



“Kirch”), among others. Scoville has obtained a Temporary Restraining Order preventing Kirch from actions which Scoville alleges have damaged him and his Internet business, Free Speech Store, and FreeSpeechStore.com (“FSS”) in an amount in excess of \$3.525 million. Scoville claims Kirch’s operation of Abusive Hosts Blocking Lists and The Summit Open Source Development Group (“AHBL” and “SOSDG”, respectively); passive websites have committed various torts against Scoville.

2. Scoville seeks:           \$2,000,000 in damages for the loss of “benefit of the bargain” to negotiate and conduct business in good faith;  
  
  \$1,000,000 in damages to his personal business credit;  
  
  \$500,000 for personal emotional distress, including humiliation and embarrassment in the UseNet portion of the Internet; and  
  
  \$25,000 for the cost of constantly changing ISPs, and his escalating costs of maintaining an ongoing business.

3. Even if Scoville could recover on these curiously plead claims, Kirch is not subject to the jurisdiction of this Court, and as a non-resident of Texas, who has neither availed himself of the privilege of conducting business here, nor maintained continuous and systematic contacts with the State, Kirch cannot be sued in the Texas Courts simply because Scoville seeks to use the Courts to bully Kirch into stopping what is “damaging” Scoville’s business. That is, alerting the Internet public to those who are known to pepper cyberspace with Unsolicited Commercial E-mail (“UCE”) and Unsolicited Bulk E-mail (“UBE); that which we all unkindly and commonly know as the dreaded, eternal, uninvited, and most unwanted ***“SPAM”***.

## FACTS

4. Kirch is not a resident of Texas, and has had no purposeful contacts with this state. Andrew D. Kirch is an individual who resides in the State of Indiana. (See, Affidavit of Andrew D. Kirch (“Kirch Affidavit”) attached hereto as Exhibit “A”). AHDL and SOSDG are unincorporated, web domains located on Kirch’s personal web-server, located in his Indiana home. These domains, commonly known as websites are what are known as “passive” websites, created exclusively for the purpose of tracking Internet “spammers”. Many spammers, like Scoville, send unwanted messages to the Internet community, offering connections to various, seemingly-desirable “links”. The Internet user soon discovers, however, that these unwanted messages jam up their computers, impair the use of one’s own systems, and offer information, unasked-for in the first place, for a price.

5. Passive sites such as the Kirch websites offer information about spam, and about computer security to the Internet public at no cost. These websites provide neither facilities nor any method whereby an Internet user can purchase services from Kirch, the site owner, or the domains AHBL and/or SOSDG. These passive sites are called “good Samaritan sites” by the United States Government. (See, 47 USC 230 § (c)(1) and(2)(A) and (B).

6. The other “Kirch” Defendants named in this case by Scoville, AHBL.ORG, SOSDG.ORG, D&K Consulting and trelane.net are either repetitive names for the Defendants discussed above (AHBL.ORG is the “address” for AHBL, and not a separate

entity; the same is true for SOSDG.ORG and SOSDG; trelane.net is merely the domain used personally by Kirch to send and receive email, and D&K Consulting is an entity once formed by Kirch and Brian J. Bruns, but which has never been used for any purpose whatsoever)(See, Kirch Affidavit, Exhibit “A”).

7. The Kirch Defendants incorporate the Kirch Affidavit, as if fully set forth herein, to establish the facts demonstrating their lack of contact with the State of Texas. To summarize a few such facts, none of the Kirch Defendants have never done business in Texas, owned real or personal property located in Texas, contracted with any person or entity in Texas, sold or purchased any goods or services in Texas, employed anyone, or been employed by anyone in Texas, borrowed or loaned any money to or from any Texas resident or entity, nor have they contracted with any person or entity in this State. Further, none of the Kirch Defendants have purposefully directed any activities toward Texas, nor had continuous and systematic contacts with Texas.

