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Defendant's Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF CALIFORNIA

CLOSED CORPORATION, a California Corporation, Plaintiff, v. OPEN SESAME USERS GROUP, DOES 1-1000, SCAPE GOAT, Defendants.	Case No.: CT-0001-DFO **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Defendants OPEN SESAME USERS GROUP, DOES 1-1000, and SCAPE GOAT hereby submit their Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. OPEN SESAME IS NOT AN UNINCORPORATED ASSOCIATION

"It is elementary that a court may not recognize an association as a legal entity under a statute or, alternatively, determine that a right vests in the individual members of an association unless the association has a distinct, identifiable membership." *Motta v. Samuel Weiser, Inc.*, 598 F. Supp. 941, 949 (D. Me. 1984). Plaintiff's argument that participation in Open Sesame provides sufficient authoritative criteria to define membership is invalid for several reasons.

First, as an unmoderated newsgroup, Open Sesame has no centralized authority or ability to restrict access. Indeed, anyone in the world can participate via the Internet by reading or posting messages. If a message is "off-topic" or otherwise inappropriate, no mechanism exists to discipline users for noncompliance or prevent them from participating then or in the future. Because there is no ability to exclude participation in the newsgroup, membership is not defined.

Second, membership cannot be determined from old Usenet archives. Individuals who access Open Sesame do not assent to membership simply by posting messages. Where the "basic and necessary conditions upon which membership in the defendant Association could be predicated are wanting, the rights and liabilities as usually arise from membership in an unincorporated voluntary association cannot be left for their enforcement to such loose contacts as evidenced herein." *Id.* at 950 (quoting *Johnson v. South Blue Hill Cemetery Ass'n*, 221 A.2d 280, 283 (Me. 1966)). Because no membership criteria for participation in Open Sesame exist, participation in the newsgroup cannot characterize assent to membership by participants.

Finally, users determine their own level of involvement in Open Sesame. They may post a message only once, every day, or never visit the site again. Such informal, transitory, and attenuated "membership" cannot form an unincorporated association. *See California Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057, 1068 (N.D. Cal. 1970).

Next, Plaintiff asserts that newsgroups "require considerable effort and planning to create," and for this reason they should be

deemed unincorporated associations. Pl.'s Mem. Opp. Mot. Dismiss at 1105. This argument is invalid. First, it is *not* difficult to create a new newsgroup. If the topic is semi-serious and a hundred people can be convinced to vote for it—out of an Internet population numbering in the tens of millions—the new newsgroup is created. Therefore, a newsgroup's existence is less evidence of effort and planning than of acceptance of a valid topic of discussion by the Usenet community. Second, method of creation is not the standard by which the existence of an unincorporated association is measured. Rather, it is the organizational structure and, specifically, its "distinct, identifiable membership" after its creation that are important. *Motta*, 598 F. Supp. at 949.

Since none of the Defendants has the ability to prescribe the conditions or qualifications of membership, to enlarge or reduce membership or the scope of group activities, to dissolve the group, or to perform any of the other acts characteristic of an unincorporated association, Open Sesame cannot possibly be an unincorporated association.

II. NEITHER OPEN SESAME NOR THE DOE DEFENDANTS HAVE SUFFICIENT MINIMUM CONTACTS WITH CALIFORNIA TO ESTABLISH PERSONAL JURISDICTION OVER THEM

Traditional jurisdictional analysis requires that a defendant have certain purposeful "minimum contacts" with the forum state before that defendant can be haled into the forum to defend a lawsuit. *See Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe v. Washington*, 326 U.S. 310 (1945). However, Plaintiff would ask this Court to discard this approach in favor of a new standard that bases jurisdiction not on any actual contacts the defendant has with the forum, but rather on the statistical likelihood that the defendant *could* have contacts with the forum. This is simply not the standard.[1]

Plaintiff argues that Defendants purposefully availed themselves of the benefits and protections of California by virtue of a study that claims "14.4% of all World Wide Web users" reside in California,

1. Even the decision in *Inset Systems v. Instruction Set*, 937 F. Supp. 161 (D. Conn. 1996), which has been rejected by most courts as overly broad, based jurisdiction on evidence of actual, multiple "hits" to the defendant's Web page by Connecticut residents.

thereby making it foreseeable that a "distributed software development group will make use of, and benefit from, developers within California." Pl.'s Mem. Opp. Mot. Dismiss at 1118. Plaintiff does not show that any developers in California actually *were* involved in developing Open, only that it is *possible* that some residents in California *may* be working on *some* distributed software development project or using the product. Not only are these not sufficient minimum contacts for exercising personal jurisdiction, they are not even "contacts." *See Burger King*, 471 U.S. at 485-87.

