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February 23, 2006

Small Claims Court  
Superior Court-Palo Alto Courthouse  
270 Grant Avenue  
Palo Alto, California 94306

Re: *Kirsch v. Bush Ross P.A.*  
Case No. 205SC002909

Dear Commissioner Madden:

On behalf of Bush Ross, P.A., a Florida professional corporation, in its capacity as the named defendant in the captioned action (the "**Firm**"), I acknowledge receipt of a copy of the court's Judgment, dated January 9, 2006 (the "**Judgment**"), continuing until Monday, February 27, 2006 the hearing originally convened on January 9 for the purpose, preliminarily, of considering the Firm's motion, made by way of a letter dated December 7, to dismiss Plaintiff's claim on the grounds that the court Packs personal jurisdiction over the Firm. This letter is intended to supplement the material contained in or attached to the December 7 letter, all of which is incorporated into the body of this letter by specific reference thereto.

The Judgment noted that the continuance had been granted so that a "non-atty rep. fi-om Bush Ross [could] appear". As we trust you will understand, we wish to avoid such an appearance so as not to be personally served during or after the hearing and to preserve our legal argument that Plaintiff has failed to effect proper service of his claim. Our ultimate goal is to force Plaintiff, should he seek to persevere in his action, to bring an action against the Firm in Florida. Accordingly, we will not have present at the hearing any firm representative<sup>1</sup> It is our understanding that under §116 370(b) of the California Code of Civil Procedure ("CCCP") we may, nonetheless, present argument favoring such a dismissal without personally appearmg, and we do so through the medium of the December 7 letter, this letter and the documents referenced in each.

The court is aware that §116.340, CCCP, states in subsection (e) that: "Service shall be made within this state, except as provided in subdivisions (f) and (g)", and that neither subsection (f) (California real property owned by a non-resident failing to identify an resident agent) nor (g) (non-resident owner of a motor vehicle involved in an accident occurring within the state) is applicable to the instant action.

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<sup>1</sup> We have, however, again asked Mr. Snyder to attend, solely so that he might report to us the substance of the discussion and any result that may be forthcoming.

Plaintiff therefore sought to effect service upon the Firm "within" California by serving the California Secretary of State<sup>2</sup>.

But under §416.10 CCCP and §2111(a), Cal. Corps. Code, a foreign corporation may be served through the medium of the California Secretary of State only if it is "doing business in the state". See, e.g. Detsch & Co. v. Calbar, Inc. 228 Cal.App.2d 556 (1964): "For a California court to have jurisdiction over a foreign corporation it is necessary that it be doing business in state at time summons is served . . . ." The court based its January 12 order, directing the California Secretary of State to accept service on behalf of the Firm, upon a finding that the Firm "has been doing business in the State of California" without having designated an agent for such service. Such a finding appears to have been based solely upon Plaintiff's appended declaration in support of his ex parte motion seeking such order. As noted in our previous correspondence of December 7, that declaration contains four separate allegations, each of which is blatantly false. In such declaration, Plaintiff alleged that:

1. the Firm "sent Plaintiff an unsolicited fax", knowing that neither the Firm, nor anyone associated therewith, ever sent any fax to him, and that such allegation, previously made by him in pleadings filed in *Kirsch v. Cuadra*, USDC, ND Calif., Case #05-03010 (the "Prior Case"), had been controverted in a declaration filed in that case by Jeremy Ross, a Firm shareholder ("Neither I nor any member or employee of [the Firm] sent any of the alleged facsimiles to plaintiff, participated in or discussed with anyone the sending of the alleged facsimiles, nor was aware that any of the alleged faxes was to be or was sent."). A copy of the Ross declaration was attached to our December 7 letter.

2. the Firm was an "intentional tortfeasor", knowing that such characterization is based upon nothing other than Plaintiff's conclusory opinion derived from the unfounded and controverted allegation that the Firm "sent" unsolicited faxes, which allegation had been controverted by Ross in his Prior Case declaration ("Neither I nor the [Firm] has ever marketed, offered for sale or sold any product or service in California via facsimile transmission."

3. "Bank records show that Bush Ross PA paid nearly \$500,000 to have the fax sent . . . .", knowing that none of the Firm's funds were so used and that the account from which funds were disbursed at the written direction of then existing Firm clients was a trust account over which the Firm had no discretionary authority.

