APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30696

Joshua Lapin,

Plaintiff and Appellant,

v.

White Collar Media LLC; John Doe Sender A
John Doe Sender B; John Doe Co-Advertisers 1-3

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE JAMES A. POWER
CIRCUIT JUDGE

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Notice of Appeal Filed April 26, 2024

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PRELIMINARY STATEMENT

All references in this brief to documents included in the appendix of this action are referred to as AX, followed by the exhibit "Ext.", and as necessary, a page number. The Memorandum Opinion & Order of

Dismissal For Want of Personal Jurisdiction is referred to simply as "the Order," or as AX, Ext. A The Dec. 21 2023 hearing over Defendant White Collar Media's Motion to Dismiss order in this matter is referred to simply as "the hearing." The Brief in Opposition to the *since-granted* motion to dismiss is referred to simply as "the Opposition Brief," or "Opp. Brief," or as AX, Ext. D. The affidavit of Robert Tolbert, filed therewith WCM's Motion to Dismiss, is referred to simply as the "Tobert Aff." or as (AX, Ext. B), with a Pilcrow designating the relevant sworn statement. Finally, the Partner Program Operating Agreement, which was attached to the Tolbert Aff. In support of WCM's Motion To Dismiss, is referred to simply as the "Partner Agreement," or as AX, Ext. C. Appellant's motion for leave to file a supplemental pleading is referred to simply as "Mtn 4 Supp. Pleading" or as AX, Ext. E, and the supplemental pleading itself, which was attached *thereto* as Ext. A, is attached *hereto* as Ext. F, and is referred to simply as the "Supp. Pleading"

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Joshua Lapin accused defendant White Collar Media LLC "WCM" of ("Advertising") in spam e-mails sent by an unknown third party(s) (the Doe Senders A-B defendants). In South Dakota, companies are liable for misrepresentations in the headers of spam e-mails they're promoted in, even if such spams were sent by a third party (e.g. marketing partner). See *Lapin v. EverQuote Inc.*, 4:22-CV-04058-KES, at *7-8 (D.S.D. Feb. 17, 2023), "[I]t follows that South Dakota has deemed the advertiser liable for its commercial e-mails, even if the advertiser is not the one who sent the emails." WCM moved to dismiss the case for want of personal jurisdiction, or alternatively for failure to state a claim; the motion was heard at oral argument on December 21st 2024, and on April 11th 2024, the final order in this matter was entered, dismissing the claims without prejudice for lack of personal jurisdiction. Appellant filed the notice of appeal on April 26th 2024, and after moving for extensions, his new deadline for this brief was rendered August 15th 2024.

STATEMENT OF ISSUES

I. IS THE UNKNOWN SENDER OF THE INSTANT SPAMS AN AGENT OF WHITE COLLAR MEDIA LLC, CONFERRING

PERSONAL JURISDICTION OVER THE LATTER BASED ON THE FORMER'S IN-FORUM CONTACTS?

Trial Court held in the

negative. Most Relevant Cases:

Bilek v. Federal Insurance Co., 8 F.4" 581 (7" Cir. 2021)

Ewing v. Freedom Forever, LLC, 23-CV-1240 JLS (AHG) (S.D. Cal. Jan. 19, 2024)

Nater v. State Farm Mut. Auto. Ins. Co., 23-cv-1408-JES (C.D. Ill. May 14, 2024)

STATEMENT OF THE CASE

The trial court was the Honorable James A. Power. A motions hearing on WCM's motion to dismiss was held on December 21st 2023, and was granted to defendant as to personal jurisdiction, without reaching the merits. Therein, the trial court held that the unknown sender was not an agent of advertiser-White Collar Media, rather a mere independent contractor, and thus the jurisdictionally significant contact of sending unlawful spams into the forum could not be attributed to White Collar Media. Importantly, the court

acknowledged that WCM may still be liable for spams sent by the unknown sender, rather that the court lacked personal jurisdiction over WCM. *Final Order*, pg. 12, last ¶ (continuing onto pg. 13). Thus, nothing in the opinion speaks to the merits of the claim. In fact, the opposite may be true. "At first glance, the 23 spam emails sent to Lapin appear to violate multiple provisions of state law, including...[SDCL §] 37-24-47(2) (header information is garbled and therefore misrepresented)." Final Order, pg. 10, last ¶.

The final order was signed by Judge Power on 4/11/24 and [NOE] was filed on 4/12/24. Plaintiff Joshua Lapin filed his Notice of Appeal on April 26, 2024, appealing from the final order, seeking reversal of the finding that personal jurisdiction was lacking over WCM, and of the relevant finding that the unknown sender was not an agent of WCM, conferring jurisdiction over the latter through the former's in-forum contacts.

STATEMENT OF THE FACTS

1. White Collar Media advertised in 23 spams emails, which were sent by an unknown third-party to

plaintiff at his e-mail address thehebrewhammerjosh@gmail.com. FAC, ¶ 1; Tolbert Aff., ¶¶ 8, 12

2. White Collar Media Relies On Third Parties, called "Publishers" and/or "Affiliates," to Send Commercial E-Mails on It's Behalf *Tolbert Aff.*, ¶ 8

3. These "Third Parties" are governed by a Partner Operating Agreement. *Tolbert Aff.*, ¶ 12. (Made Available at AX, Ext. C)

4. Aside from the Publisher/Affiliate's Alleged Act of Sending Illegal Spam Into the Forum, WCM Otherwise Has No Relevant Contacts With South Dakota. Tolbert Aff., ¶ 6. Appellant Is and Was a Sioux Falls, South Dakota resident at all times material. *Final Order*, pg. 2, 2nd ¶

5. White Collar Media is a limited liability company formed under the laws of Georgia with its principal place of business in Ellijay, Georiga. *Final Order*, pg. 2, 3rd ¶.

SUMMARY OF THE ARGUMENT

The lower court err'd when it found that personal

jurisdiction is lacking over White Collar Media. White Collar Media's Publishers & Affiliates are agents of WCM when they send commercial e-mails on WCM's behalf. White Collar Media is legally required to not advertise in spams which have misrepresented header information, and such an obligation is a non-delegable duty which cannot be shifted onto an independent contractor, which further renders the relationship one of agency, not merely one of an independent contractor. The key to agency is the *right* to control, rather than *actual interference*; as such, the Partner Agreement reveals an agency relationship which the lower court did not see. Further still, the lower court erroneously over-relied on defendant's unpublished opinions in light of plaintiff's published, 7th circuit opinion on the topic of agency. Finally, the lower court err'd in finding Lapin failed to plead a prima face case of agency because appellant "admittedly does not know who sent these e-mails." Final Order, pg. 18, 2nd ¶; agency between WCM and the unknown sender *can*, and *has*, been sufficiently plead in the FAC and in the proposed Supplemental Pleading.

ARGUMENT

I. Relevance of the Supplemental Pleading

Appellant filed a motion for leave to file a supplemental pleading, (AX, Ext. E) with the proposed, supplemental pleading submitted therewith, on 12/18/23, in advance of the hearing on Defendant WCM's Motion To Dismiss. The Supplemental Pleading Itself is included herein as AX, Ext. F) At the hearing, appellant informed the lower court that the supplemental pleading is intended to show the court what can be done with leave to amend.