### **ARGUMENT AND AUTHORITIES**

8. Texas courts do not have jurisdiction over a non-resident defendant unless the non-resident defendant has purposefully established “minimum contacts” with Texas, and the exercise of jurisdiction comports with “fair play and substantial justice.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76, 105 S. Ct. 2174, 2183-84(1985); *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P. L. C.* 815 S. W. 2d 223, 226 (Tex.1991).

## NO MINIMUM CONTACTS

9. Under minimum contacts analysis, Texas courts must determine whether the non-resident defendant has purposefully availed itself of the privilege of conducting activities within Texas. *Guardian Royal*, 815 S. W. 2d at 226; *see CSR Ltd. v. Link*, 925 S.W. 2d 591, 596 (Tex. 1996). Minimum contacts are not established unless the court finds it has either specific or general jurisdiction over the defendant. *See Guardian Royal*, 815 S. W. 2d at 227-28.

10. Texas courts cannot exercise specific jurisdiction over a non-resident defendant unless the non-resident defendant's activities were "purposely directed" to Texas, and the litigation results from injuries that are alleged to "arise out of" or "relate to" those activities. *National Indus. Sand. Ass'n v. Gibson*, 897 S.W. 2d 769, 774 (Tex 1995); *Schlobohm v. Schapiro*, 784 S.W. 2d 335, 358 (Tex. 1990); *see Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U. S. 408, 414, 104 S. Ct. 1868, 1872 (1984); *Guardian Royal*, 815 S. W. 2d at 227. Texas courts do not have specific jurisdiction over defendant because defendant did not purposefully direct his/its activities to Texas, and plaintiff's cause of action did not arise from or relate to defendant's contacts with Texas. Rather, plaintiff's cause of action, if any, arose from the decisions of individual Internet users to block unwanted spam, and/or to pay a fee for information or services associated with links given on Scoville's spam. Furthermore, the only conduct at issue in this case is the creation and maintenance of a website in Indiana where information can be provided

about abuse from Scoville's (or any other spammer's) web presence was undertaken by Kirch in Indiana. Kirch's actions took place far outside of Texas, and entailed no contact at all with the State of Texas. The Fifth Circuit, along with the vast majority of the federal courts has held that the mere viewing of a non-resident defendant's passive website is insufficient to warrant the assertion of personal jurisdiction. *Mink v. AAAA Development*, 190 F.3d 333 (5<sup>th</sup> Cir. 1999). In that case, the court held that a Vermont company could not be sued in Texas where a passive Internet site allowed viewers to send emails to the defendant company. *Id.* A New York federal court refused to allow jurisdiction against an out of state defendant because a "Web site that can be accessed worldwide" is not the equivalent of actively seeking New Yorkers to access the site, especially where the defendant conducted no business in New York. *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.2d 25 (2d Cir. 1997). Creating a website, like placing one's product into the stream of commerce, may be felt nationwide, or even worldwide, but without more, is not an act purposefully directed at the forum state. *Id.*, *citing Asahi Metal Indus. Co. v. Superior Court*, 480 U. S. 102, 112 (1992).

11. Kirch, an Indiana resident, after receiving Scoville's spam on Kirch's email server, as well as on his Net News Server, also located in Indiana, noted this activity on his passive web domain, which was created in Indiana. Kirch thereafter posted the email volleys he received from Scoville, and his response to those volleys, pursuant to the posted Privacy Policy set forth on Kirch's website. Kirch is not Scoville's competitor, Kirch sells nothing to Texas residents, or anyone else. He has never lived in, worked in, or even been to Texas. Surely, this is not a defendant who could have reasonably anticipated being haled into court in Texas.

12. Texas courts cannot exercise general jurisdiction over a non-resident defendant, unless the defendant has continuous and systematic contacts with Texas. *Guardian Royal*, 815 S. W. 2d at 230.; *see Helicopteros*, 466 U. S. at 416, 104 S. Ct. at 1873; *Siskind v. Villa Found. For Educ., Inc.*, 642 S. W. 2d 434, 438 (Tex. 1982). Texas has no general jurisdiction over the Kirch defendants, because they have had no contacts with Texas, much less any that can be described as continuous and systematic. (See Kirch Affidavit, Exhibit "A".)