4. "[the Firm] was a key conspirator in the pump and dump securities fraud.", knowing that: (a) such statement had no basis in fact or law; (b) the United States Securities and Exchange Commission (the "Commission"), which had commenced in mid-August 2004 its own investigation of matters involving the offer and sale of securities issued by the Firm's client, Concorde America, Inc. ("Concorde"), and had initiated civil litigation against such entity and others in February 2005, had brought no action against Mr. Ross or the Firm; and (c) neither Mr. Ross nor the Firm has been identified as a target, suspect or person of interest in any of the federal grand jury proceedings which have been convened to review, from a criminal law perspective, the securities transactions of Concorde and other entities.

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<sup>2</sup> We acknowledge that Plaintiff has also attempted on two occasions to effect service upon the Firm at its Tampa, Florida office by use of a commercial process server, but as noted neither such effort was permitted by the California Code of Civil Procedure.

On the date that Plaintiff made his false declaration, he was also aware that the court in the Prior Case had previously entered an order granting the Ross motion to dismiss for lack of jurisdiction (the "Order"), that Ross was **the only member of the Firm having any connection** to the facts with respect to which the pending action relates, and that the Order had found that Plaintiff had failed to allege sufficient facts:

1. which could satisfy his burden of proving the elements required for a finding of California jurisdiction (i.e. the commission of an intentional act directed at the State of California);
2. which identified any conduct by Ross in support of a finding that Ross had minimal contact with California;
3. demonstrating how Ross' legal representation of Florida clients, in Florida, could amount to an intentional act directed at California; or
4. which proved that funds transferred out of a Firm trust account belonged to Ross (or, by inference, to the Firm itself) or were under his control, or how any such transfers demonstrated "purposeful contact with California."

In light of the noted awareness, Plaintiffs false allegations appear to have worked a conscious fraud upon the Court, and at a minimum his action should be dismissed for lack of jurisdiction.

In considering such request, we believe it is important for the court to recognize that Plaintiffs **only** claim, for which he seeks the court's jurisdiction, is founded upon the Finn's alleged "knowing and willful violations of the TCPA [the federal Telephone Consumer Protection Act](action authorized by 47 U.S.C. §227(b)(3))." Section (b) of that Act pertains to restrictions on the use of automated telephone equipment. Subsection (b)(1)(C) renders unlawful the use of any "telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine". It is a single such "use" ("an advertisement for TWTN sent via fax to my home fax machine without my express consent") that Plaintiff has claimed himself to be the victim of and for which he seeks redress against the Firm. He bases his state court private right of action upon Subsection (b)(3) of the Act which allows him to "recover [the greater of] actual monetary loss from such a violation, or . . . \$500 . . . for each such violation, and establishes grounds for treble damages if "the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed [hereunder]".

A single regulation, found in 47 CFR §68.318(d), has been promulgated under the Act with reference to the nature of Plaintiffs claim. Chapter 47 CFR deals with ""Telecommunications", Part 68 is entitled, ""Connection of Terminal Equipment to the Telephone Network", Subpart D (covering sections 300 - 354) is entitled, "Conditions for Terminal Equipment Approval", and Section 318 is entitled, ""Other Limitations". Subsection (d) states as follows:

**"Telephone facsimile machines; Identification of the sender of the message.** It shall be **unlawful for any person** within the United States **to use** a computer or other electronic device **to send** any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the

telephone number of the sending machine or of such business, other entity, or individual. If a **facsimile broadcaster** demonstrates a **high degree of involvement** in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted page." (the "**Regulation**") [**emphasis added**].

The following sorts of persons are identified in this subsection: (a) **users** of electronic equipment, (b) **senders** of the illegal messages, and (c) **facsimile broadcasters**. All three may be the same "person", or, more likely, where a high volume of messages is transmitted there apparently will be a "professional" facsimile broadcaster, who will likely also be the "user" of the equipment, and a separate "sender" who will likely be the party advertising a particular product, service or solicitation. The Regulation states that (a) if the broadcaster "demonstrates a high degree of involvement in the sender's facsimile messages, . . . the broadcaster's name must be identified on the fax, and (b) each facsimile machine manufactured after 12.20.92 must "clearly mark such identifying information on each transmitted page." There is no reported case under the Act or the Regulation which imposes liability against anyone other than the user, the sender or the broadcaster, nor any reported effort to attach liability to a party not so characterized.