II. John Doe Sender Must Be An Agent, Not Merely an Independent Contractor Re: the Non-delegable duty doctrine.

1. A Non-Delegable Duty-In-Law is imposed on Advertisers to Not "Advertise" in Spams With Misrepresented Headers, Regardless if the Spams Are Sent By a Third Party

South Dakota's spam law holds advertisers strictly liable for spams with misrepresented headers, regardless if such spams were sent by a third-party, such as a marketing partner. See *EverQuote*, 2023 WL 2072059 at *3 (Concluding "South Dakota has deemed the advertiser liable for its commercial e-mails, even if the advertiser is not the one who scnt the emails.") Summary from the lower court in Final Order, pg. 13, first ¶. Nor is *EverQuote* the first to conclude precisely the same. South Dakota's anti-spam law is word-by-word identical to the older, California spam law at Cal. Bus. Prof. Code § 17529.1 *et seq.* An earlier case interpreting that California copy of the same language was summarized in the FAC, ¶ 6, "[*Hypertouch, Inc. v. Valueclick, Inc.*, 191 Cal.App.4th 1209 (Cal. Ct. App. 2011)], the court noted that '[S]ection 17529.5 was intended to apply to entities that advertise in [deceptive commercial e-mails, not only the spammers who send them.'" The entirety of the *Hypertouch* opinion explains the rationele behind this strict liability of advertisers based upon their affiliates and publisher's conduct,

in tremendous detail. WCM's substantively liability for spams it did not send itself, while distinct from jurisdictionally relevant contacts, demonstrates that a nondelegable duty is imposed on companies like WCM. The same is true nationwide, the CAN-SPAM Act sets a uniform, national standard for email marketers to follow. It defines "Initiate," at 15 U.S.C. § 7702(9), which incorporates the word "procure," which is defined very broadly therein at subpart (12), and includes a company situated similarly to WCM. We know this because the FTC, given its rulemaking authority over the CAN-SPAM Act, said as much in its "CAN-SPAM Act: A Compliance Guide for Business," available at https://www.ftc.gov/business-guidance/resources/can-spam-act-compliance-guide-business, which reads in relevant part: "compl[y] with the 'initiator' provisions of the Act...If the designated sender doesn't comply with the responsibilities the law gives to initiators, all marketers in the message may be held liable as senders." The point is that various state laws, and the Federal Spam law, impose a non-delegable duty onto companies like WCM to not advertise within spams with misrepresented headers.

2. This Non-delegable duty *converts* a *purportedly*-independent contractor into an agent for the purposes of the Restatement (Second) of Torts.

"Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence" *Anderson v. Service Merchandise Co.*, 240 Neb. 873 (Neb. 1992). "[T]he employer of an independent contractor is vicariously liable for the independent contractor's negligent performance of a nondelegable duty." *Massert v. Radisson Blue MOA, LLC*, No. A22-0815, at *7 (Minn. Ct. App. Apr. 3, 2023), quoting *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992)" This is tied into the Restatement (Second) in *Wiggs v. City of Phoenix*, 198 Ariz. 367, 370 (Ariz.2000), "See Restatement (Second) of Agency § 2(3) (1958) (defining an independent contractor as 'a person who contracts with another to do something. . . . He may or may not

be an agent.' (emphasis added)); see also *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D.Ariz. 1993) ('[A]n independent contractor and an agency relationship are not mutually exclusive concepts.') (citing Restatement (Second) of Agency § 14N (1958)). Where there is a non-delegable duty, the principal is 'held liable for the negligence of his agent, whether his agent was an employee, or an independent contractor.' *Maloney v. Rath*, 445 P.2d 513, 515 (Cal. 1968). See generally, Restatement (Second) of Agency §§ 214, 251(a) (1958)." In Wiggs, *supra*, because a company called APS contracted to act on the City's behalf to maintain the streetlights, APS was the City's agent for the performance of that non-delegable duty, and the same is true here between WCM and its senders who hid behind misrepresented headers. WCM and its senders should not be rewarded for rendering the e-mails untraceable, the very wrong which the SD anti-spam law sought to prevent. After all, as Iowa Supreme Court explains, "In such a situation, an employer of an independent contractor is liable for the negligent performance or non-performance of such duties even though he employs an independent

contractor to do the work." *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 705 (Iowa 1995). The lower court believes, "WCM contractually prohibited its media partners from sending the type of spam emails at issue, the Court concludes that Lapin has not established a prima facie case based on either WCM's own actions or an agency theory that WCM is jurisdictionally responsible for sending the 23 spam emails." *Final Order*, pg. 19, final ¶. However, a nondelegable duty can be established by contract *or by statute*, "The 'nondelegable duty' exception may be invoked where a particular responsibility is imposed upon a principal by statute or regulation." *Reinhardt v. City of Buffalo*, 1:21-cv-206, at *29 (W.D.N.Y. July 5, 2022) , quoting Chainani by Chainani v. Bd. of Educ. of City of New York, 87 N.Y.2d 370, 381 (N.Y. 1995)." The lower court, intending no disrespect, seems to not understand that "[a] nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor. " *Felmlee v. Falcon Cable Tv*, 36 Cal.App.4th 1032, 1036 (Cal. Ct. App. 1995).

Appellant fully understands that substantive liability and jurisdictionally relevant contacts are distinct concepts. However, this doctrine ensures that such an "independent contractor" is an agent for our purposes, which lays the groundwork for a successfully agency theory of personal jurisdiction. After all, "the party charged with a nondelegable duty is 'held liable for the negligence of his agent, whether his *agent* was an employee or an independent contractor.' *Pennington v. Schulze*, 2d Civil No. B232349, at *7 (Cal. Ct. App. June 4, 2012).

3. The non-delegable duty theory has been used to find personal jurisdiction over a non-resident defendant

In *Buckles v. Cont'l Res., Inc.*, 400 Mont. 18 (Mont. 2020), the Montana Supreme Court reversed the lower court and found personal jurisdiction through non-delegable duty doctrine for substantially the same reasons. Continental Resources Inc was an Oklahoma Corporation which owned the Columbus

Federal/Tallahassee complex, where the plaintiff died in a tragic accident at the North Dakota oil well site. "Continental entered into a Master Services Agreement ("MSA") with BH Flowtest, Inc., a Montana corporation, to perform certain services at the Columbus Federal/Tallahassee complex [in North Dakota]. The MSA provided: "It is expressly understood that Contractor [BH Flowtest] is an independent contractor and that neither Contractor nor Contractor's principals, partners, employees, or subcontractors are servants, agents, or employees of Continental...Continental signed the MSA from its offices in Enid, Oklahoma" *Id*, at 22. Personal jurisdiction over Continental in Montana hinged in part on whether Continental's act of contracting with Montana-based BH Flowtest is jurisdictionally significant. The court diregarded the language above which disavowed the existent of an agency relationship, and which sought to ensure BH Flowtest would only ever be seen as the former's independent contractor. Id, n.3, "Nondelegable duty is an exception to the general rule of non-liability for the tortious conduct of independent contractors and may

