, OptOutByDomain.com, and SUEaSpammer.com are passive in nature for non-clients of Web Guy Internet Solutions, and Web Guy Internet Solutions has no Virginia clients, see Mumma Decl., ¶¶ 5, 6 and 8, and Exhibits A, C and D thereto. As the Fourth Circuit has held:

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. . . . Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

*ALS Scan*, 293 F.3d at 714.

Thus, a defendant's action of placing information on the Internet is not sufficient by itself to subject the defendant to personal jurisdiction in a forum state in which the site is accessed. *Id.* at 712. Plaintiff must prove that defendants posted the offending



material with a “manifest intent” of targeting persons in the forum state. See *Young v. New Haven Advocate*, 315 F.3d 256, 263-64 (4<sup>th</sup> Cir. 2002) (no personal jurisdiction when newspaper placed articles allegedly defaming Virginia resident on its passive Internet site without specifically intending to target Virginia residents); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4<sup>th</sup> Cir. 2003) (no personal jurisdiction for claim of trademark infringement when company set up semi-interactive web site but did not target Maryland residents).

In the instant case, Mummagraphics did not target a Virginia audience with its web sites. Mumma Decl., ¶ 5, 6 and 9. Indeed, there is nothing about the sites that would draw particular attention from Virginia residents. *Id.*, ¶ 9. SUEaSpammer.com’s references to Omega Travel, Cruise.com’s parent company and to its owners Daniel and Gloria Bohan do not refer to Virginia. See Exh. D to Mumma Decl. The SUEaSpammer.com site has an Oklahoma focus because the alleged spamming featured on the site occurred there. Mumma Decl., ¶ 8. The site is primarily directed to clients of Mummagraphics and others concerned about spamming, and in no way singles out Virginia residents for its messages.

Therefore, in the absence of Mummagraphics’ Internet activities specifically targeting residents of Virginia, there can be no personal jurisdiction over either defendant. Accordingly, defendants respectfully request this Court to dismiss plaintiffs’ Complaint.

## **B. Venue**

In the absence of personal jurisdiction over the defendants, venue would not be proper in Virginia. However, even if personal jurisdiction were found over Mr. Mumma in

Virginia, venue would not lie in this District for this suit against him personally because a substantial part of the events and omissions giving rise to the suit did not occur in this District, and Mr. Mumma is not present in Virginia for venue purposes. See 28 U.S.C. 1391 (b) and (c).

#### **IV. CONCLUSION**

For the foregoing reasons, plaintiffs' Complaint should be dismissed in its entirety against both defendants.

Dated: March 15, 2005

Respectfully submitted,

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