In an effort to obtain a document production subpoena, Plaintiff filed with the court a separate declaration, dated December 18. Therein, he attempted to draw the Firm within the scope of the Regulation by alleging that it could be held "liable for sending the faxes [sic]" if:

1. the Firm "originated the payment for the faxes [sic]";
2. the Firm "acted as an agent of the sender with full knowledge of what they were being asked to do";
3. the Firm is "a co-conspirator in securities fraud"; or
4. "Jere Ross conspired with Bryan Kos to commit securities fraud and is thus liable for all torts committed by the conspiracy", causing the Firm to be liable under the doctrine of respondeat superior.

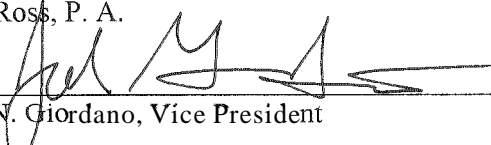
None of the foregoing allegations contains even a modicum of truth. They are simply the quixotic hopes of a strange man who apparently fashions himself as something of a vigilante, not content to leave securities law violation investigations in the hands of regulatory agencies to which such investigative powers have been granted by statute. Neither Mr. Ross nor any other member of the Firm (a) originated any payment for any fax sent by, for or with respect to "TWTN"; (b) served as principal, agent, servant or employee to, for or with any sender of the complained of fax; or (c) at any time marketed or sold any product in California via facsimile transmission, nor had notice of or participated in any plan to violate the Act or to engage in securities or any other form of fraud. What could be proven at the end of the day is that for a short period of time (five months), Mr. Ross served as legal counsel to a limited liability company, Corporate Financial Consultants, LLC, whose managing member, Bryan Kos, and whose independent consultant, Donald Oehmke, are both named defendants in the civil action initiated by the Commission in early 2005, and that in such capacity the Firm's trust account received

funds belonging to such entity and, under written direction, disbursed the same to persons identified by the client as vendors or other types of payees.

Under the principles of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a state has power to exercise judicial jurisdiction over a foreign corporation which has not appointed a domestic agent for the service of process **only** if such entity has (a) been doing business within the state, (b) has performed a substantive act within the state, (c) has performed an act outside of the state which has a substantive effect within the state, (d) owns, uses or possesses things within the state, or (e) has other substantive and continuing relationships to the state which make the exercise of personal jurisdiction reasonable<sup>3</sup>. Plaintiff has not demonstrated the existence of any such element. We has simply decided, on the basis of his own peculiar desires, to sue the Firm in a judicial forum far removed from the alleged situs of the act of which he complains, on grounds which have their genesis and their only underpinnings in Plaintiffs fertile and disturbed imagination. His action should be dismissed for lack of jurisdiction.

Yours truly,

Bush Ross, P. A.

  
John N. Giordano, Vice President

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<sup>3</sup> In that regard, a recent Berkeley Technology Law Journal Article, entitled "A Survey of Personal Jurisdiction Based on Internet Activity: a Return to Tradition", 19 Berkeley Tech. L. J. 519 (2004), reaches the following interesting conclusion with regard to the scope of personal jurisdiction in the current technologically driven age:

"The Internet has significantly enhanced our ability to communicate--we can easily post information that can be accessed instantaneously by people worldwide. While this ability can be used for good purposes, unfortunately, it can also be used for bad purposes. Thus, a key legal issue currently facing courts is determining the courts' ability to exercise personal jurisdiction over a defendant based on the defendant's Internet activity.

Personal jurisdiction is a fairly well-settled doctrine: a court may exercise personal jurisdiction when the defendant is physically present within its territory or when the defendant has sufficient minimum contacts with the forum court such that the exercise of personal jurisdiction is reasonable. What is not well-settled is the application of personal jurisdiction doctrine to activities conducted via the Internet. Given the reach a person has through the Internet, whether by posting a website or conducting electronic commerce, a defendant could potentially be haled into court anywhere in the world based on the website's accessibility. [FN114]

Although it is tempting to think that a new and different technology such as the Internet might require a new and different personal jurisdiction test, the trend in the case law has shown otherwise. Courts initially crafted a new test specifically for the Internet, yet have now fallen back to using the existing personal jurisdiction test. This shift back to tradition has been subtle, since courts still act as if they are using a technology-specific test.

However, the traditional tests still retain several advantages when applied to Internet activities, such as being well-developed and familiar to judges, being technology-neutral and applicable even when technology changes, and best preserving the underlying policy reasons for limiting courts in their exercise of personal jurisdiction. Moreover the Internet is not so unique and different that it requires a tailored test. Thus, the courts' shift back to tradition is good because the traditional tests are still the best way for courts to determine when to assert personal jurisdiction based on Internet activity."