arise from contracts for the performance of abnormally dangerous activity, contracts for the performance of activity posing a peculiar risk of harm, or statutory, regulatory, or contract duties of safety" (underline added). In *Buckles,* the nondelegable duty except was based on contract for the performance of activity posing a peculiar risk of harm, but here as it relates to WCM, the duty is imposed statutorily, which is included in the above footnote in *Buckles*. "As the owner and operator of the Columbus Federal/Tallahassee complex, Continental generally is not liable for any torts committed by its independent contractors. Beckman v. Butte-Silver Bow County , 2000 MT 112, ¶ 12, 299 Mont. 389, 1 P.3d 348. "Exceptions to this rule, which create vicarious liability for the employer, arise when (1) there is a non-delegable duty based on contract; (2) the activity is inherently or intrinsically dangerous; or (3) the general contractor negligently exercises control reserved over a subcontractor's work." (citations omitted) *Id*, at 27. The court ultimately reversed the finding that personal jurisdiction over Continental was lacking. While that case is very complex, and appellant will

fully admit he still struggles to digest it entirely after the third reading, we know for sure that this non-delegable duty was used, in part, to imput Montana-based BH Flowtest onto Oklahoma-based Continental because the dissent makes the same very clear. "The Due Process Clause does not permit Montana to extend its non-delegable duty law to exercise jurisdiction and define a lawsuit arising out of a death at a North Dakota well site owned by an Oklahoma company." *Id*, 239. Appellant doesn't disagree that the majority upended due process, but relies on this to make clear that the majority did, in fact, use the nondelegable duty doctrine to input contacts on an "independent contractor," as if it was an agent, which is wholly consistent with the line of cases cited in the previous subpart of this brief.

III. The Key To Agency Is The Principal's *Right* To Control, Rather than *Actual* Interference

1. Lower Court Focuses on WCM's Sworn Representation it Doesn't Control What The Media Partners do,

Rather than WCM's Right To Control Them

The lower court erroneously found non-agency by relying on the following portions of the Tobert Aff., "The media partners 'control all aspects of transmitting the e-mails.' Accordingly, other than the prohibitions in the contract, WCM "does not know, does not direct, and has no control over" the recipients to whom its media partners choose to send emails. (citations omitted, but they're all quotes from the Tobert Aff.,) *Final Order*, pg. 5, first ¶. See also *Final Order*, pg. 16, final ¶, "Lapin has not contradicted WCM's evidence that WCM does not control to whom its media partners send emails, (Tolbert Aff. ¶¶ 7-8)," Lower court continues, "the hallmarks of an independent contractor relationship are that the contractor 'is performing services free of direction and control and that the individual is customarily engaged in an independently established occupation or business.' (citation omitted) *Final Order*, pg. 17, final ¶, and finally, "WCM prohibits sending unlawful emails and provides a "suppression list," but

otherwise docs not control how the media partners send emails. (Tolbert Aff. §9 8-9.)" *Final Order*, pg. 19, first two lines.

2. This Court Consistently Holds the "Test of the relationship is the *Right* To Control"

Biggins v. Wagner, 60 S.D. 581, 588 (S.D. 1932) "`The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.' 26 Cyc. 1547" "If one party has right under contract to control manner and continuance of particular service to be rendered by the other party and the final result thereof, relationship created by contract would be that of 'master and servant' or 'principal and agent' but other party would not be 'independent contractor' (underline added) *Halverson v. Sonotone Corp.*, 71 S.D. 568 (S.D. 1947) at 568. That the "affiliate" and "publisher" may be an independent contractor does not preclude

them from being WCM's agent, as the lower court seems to think. See *Final Order*, pg. 17-19 *generally*. "Restatement (Second) of Agency § 14N (1958) ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."). As the comment explains:

In fact, most of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies are independent contractors as the term is used in the Restatement of this Subject, since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. However, they fall within the category of agents."

Nattymac Capital v. Pesek, 784 N.W.2d 156 (S.D. 2010), at *n.5. In Nattymac Capital v. Pesek, *supra*, this court found that, per the contact between ACT and NattyMac, the former was the agent of the latter for collections purposes, notwithstanding that it was an independent contractor and designated as such in the "Master Loan Agreement" that governed their

relationship. This court explained in Halverson v. Sonotone Corp, *supra*, at 568, "If one party has right under contract to control manner and continuance of particular service to be rendered by the other party and the final result thereof, relationship created by contract would be that of "master and servant" or "principal and agent" but other party would not be "independent contractor." This "right under contract to control," is materially distinct from "actual interference," as this court articulated in Biggins v. Wagner, *supra*, at 588.

3. White Collar Media Had The Right to Control The Manner and Continuance of the sender's work (whether it exercised such control is irrelevant)

Having established the irrelevance of the allegations of the Tolbert Aff., including "Publishers control all aspects of transmitting the e-mails." Id, ¶ 8, let us see the incredible extent to which WCM admits, through the Partner Program Operating Agreement, it has the right to control the e-mails, without regard to whether it

exercises such control for the foregoing reasons in the last subpart.

The pages of the Partner Agreement are not numbered, so appellant will go by section title. The Partner Agreement contains, in relevant part:

1. WCM Had The Right To Terminate "Partner" [sic] At Any Time Without Notice, For Any Reason

Section entitled, "Termination" reads, in relevant part: "White Collar Media may terminate Partner's participation in one or more Offers or this Agreement at any time and for any reason which White Collar Media deem appropriate with or without prior notice to Partner by disabling the Links or providing Partner with a written notice. Upon termination of Partner's participation in one or more Offers or this Agreement for any reason, Partner will immediately cease all use of and delete all Links, plus all White Collar Media or Client intellectual property, and will cease representing yourself as a White Collar Media or Client partner for such one or more Offers." As

this court has said, in the context of agency, "No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself." Halverson v. Sonotone Corp, *supra*, at 572.

2. WCM Had the Right To Control Each And Every Feature Of The E- Mails, And Modify Or Stop Them At Its Leisure

It's necessary to understand that the "links" White Collar Media provides is paramount to the "Partner Program," as it enables the "Partner" [sic] to drive traffic to WCM's websites and ensure that WCM knows that the partner was the one that drove the customer there, for the purposes of commissions. The e-mails, are essentially juxtaoposed fancy "graphics" calculated to drive the recipient to clicking or ending up on such "link," with a fancy and inviting, graphically/visually pleasing "call to action" button. (e.g. sign up now, save on taxes now, etc). If

WCM pulls/disables any of these links, it renders each email invalid, and stops "Partner" from receiving a single cent more in commissions. See section "obligation of the parties," subpart 1 (on the first page of the partner agreement,) to see how critical these links and graphics are.

Upon this foundation, The Partner Agreement contains the following under "Modifications" Section:

"White Collar Media may change, suspend or discontinue any aspect of an Offer or Link or remove, alter, or modify any tags, text, graphic or banner ad in connection with a Link. Partner agrees to promptly implement any request from White
Collar Media to remove, alter or modify any Link, graphic or banner ad that is being used by Partner as part of the Partner Program."

Taken together, this gives WCM complete and absolute control over the appearance of any particular e-mail sent as part of the Partner program (re: the "graphics"), can "pull the plug," on any particular spam email by

deactivating the link (re: the "links"), and Partner is required to honor *any* request from WCM to "alter or modify" any "Link", "Graphic", or "Banner Ad" in any of the e-mails. It can also kick out the Partner with or without reason, and with or without notice (prior subsection of this brief re: "termination").