## NO FAIR PLAY & VIOLATION OF DUE PROCESS

13. This court's assumption of jurisdiction over the Kirch defendants will offend traditional notions of fair play and substantial justice, inconsistent with the Constitutional requirements of due process. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945); *Guardian Royal*, 815 S.W. 2d at 231. The Court should refuse to exercise jurisdiction over the Kirch defendants because to do so would drag these defendants over a thousand miles from their resident state; because Texas has no special interest in adjudicating the Plaintiffs purported claims, none of which arose in this state; and, to do so would clearly interfere with the interstate judicial systems' interest in obtaining the most efficient resolution of controversies. Even the plaintiff cannot obtain the most convenient and effective relief when his home state erroneously exercises jurisdiction where it has none. Finally, such an exercise of jurisdiction in this case would have only the most chilling effect on the free speech of the citizens of our country, and indeed of the world, which is now bound together by our computerized communications "net." We must guard the right not to be dragged into foreign jurisdictions without cause. *See Guardian Royal*, 815 S. W. 2d at 231.

CONCLUSION

14. The Kirch defendants do not have the minimum contacts with the State of Texas to justify a Texas court's assumption of jurisdiction. If this court assumes jurisdiction, it will offend traditional notions of fair play and substantial justice.

WHEREFORE, PREMISES CONSIDERED, the Kirch Defendants request that their Special Appearance be set for hearing, that the Special Appearance be Sustained by the Court, and that the Court enter a final judgment dismissing Plaintiffs' claims against Defendants with prejudice for refiling in Texas; that the Court award the Kirch Defendants all costs of court, attorney's fees and expenses, and such other and further relief, at law or in equity, to which they may be justly entitled.

*MARY CLAIRE FISCHER*  
*ATTORNEY AT LAW*  
*9311 SAN PEDRO AVENUE,*  
*SUITE 700*  
*SAN ANTONIO, TEXAS 78216*  
*(210) 541-3905*  
*(210) 541-3906 (FACSIMILE)*

  
*MARY CLAIRE FISCHER*  
*SBN 07043020*

*ATTORNEY FOR DEFENDANTS,*  
*ANDREW D. KIRCH, ABUSIVE*  
*HOSTS BLOCKING LISTS,*  
*AHBL.ORG,*  
*THE SUMMIT OPEN SOURCE*  
*DEVELOPMENT GROUP,*  
*SOSDG.ORG, D&K*  
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**MARY CLAIRE FISCHER**  
**ATTORNEY AT LAW**  
**9311 SAN PEDRO AVENUE,**  
**SUITE 700**  
**SAN ANTONIO, TEXAS 78216**  
**(210) 541-3905**  
**(210) 541-3906 (FACSIMILE)**

  
**MARY CLAIRE FISCHER**

**ATTORNEY FOR DEFENDANTS,**  
**ANDREW D. KIRCH, ABUSIVE**  
**HOSTS BLOCKING LISTS,**  
**AHBL.ORG,**  
**THE SUMMIT OPEN SOURCE**  
**DEVELOPMENT GROUP,**  
**SOSDG.ORG, D&K**  
**CONSULTING AND TRELANE.NET**



2. I gained my personal knowledge of the facts stated in this Affidavit through my participation in development and operation of two Internet domains, which have also been named as Defendants in the Lawsuit, Summit Open Source Development Group ("SOSDG") and Abusive Hosts Blocking Lists ("AHBL"), as well as from my life experience as a resident of Indiana. Although the Plaintiffs have also named SOSDG.ORG and AHBL.ORG as separate Defendants, these entities are the same as SOSDG, and AHBL, respectively, described above. Plaintiffs have also named TRELANE.NET (which is correctly spelled: trelane.net) as another Defendant in the Lawsuit. "trelane.net" is not a business entity of any kind. Rather it is the domain name I use to send and receive emails.