Neither is the existence of a passive Web site alone enough to find personal jurisdiction. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997). A newsgroup is akin to a passive Web site for the purpose of determining personal jurisdiction. *See Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 728 (E.D. Pa. 1999). In cases involving passive Web sites where personal jurisdiction was found, courts have consistently found additional contacts directed at the forum. *See, e.g., Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (attempting to extort money from the plaintiff, defendant sent e-mail and made telephone calls to the forum); *CompuServe v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (entering into a contract with forum "choice of law" provision); *Bochan v. La Fontaine*, 68 F. Supp. 2d 692 (E.D. Va. 1999) (posting defamatory messages and soliciting business in the forum); *Blumenthal v. Drudge*, 992 F. Supp. 44, 54 (D.C. 1998) (traveling to the forum to promote a Web site); *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 44 (D. Mass. 1997) (using Web site to solicit additional commercial contacts with forum residents); *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1126-27 (W.D. Pa. 1997) (entering into contractual agreement via e-mail).

This is consistent with jurisdictional analysis outlined by the Supreme Court, which has rejected finding jurisdiction where a defendant's only contacts with a forum were the placing of a product into the stream of commerce. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Similarly, the Defendants here should not be forced to defend a lawsuit in California simply because mirror servers outside the Defendants' control brought the newsgroup into California and the Open Sesame newsgroup can be accessed by California residents.

Next, Plaintiff argues that personal jurisdiction is proper because Open Sesame "targets" California. This argument fails for two reasons. First, because Open Sesame is an unmoderated newsgroup, it has no means whatsoever to exclude anyone in the world from reading and posting messages. Second, Open Sesame's content is not directed exclusively at California residents. Because anyone in the world can access and participate in the site, Open Sesame is not targeting any specific forum.

Next, Plaintiff contends that since Open Sesame *could* have been created as a moderated newsgroup, it targets California regardless of the fact that it is an *unmoderated* group. This argument lacks merit. Not only is there no requirement that a newsgroup be moderated, in Open Sesame's case such moderation would greatly encumber the newsgroup because of the volume of discussions that would have to pass through the bottleneck of a moderator. In addition, as e-mail addresses provide no indication of the geographic location of the sender, there is no practical and effective way for a newsgroup moderator to screen users from a particular locale. Users from the blacklisted forum could easily circumvent screening measures by using e-mail hosted on servers located outside the forum or simply by supplying inaccurate information. Furthermore, even if effective screening measures could be devised, Defendants would be forced to exclude users from any forum where they faced potential liability. Because the Views product is located everywhere, the only option for Defendants in this case would be not to have a newsgroup at all. This would have a disastrous chilling effect on Internet innovation.

Plaintiff's argument that personal jurisdiction is proper under the "effects doctrine" outlined in *Calder v. Jones*, 465 U.S. 783 (1984), is also invalid. Because Defendants cannot limit access or distribution of the Open Sesame newsgroup, this case is clearly distinguishable from *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, L.P.*, 34 F.3d 410 (7th Cir. 1994), and *Calder*, where the defendants had control over distribution of their product. Because Views is sold worldwide, California is not the focal point of any harm suffered. Therefore, Plaintiff's reliance on *Panavision*, *supra*, 141 F.3d 1316, where the plaintiff's harm centered in California because of the presence of the movie industry, is misplaced. Furthermore, courts have "refused to extend the [effects doctrine] to

defendants whose contacts are more remote." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993) ("[W]e refused to accept the plaintiff's argument that the effects of libel are felt and jurisdiction exists wherever a corporate plaintiff resides."). Similarly, the effects doctrine should not be applied here simply because Plaintiff's headquarters is located in California.

Finally, Plaintiff asserts that because "defendants are sophisticated users of the Internet and capable of maintaining complex interactions from a distance[, t]his is strong evidence that they would be able to participate in their own defense from their own domicile with little difficulty." Pl.'s Mem. Opp. Mot. Dismiss at 1122. This sorely underestimates the burdens that foreign defendants will face if forced to defend a lawsuit in California. "The Supreme Court has recognized that defending a lawsuit in a foreign country can impose a substantial burden on a nonresident alien." *Core-Vent*, 11 F.3d at 1488. Because none of the Defendants receives any remuneration for his or her participation in Open Sesame, the vast majority participate only as a hobby and must hold other paying jobs from which they will be forced to take time off for this lawsuit. In addition, for many of the Defendants, English is not their primary language. For this and many other reasons, exercising personal jurisdiction over Defendants in this case would not comport with "traditional notions of fair play and substantial justice."