In a similar vein, the Section entitled "Obligations of the Parties," subpart 2, reads in relevant part, "All materials posted on the Media or otherwise used in connection with the Partner Program (i) are not illegal, (ii) do not infringe upon the intellectual property or personal rights of any third party, and (iii) do not contain or link to any material which is harmful, threatening, defamatory, obscene, sexually explicit, harassing, promotes violence, promotes discrimination (whether based on sex, religion, race, ethnicity, nationality, disability or age), promotes illegal activities (such as gambling), contains profanity or otherwise contains materials that White Collar Media informs Partner that it considers objectionable (collectively, "Objectionable Content")." The so-called "objectionable content" is subjective and entirely up to

WCM, who can inform Partner that *anything* is "objectionable" and must be modified.

Taken together, White Collar Media has the absolute right to control each and every e-mail that is sent, with precision, and full-reign to entirely "puppet" the Partner to send or stop sending e-mails, with the content, nature, and appearance of such emails being completely at the control of WCM (re: the "graphics"). Anything WCM subjectively finds objectionable can be forcible removed, and WCM can "modify" such content as it pleases through the other section.

3. WCM requires Partner to Comply With Anti-Spam Laws; Lower court erroneously thought this rendered the violating e-mails outside the scope of agency; Other Courts Hold Opposite: Provision Actually Makes "Partner" an Agent of Principal

The Partner Agreement Has a section entitled "Anti-Spam Policy," which reads in relevant part:

"Partner must strictly comply with the federal CAN-SPAM Act of 2003 (the "Act"). All emails sent in connection with the Partner Program must include the appropriate party's opt-out link. From time to time, White Collar Media may request - prior to Partner's sending emails containing linking or referencing the Partner Program that Partner submit the final version of Partner's email to White Collar Media for approval
by sending it to Partner's White Collar Media representative and upon receiving written approval from White Collar Media of Partner's email the email may be transmitted to third parties."

The lower court took this to believe that, since the spams at issue violated state and federal spam law, the spams couldn't be attributed to WCM. See *Final Order*, pg. 10-11, "Importantly, WCM's contract specifically requires media partners to use marketing media that is not illegal...The media partner must strictly comply with the federal CAN-SPAM Act of 2003..The media partner

'represents and warrants' that it will also comply with 'all applicable . . . state or local laws.'...At first glance, the 23 spam emails sent to Lapin appear to violate multiple provisions of state law, including...37-24-47(2) (header information is garbled and therefore misrepresented)...[B]ecause WCM's contract specifically prohibits sending spam emails that violate state or federal law, and the 23 spam emails at issue appear inconsistent with state and federal anti-spam laws, it would not be reasonable to infer that WCM created or authorized the 23 spam emails at issue here without some evidence that WCM ignores the provisions in its own contract." In other words, *because* the e-mails violate South Dakota's spam law and WCM prevented such e-mails from being sent, it would be unfair to attribute the e-mails to WCM. Setting aside how much the lower court rewards WCM for conspicuously overlooking the actions of its publishers and affiliates, it's the wrong angle entirely. Wholly to the contrary, this Court has found that "[g]enerally, a principal may be held liable for the fraud and deceit of his agent acting within the scope of his actual or apparent authority, even though the principal was unaware of or received no benefit from his

agent's conduct." *McKinney v. Pioneer Life Ins. Co.*, 465 N.W.2d 192, 194-95 (S.D. 1991) . In more detail, this court has explained, "Under general rules of agency law, a principal may be held liable for fraud and deceit committed by an agent within his apparent authority, even though the agent acts solely to benefit himself...Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. Restatement (Second) of Agency § 8 (1958). Restatement (Second) of Agency § 261 provides: A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud. Comment a to section 261 states: The principal is subject to liability under the rule stated in this Section although he is entirely innocent, has received no benefit from the transaction, and, as stated in Section 262, although the agent acted solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud" *Leafgreen v.*

American Family Mut. Ins. Co., 393 N.W.2d 275, 277 (S.D. 1986)

Another court, hearing claims under Maryland's spam law, concluded "Here, ironically enough, Keynetics' [like WCM] very attempt to control its affiliates by banning the use of bulk mail, among other restrictions it imposes, implies control which in turn is suggestive of a principal's control of an agent." *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 548 (D. Md. 2006)." This is the correct angle to take, and the only one which doesn't reward WCM for its willful ignorance. See *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal.App.4th 805 (Cal. Ct. App. 2011), *generally*, refusing to allow ValueClick to escape responsibility for affiliates it claims it has "no control over the e-mail delivery methods used by affiliates." The prohibits against unlawful spams doesn't lessen the agency argument as the lower court believes...it strengthens it.

IV Lower Court Relied On Appellee's Unpublished Opinions Over Plaintiff's Published Opinions On Agency Over Spammers, Afoul of This Court's Jurisprudence

Plaintiff incorporated by reference part of his never-heard motion for summary judgment, into his Opposition Brief to Defendant's motion to dismiss. (*Opp. Brief*, lower half of pg. 19). The incorporated text from the brief in support of motion for summary judgment included the following:

Plaintiff's *Brief ISO MSJ*, pg. 28: "The South Dakota Supreme Court refuses to allow its circuit courts to rely on cases from other jurisdictions which are un-citable in their own forums, and reverses them when they do so. In re Estate of Olson, 744 N.W.2d 555, 572 (S.D. 2008) "The [lower court's] second proposition that "a general power authorizing the sale . . . of any property which the testator possessed at the time of death applies only to property not specifically devised" is not supported for a number of reasons. First, the Court's cited authority, Radjenovich, is an unpublished Minnesota Court of Appeals decision. 1991 WL 70304, at *1 (Minn.Ct.App.1991) (unpublished). Under Minnesota law, '[u]npublished opinions of the [Minnesota] Court of Appeals are not precedential." Minn. Stat. § 480A.08.' "

At absolute least, unpublished decisions are disfavored in South Dakota, and disallowed under certain circumstances. The lower court didn't seem bothered, "WCM cites an unpublished California decision, *Durward v. One Technologies LLC*, 2019 WL 4930229 (C.D. Cali. Oct. 3, 2019), that shares some critical facts with this case. …"The Court concludes that the record in this case is more analogous to the decisions WCM cites." [than to Bilek, the published opinion cited by appellant] *Final Order*, pg. 14 & pg. 16. That defendant couldn't find a single published opinion to cite in support of non-agency speaks volumes, and this court should find that appellant's citations to the published, well-reasoned, 7th circuit Court of appeals decision *Bilek v. Federal Insurance Co.*, 8 F.4" 581 (7" Cir. 2021), should have been afforded more weight under the circumstances, and taken precedence (pun intended) over defendant's reliance on unpublished opinion Durward, *supra*.

V Agency With the John Doe Sender Can/Has Been Plead, Notwithstanding their Unknown Identity (New Cases Came Out After the MTD Was Briefed Showing *Bilek* citation was

Spot-On)

The lower court found the facts best-aligned with defendant's unpublished opinions over appellant's citation to Bilek, supra, partially because appellant was unable to identify the sender (John Does A-B) and sufficiently plead agency with the Doe: "As discussed above, it is undisputed that WCM did not send the 23 spam emails, and Lapin has not contradicted WCM's evidence that WCM does not control to whom its media partners send emails, (Tolbert Aff., ¶ 7-8), and specifically prohibits them from sending illegal spam. Lapin does not allege that WCM received any benefit from the 23 spam emails sent to him. *It is also Noteworthy that the identity of the sender remains unknown."* In these circumstances, the Court concludes that Lapin has not presented a prima facie case that whoever sent the 23 spam emails. (underline added, citations omitted) *Final Order*, pg. 16, final ¶. In a case in which a plaintiff sues over emails with headers misrepresented as to be untraceable to the identity of the sender...it makes sense that he/she would not know the identity of the sender prior to discovery. This effectively rewards the spammers for the materiality of

the misrepresentations in the header. In any event, pleading agency with a DOE is proper and possible, especially when DOE conceals their identity.