2. AHBL and SOSDG are separate domains (commonly referred to as "websites"), located on the same web-server. That web-server is located in my home office in Indianapolis, Indiana. I am 24 years old. I am a resident of, live in, and work in Indianapolis, Indiana. I was born in Indianapolis Indiana, and have lived my entire life in the state of Indiana. With the exception of a portion of one school-year, during which I lived in Howe, Indiana, I have lived my entire life in the City of Indianapolis. I have never lived in, traveled to, visited, traveled through or done business in the State of Texas.

3. I do not, nor have I ever, individually, or through AHBL, SOSDG or trelane.net owned any personal property or real estate in Texas. I have never invested in any companies located in Texas; I have never employed anyone in the State of Texas, nor have I been employed by anyone living in the State of Texas, or by any company located in the State of Texas. I have never, individually, or through AHBL, SOSDG or trelane.net, signed, entered into or performed any contract in the State of Texas.

4. I do not, individually, or through AHBL, SOSDG or trelane.net, sell any products at all, much less any products which could have entered into Texas, or could have been sold in Texas. I have never, individually, or on behalf of AHBL, SOSDG or trelane.net placed or received any telephone calls to or from anyone in the State of Texas for the purpose of soliciting any kind of business. I have never made payments to anyone in the State of Texas under any contract or agreement, or for the purchase or sale of any goods or services (with the exception of attorneys' fees I may be required to pay to Mary Claire

Fischer to represent me, AHBL, SOSDG, and trelane.net in the Lawsuit). I have never received payments from anyone in the State of Texas under any contract or agreement, or for the purchase or sale of any goods or services.

5. I have never, individually, or through AHBL, SOSDG or trelane.net, loaned money to anyone living in or located in the State of Texas. I have never, individually, nor through AHBL, SOSDG or trelane.net, secured any loan made to me, AHBL, SOSDG or trelane.net, or by me, AHBL, SOSDG or trelane.net, with any property located in the State of Texas. I do not now, nor have I ever had a bank account in the State of Texas. None of AHBL, SOSDG or trelane.net now has, nor have they ever had a bank account in the State of Texas.

6. I am the sole proprietor, owner and operator of the AHBL and SOSDG domains. Neither of these domains are incorporated companies as stated by the Plaintiffs in the Lawsuit. Along with other individuals, who provided their work on a voluntary basis, without compensation, I created these two domains in my spare time, and both of them are operated on a not-for-profit basis.

7. AHBL and SOSDG were created for the sole purpose of tracking Internet "spammers". A spammer is a company or website or individual that sends what is popularly known as "spam" to internet users. The technical names for Internet "spam" are: Unsolicited Commercial E-mail ("UCE"), and Unsolicited Bulk E-mail ("UBE"). The AHBL and SOSDG websites are what are known as "passive" websites. That is, they offer information about spam, and computer security for internet users. Neither AHBL nor SOSDG provide any facility whereby viewers of these websites can purchase goods or services from me, AHBL or SOSDG.

8. I received spam, both UCE and UBE from the Plaintiffs, Richard M. Scoville ("Scoville"), Free Speech Store a/k/a FSS, and/or FreeSpeechStore.com on both my email server and my "Net News Server"

in Indianapolis Indiana. I noted the receipt and sender(s) of this spam on AHBL and SOSDG. Thereafter, I received email threatening me with lawsuits, and other actions from Scoville, Free Speech Store a/k/a FSS, and/or FreeSpeechStore.com. In accordance with the clearly stated, written Privacy Policy posted on AHBL and SOSDG, those threatening emails were also posted on AHBL and SOSDG.

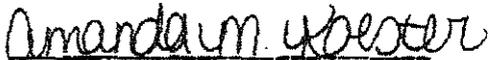
9. I have done nothing more than document unsolicited information and abuse information I received from and about the Plaintiffs on my non-commercial, passive websites, which are located in my home in Indianapolis, Indiana.

Further, Affiant sayeth not.

  
Andrew D. Kirch, Affiant

Subscribed and sworn to before me by the said Andrew D. Kirch, on this the 28 day of December, 2005.

Indiana

  
Notary Public, State of  
County of Marion

Amanda M Koester  
Printed Name of Notary

My Commission Expires:

12/29/2011