III. THIS COURT DOES NOT HAVE PROPER VENUE OVER DEFENDANTS

Courts have held that advertising on a Web site does not constitute "transacting business" in a state. *See Hearst Corp. v. Goldberger*, No. 96CV3620, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997) (holding that a Web site with national advertisements for legal services did not constitute the transaction of business in New York nor the solicitation of business because it was viewable by persons in all fifty states). To hold otherwise would allow jurisdiction (and venue) in any forum in the world. Therefore, Defendants are not "transacting business," and California cannot constitute their "regular and established place of business" under 28 U.S.C. § 1400(b).

Plaintiff contends that the Open Sesame newsgroup and the FTP server in Finland constitute an "offer to sell" Open to California residents and that this constitutes a regular and established place of

business in California. Despite the obvious fact that Open is free and none of the Defendants is offering to sell it, the existence of an Open source code and instructions on the FTP server do not fit with the definition of a valid offer. Anyone can access the site and download the code, with no strings attached. Although those who make modifications to the code are asked to post those changes to the newsgroup, there is no mechanism to enforce this and no evidence that Open Sesame can sue for breach of contract. There is no click license, only the honor system. Even if the FTP server were an offer, it would not constitute a regular and established place of business in California any more than offering to sell legal services in a national newspaper or a Web site viewable worldwide would constitute a regular and established place of business in New York. *See id.*

IV. SERVICE OF PROCESS ON OPEN SESAME AND THE DOE DEFENDANTS WAS IMPROPER

No court in the United States has recognized e-mail as a valid form of service. Because there is no return receipt to disclose who is actually receiving the e-mail, it is not reasonably calculated to provide actual notice and, therefore, will not constitute proper service under California Code of Civil Procedure section 415.30 or section 413.30. Furthermore, posting the summons to the newsgroup is not valid service on the Doe Defendants under section 413.30 because it is not reasonably calculated to give them actual notice, given the fact that newsgroup messages are removed after a time to make way for new messages and many users do not read, filter through, or simply never check all the messages posted. Furthermore, given the ease with which a summons could be reproduced, altered and posted on newsgroups and adjacent servers that were not the newsgroups being served, users would have great difficulty determining whether such summons were the genuine article or simply an Internet hoax. Therefore, posting of the summons is not valid service.

Because Open Sesame is not an unincorporated association, it cannot be served. However, even if it were an unincorporated association, service here would be invalid. Plaintiff argues that the subset of developers suffice as the "head" of Open Sesame for purposes of service of process under California Code of Civil Procedure section 416.40. This argument cannot prevail because the identity of

the developers is unknown and e-mailing them entails the same shortfalls as e-mailing the Doe Defendants. Furthermore, because membership in Open Sesame is unlimited and transitory, different individuals may be performing the developer task each time. Therefore, posting summons to the newsgroup is not valid service.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion to Dismiss be granted with prejudice.

Dated: October 19, 1999

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF CALIFORNIA

CLOSED CORPORATION, a California Corp., Plaintiff, v. OPEN SESAME USERS' GROUP, DOES 1–1000, SCAPE GOAT, Defendants.	Case No. CT-0001-DFO ORDER

DIARMUID F. O'SCANNLAIN, Judge*

This matter came on for evidentiary hearing before this Court on October 23, 1999, at the California Institute of Technology, Pasadena, California, on Defendants' Motion to Dismiss. The evidence presented by all parties having been duly considered, argument on all issues having been fully heard, and a ruling from the bench having been rendered by this Court on the completion thereof (see transcript attached),

1) Defendants' Motion to Dismiss is GRANTED with respect to Defendants Does 1–1000;

2) Defendants' Motion to Dismiss is DENIED with respect to Defendant Open Sesame Users' Group;

3) Defendant's Motion to Dismiss is DENIED with respect to Defendant Goat; and

4) Plaintiff shall have 30 days within which to amend its complaint whereafter the case shall be set for trial on the merits.

IT IS SO ORDERED.

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* United States Circuit Judge for the Ninth Circuit, sitting by designation.