1. Nater v. State Farm

In May of this year, an on-point opinion came out after the Final Order was filed: *Nater v. State Farm Mut. Auto. Ins. Co.*, 23-cv-1408-JES (C.D. Ill. May 14, 2024). Therein, "Plaintiff Gabriel Bou Nater...filed suit against Defendant State Farm Mutual Automobile Insurance Co. ("State Farm"). He alleges that State Farm violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), by engaging in unlawful and invasive use of unsolicited and non-consensual robocalls for the purpose of generating business...State Farm has now moved to dismiss the Amended Complaint for lack of jurisdiction" *Id*, at 1.

Despite plaintiff not knowing the identity of the unknown calling him on behalf of State Farm, the court found he sufficiently plead agency at the pleading stage:

"Nater alleges that State Farm gave its insurance agents,

like the Franklin Agency, the actual authority to make the Robocalls. Doc. 8 at 13. He also alleges that State Farm's insurance agents are authorized to hire third parties, including the unknown entity that contacted him, for marketing purposes. Id. Furthermore, Nater alleges that its insurance agents contracted with the unknown entity to place the Robocall to communicate with consumers. Id. at 14. And, Nater alleges that State Farm hired the unknown entity, who was authorized to use State Farm's trademark and employ a pre-recorded voice, to generate insurance leads...Based on the foregoing, the Court concludes that Nater has plausibly pled State Farm's vicarious liability for the Robocall by alleging a chain of agency relationships based on actual authority. Other theories of liability and arguments for dismissal, if they remain relevant, may be addressed at summary judgment with the benefit of a further-developed evidentiary record... it is unnecessary for Plaintiff to settle on an exact agency theory as, until discovery is complete, it would be almost impossible for her to know this information." (underline added, citations omitted) *Id*, at 19-20.

In essence, Nater was allowed to plead agency theory

between state farm and the unknown caller, and the court understood that the identity of the caller would be unknown to the plaintiff without the benefit of discovery. Had the lower court in the instant case construed appellant's agency theory as liberally, it would be passed the pleading stage and headed for trial at this time.

2. Ewing v. Freedom Forever, LLC

Just shy of one month after the prevailing motion to dismiss was argued, *Ewing v. Freedom Forever, LLC*, 23-CV-1240 JLS (AHG) (S.D. Cal. Jan. 19, 2024) was published. Therein, "Plaintiff alleges that the solar-panel-sales company Freedom Forever-through its agents and employees-repeatedly called and texted him in violation of the Telephone Consumer Protection Act ("TCPA") (47 U.S.C. § 227), its associated regulations (47 C.F.R. § 64.1200), and the California Invasion of Privacy Act ("CIPA") (Cal. Penal Code §§ 632.7, 637.2)" *Id*, at 2. As it relates to pleading an agency relationship between Freedom Forever and the third-party callers, "the precise details of the agency relationship need not be pleaded to survive a motion to dismiss, sufficient facts must be offered to

support a reasonable inference that an agency relationship existed." This standard is a flexible one, as '<u>the information necessary to connect all the players is likely in [the defendant's] sole possession</u>.'" (underline added, citations omitted) *Id*, at 12. Just like appellant, the *Ewing* court then relied heavily on *Bilek* for agency purposes:

"The Ninth Circuit has not yet explicitly addressed what facts a plaintiff must plead to support a reasonable inference of agency in TCPA cases, but the Seventh Circuit has. Bilek v. Fed. Ins. Co., 8 F.4th 581, 586-89 (7th Cir. 2021). Applying the Restatement, the Seventh Circuit assessed whether the plaintiff had stated a plausible claim for relief under an actual authority theory of liability. Id. at 587. The Seventh Circuit noted that the plaintiff "ultimately must show evidence that (1) a principal/agent relationship exists, (2) the principal controlled or had the right to control the alleged agent's conduct, and (3) the alleged conduct fell within the scope of the agency," i.e., that the agent acted in accordance with the principal's manifestations. Id. at 587. But the court declined to require the plaintiff to plead

"allegations of minute details of the parties' business relationship" at the motion-to-dismiss stage. Id. at 588. Instead, Bilek determined that the plaintiff had met his burden by pleading that: (1) the defendant authorized the callers to make calls using its approved scripts, tradename, and proprietary information; (2) the callers quoted him the defendant's health insurance, and (3) the defendant provided said callers those quotes and permitted said callers to enter information into its system"

Appellant met the same *Bilek* standard as the *Ewing* plaintiff. See *Supp. Pleading*, generally (AX, Ext. F). In fact, the Supp. Pleading doesn't hide that it was calculated to conform to the *Bilek* agency standard. See Mtn 4 Supp. Pleading (AX, Ext. E,) ¶ A, making clear intention to match *Bilek's* agency pleading standard. It can be observed how similar the supplemental pleading is to the Ewing allegations, which were held to sufficiently plead agency, at least at the pleading stage.

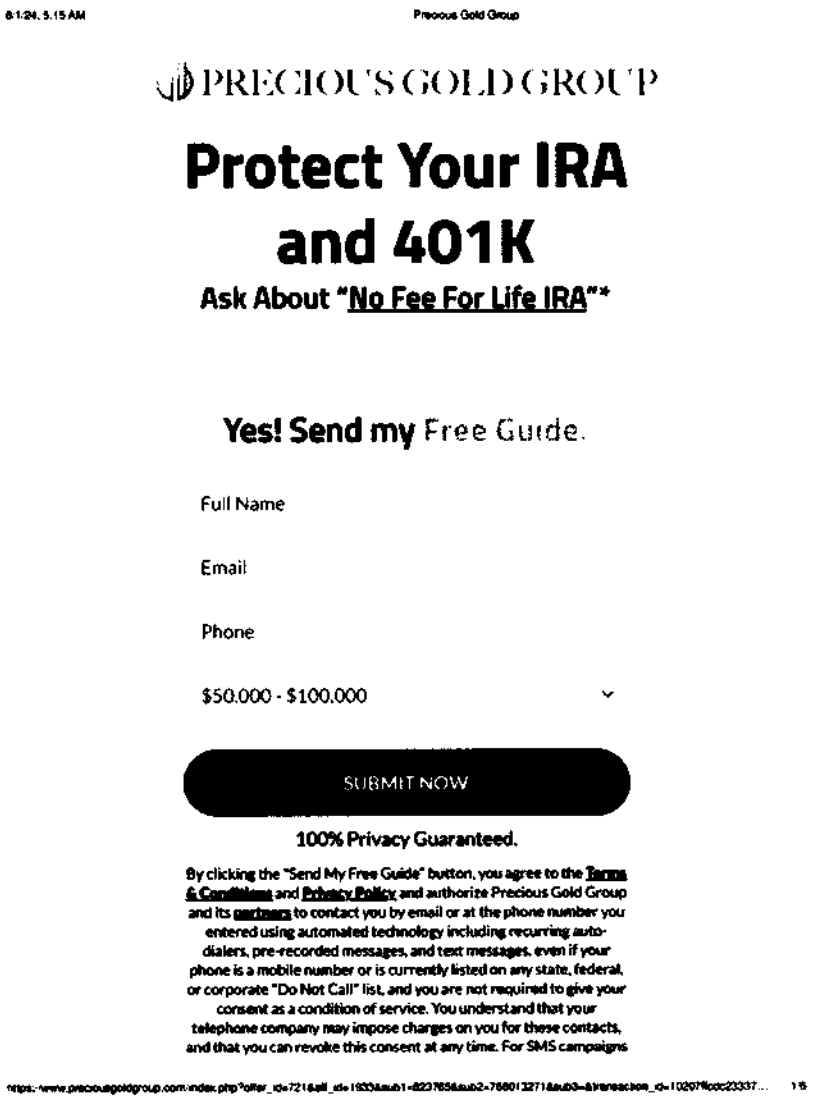
Also noteworthy is that the *Ewing* court found 'the information necessary to connect all the players is likely in [the defendant's] sole possession. This is

functionally identical to the *Nater* opinion's language to the same effect, "it is unnecessary for Plaintiff to settle on an exact agency theory as, until discovery is complete, it would be almost impossible for her to know this information." It is clear, using both cases as a foundation, that the lower court in the instant matter held appellant to too high a pleading standard at the motion to dismiss stage, and unfairly required plaintiff to plead facts within defendants knowledge. To wrap up this section, the lower court err'd in not relying on *Bilek* as the Ewing court did, instead preferring unpublished opinions from the defense.

VI WCM Advertised in More Spams Sent To Plaintiff Last Week, Giving Rise To New Jurisdictional Allegations (e.g. Ratification, Actual & Apparent Authority); This Case Should Be Remanded So New Jurisdictional Allegations Can Be Made

Showing ingratitude for the kindness of the lower court, and continued commitment to the same wrong for which they were cut a break, appellee White Collar Media appears to have continued advertising through

equally tortious spam emails. In fact, such emails were sent to the very person who just sued them, while the matter was on appeal (me). Appellant received four spams, each of which advertising a *forth* website of White Collar Media: PreciousGoldGroup.com



8/1/24, 5:15 AM Precous Gold Group

PRECIOUS GOLD GROUP

Protect Your IRA and 401K

Ask About "No Fee For Life IRA"*

Yes! Send my Free Guide.

Full Name

Email

Phone

$50.000 - $100.000

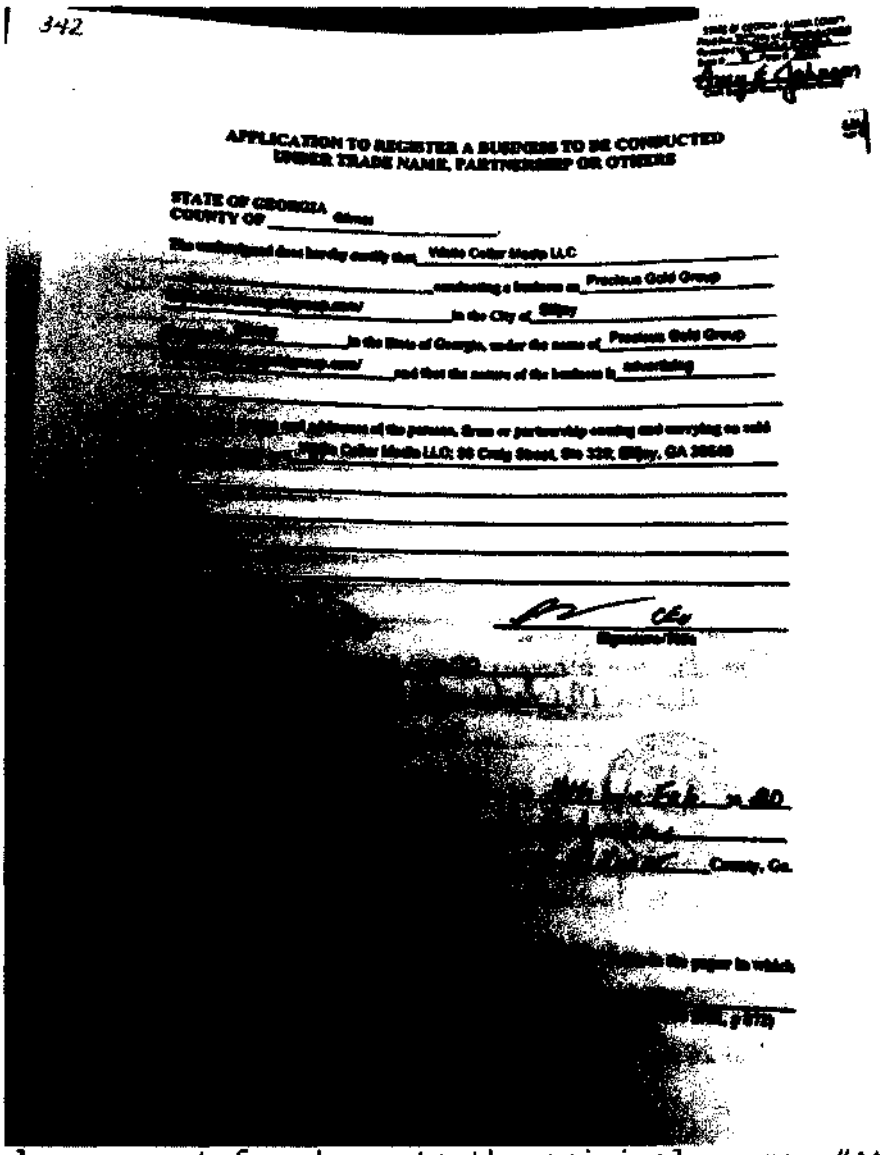
SUBMIT NOW

100% Privacy Guaranteed.

By clicking the "Send My Free Guide" button, you agree to the Terms & Conditions and Privacy Policy and authorize Precious Gold Group and its partners to contact you by email or at the phone number you entered using automated technology including recurring auto-dialers, pre-recorded messages, and text messages, even if your phone is a mobile number or is currently listed on any state, federal, or corporate "Do Not Call" list, and you are not required to give your consent as a condition of service. You understand that your telephone company may impose charges on you for these contacts, and that you can revoke this consent at any time. For SMS campaigns

https://www.preciousgoldgroup.com/index.php?offer_id=721&aff_id=1933&sub1=822765&sub2=76601327 1&sub3=&transaction_id=10267fccc23337... 1/5

This image of this new, fourth WCM website advertised in spams in very comparable to the first three in the *FAC*, pg. 9, three side-by-side images. In the first three sites (advertised in the spams sued over prior to these new ones), WCM had registered dba's with the Gilmer County [Georgia] Superior Court. See FAC, ¶ 10, three side-by-side images of "assumed name" registrations. Sure enough, WCM registered Precious Gold Group / preciousgoldgroup.com as well, in similar fashion:

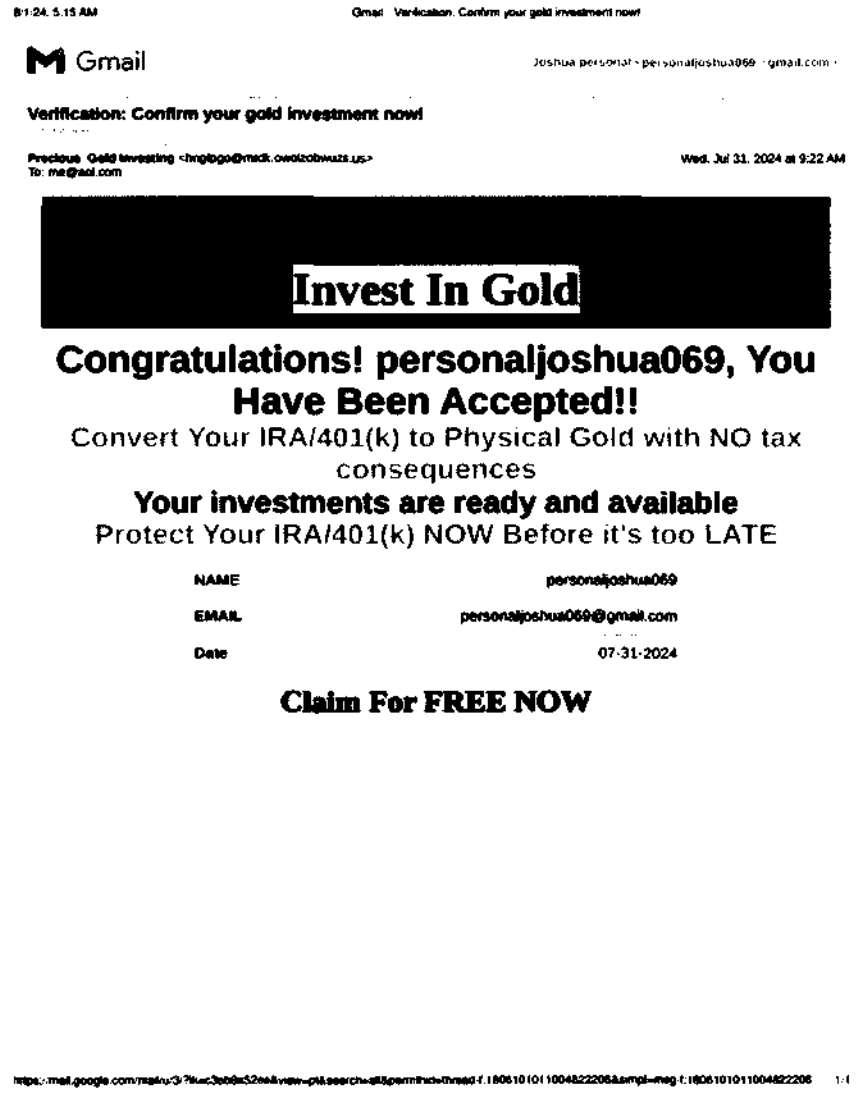

342

APPLICATION TO REGISTER A BUSINESS TO BE CONDUCTED UNDER TRADE NAME, PARTNERSHIP OR OTHERS

STATE OF GEORGIA
COUNTY OF

The lower court found, as to the original spams, "At first glance, the 23 spam emails sent to Lapin appear to violate multiple provisions of state law, including...[SDCL §] 37-24-47(2) (header information is garbled and therefore misrepresented)." *Final Order*, pg. 10, last ¶. Indeed, these new spams appellant *just* received have garbled and untraceable

headers, violating the same provision of South Dakota law:



8/1/24, 5:15 AM Gmail - Verification: Confirm your gold investment now!

Gmail Joshua personal <personaljoshua069@gmail.com>

Verification: Confirm your gold investment now!

Precious Gold Investing <hnglpgo@mack.owolzobwuzs.us>
To: me@aol.com
Wed, Jul 31, 2024 at 9:22 AM

Invest In Gold

Congratulations! personaljoshua069, You Have Been Accepted!!

Convert Your IRA/401(k) to Physical Gold with NO tax consequences

Your investments are ready and available

Protect Your IRA/401(k) NOW Before it's too LATE

NAME	personaljoshua069
EMAIL	personaljoshua069@gmail.com
Date	07-31-2024

Claim For FREE NOW

https://mail.google.com/mail/u/0/?ik=c3eb9e52ea&view=pt&search=all&permthid=thread-f:1806101011004822206&simpl=msg-f:1806101011004822206 1/1

This lends to new allegations which can confer personal jurisdiction over WCM as to the claims for the old and new spams alike. While appellant believes he's already sufficiently plead an agency theory of personal jurisdiction over WCM through the FAC and the [proposed] Supplemental Pleading, hence the existence of this appeal, it is nonetheless true that certain findings from the court are now entirely moot:

1. New Evidence WCM Ignores Provisions in Its Own Contract

Final Order, pg. 11, 2nd ¶: "[I]t would not be reasonable to infer that WCM created or authorized the 23 spam cmails at issue here without some evidence that WCM ignores the provisions in its own contract." (underline added)

Without waiver to appellant's position that such inference was reasonable, there's now extraordinary evidence that WCM is ignoring the provisions of its own contract by allowing these e-mails, even after

being put on the ultimate form of notice by the lower court.

2. New Evidence WCM's "Partner" Sent Spams Received By Appellant

Pertinent to the lower court's dismissal, "Lapin has not established a prima facie case that WCM and whoever sent the 23 spam emails were partners, or even principal and agent, because he admittedly does not know who sent those emails. The record therefore contains no evidence concerning the nature of the relationship, if any, between WCM and the person or persons that sent the 23 spam emails to Lapin." (underline added, citations omitted) *Final Order*, pg. 18, 2nd ¶. See also, "Lapin does not allege that WCM received any benefit from the 23 spam emails sent to him. It is also noteworthy that the identity of the sender remains unknown. (underline added) *Id*, pg. 16, Last ¶.

Appellant doesn't concede the validity of this, but in

any event, he has fresh evidence that the sender of the spams were sent by WCM's "Partner" or downstream "Partner's Partner." Armed with the reasoning behind the lower court's dismissal of the spams, when these four new ones came in just the other day, appellant went to great lengths to document the spams, including the aforementioned "Links" as referenced in the WCM Partner Agreement, in the spams. When appellant recorded the spam e-mail "in-action" (meaning clicked the button in the e-mail and recorded his web browser land on the landing page at WCM's "Precious Gold Group" website), he preserved the full url of the landing page. The "Links" of the four spams are pasted below:

https://www.preciousgoldgroup.com/index.php?offer_id=721&aff_id=1933&sub1=823765&sub2=768013271&sub3=&transaction_id=10207ffcdc233371fc6943e60ac9db

https://www.preciousgoldgroup.com/index.php?offer_id=721&aff_id=1933&sub1=823765&sub2=768013271&sub3=&transaction_id=10207ffcdc233371fc6943e60ac9db

https://www.preciousgoldgroup.com/index.php?offer_id=721&aff_id=1933&sub1=823765&sub2=768013271&sub3=&transaction_id=10207ffcdc233371fc6943e60ac9db

https://www.preciousgoldgroup.com/index.php?offer_id=721&aff_id=1933&sub1=823765&sub2=768013271&sub3=&transaction_id=10207ffcdc233371fc6943e60ac9db

From this, with leave to amend upon remand, appellant can and will thereon allege that WCM has an affiliate given the ID "1933", a sub-affiliate given the ID "823765", and an even futher-downstream affiliate given the ID "768013271". The primary affiliate, let's call them John Doe 1933, committed the act which we know is jurisdictionally-conferring according to the lower court:

"The Court takes no issue with the logic of cases finding that a defendant who had sent allegedly unlawful spam email(s) to a plaintiff was subject to specific personal jurisdiction. Those cases are simply irrelevant because here it is undisputed that WCM did not send the 23 spam emails at issue, and

Lapin does not know who sent them." *Final Order*, pg. 8, final ¶.

This is now moot, and jurisdictional discovery can be focused towards the relationship of WCM and it's affiliate. The lower court agrees that "John Doe 1933's" act of sending spams into the forum is jurisdictionally-conferring, and now we can definitively link this act to WCM, meeting even the [allegedly improperly] high pleading standard for agency as set by the lower court.

Further, appellant can now plead, even more directly, "evidence that WCM ignores the provisions in its own contract," as the lower court would say, because these four new spams all occurred months *after* the filing of the Final Order, which informed WCM that e-mails with the same defect "appear to violate multiple provisions of state law, including...[SDCL §] 37-24-47(2) (header information is garbled and therefore misrepresented)." Final Order, pg. 10, last ¶.

It is for the same reasons that appellant can plead an additional *apparent* authority theory. This court has found, "Apparent authority is analogous to "ostensible" authority which is defined in SDCL 59-3-3 as authority "such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess." (underline added) Leafgreen v. American Family Mut. Ins. Co, *supra, at* *n.4.

On this basis, this court should remand this matter so these additional, jurisdictional-fate-sealing allegations can be plead.

VI Conclusion

This court should reverse the lower court's finding of non-agency, and remand for further proceedings.

Dated this 18th day of August 2024.

Respectfully submitted,

Joshua Lapin 8/22/24

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Certificate of Compliance

1. I certify that the Appellant's Brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Cambria Font in proportional 12 point type. Appellant's Brief contains approximately 8,447 words.

2. I certify that the word processing software used to prepare this brief is LibreOffice 24.2.5.2 on the Arch Linux Operating System.

Joshua Lapin 8/22/24

Joshua Lapin
Appellant (Pro Se)

Certificate of Service

The undersigned hereby certifies that on this 19th day of August 2024, one copy of the foregoing brief was served by e-mail, in lieu of United States mail, as expressly stipulated by the parties, on Steven Morgans at <smorgans@myersbillion.com> and Berkley Fierro at <bfierro@myersbillion.com>

Joshua Lapin 8/22/24

Joshua Lapin
Appellant (Pro Se)

APPENDIX

Exhibit	A	Memorandum Opinion and Order Granting White Collar Media LLC's Motion To Dismiss RE Personal Jurisdiction
Exhibit	B	Affidavit of Robert Tolbert (filed w/ White Collar Media's Motion To Dismiss)
Exhibit	C	Partner Program Operating Agreement (attached as Exhibit to the Tolbert Aff.)
Exhibit	D	Plaintiff's Brief in Opposition To Defendant's Motion To Dismiss
Exhibit	E	Plaintiff's Motion For Leave To File a Supplemental Pleading
Exhibit	F	Proposed Supplemental Pleading (attached to the above-motion, in the record, in the form of Ext. A *therein*, but is Ext. F *herein*, if that makes sense)

EXHIBIT

A

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

JOSHUA LAPIN, Plaintiff, v. WHITE COLLAR MEDIA LLC; JOHN DOE SENDER A; JOHN DOE SENDER B; and JOHN DOE CO-ADVERTISERS 1-3, Defendants.	49 CIV 23-2808 MEMORANDUM OPINION AND ORDER GRANTING WHITE COLLAR MEDIA LLC'S MOTION TO DISMISS RE PERSONAL JURISDICTION

The above-referenced matter came before the Court pursuant to Defendant White Collar Media LLC's ("WCM") motion to dismiss. The motion was heard December 21, 2023, at 9:00 a.m. Plaintiff Joshua Lapin appeared in person and represented himself. WCM appeared through its counsel of record, Mr. Steven Morgans and Ms. Berkley Fiero. After hearing argument, the Court took the matter under advisement. It also stayed discovery during the pendency of the motion. Having now considered the parties' arguments, authorities, and pleadings, the Court issues following Opinion and Order granting WCM's motion to dismiss without prejudice based on lack of personal jurisdiction.

Standard and Facts

Although the parties have submitted affidavits and declarations, neither side requested an evidentiary hearing. In these circumstances, Lapin "has the burden of showing a prima facie case of jurisdiction" concerning WMC. *Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, ¶ 8, 857 N.W.2d 401, 405. But "jurisdiction need not be proved by a preponderance of the evidence until trial or the court holds an evidentiary hearing." *Id.* Consequently, at this point, the Court "must

treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Id.* ¶ 8, 857 N.W.2d at 406. The Court concludes that, viewed through that lens, the record reveals the following facts relevant to jurisdiction.

This case is based on South Dakota's anti-spam statute. SDCL §§ 37-24-41 to -48. Lapin alleges that he received a total of 23 spam emails at his personal email address: thehebrewhammerjosh@gmail.com between July 9, 2023 and August 22, 2023. (*See* First Amended Complaint ("FAC") ¶ 1 and Exhibits A & B.) During this time frame, Lapin resided at a physical address in Sioux Falls, South Dakota, and routinely accessed his email from his cell phone and laptop computer while in Sioux Falls. (FAC ¶ 12.)

WCM is a limited liability company organized under Georgia laws with its principal and sole place of business in Ellijay, Georgia. (FAC ¶ 3; Aff. of Robert Tolbert ¶¶ 3, 5.) WCM's sole members are Robert and Christy Tolbert. (Aff. of Robert Tolbert ¶ 3.) WCM:

- Does not have a license to transact business in South Dakota;
- Does not have any members who reside in South Dakota;
- Does not employ anyone in South Dakota;
- Does not own property or assets in South Dakota
- Does not have an office or mailing address in South Dakota;
- Does not pay income taxes in South Dakota;
- Does not maintain a bank account in South Dakota;
- Does not transact business in South Dakota; and
- Does not have a public telephone listing in South Dakota.

(*Id.* ¶ 6.)

WCM does not send marketing emails itself. Instead, it relies on other entities to send marketing emails. (*Id.* ¶ 8.) WCM therefore contends that it did not send any of the spam emails at issue to Lapin. WCM's contention is consistent with Lapin's First Amended Complaint,

which alleges that "at least two third parties" sent the emails. (FAC ¶ 6.) Lapin has not been able to identify those third parties, so he refers to the parties who actually sent the 23 emails as John Doe Sender A and John Doe Sender B. (*Id.* ¶¶ 7, 13.) The Court therefore assumes for purposes of this motion that WCM did not directly send the emails at issue to Lapin.

Lapin does allege that WCM "caused these spams to be sent by Sender A and Sender B." (*Id.* ¶ 6.) Lapin's First Amended Complaint does not specify how WCM caused the two unknown senders to send the emails at issue. Lapin does not contend that WCM drafted the spam emails at issue; instead, he expressly alleges that the John Doe senders created the misleading headers. (*Id.* ¶ 7.) Lapin does allege that WCM benefits from the sending of spam emails because it owns and controls the websites promoted by the spam emails, but there is no allegation that Lapin purch. (*Id.* ¶¶ 6, 8.)

The First Amended Complaint does not allege a specific type of relationship between WCM and the John Doe senders. (*See id.* ¶ 7.) It alleges that the John Doe senders "may be 'publishers' of" WCM, or they may "have only an indirect relationship through an advertising network such as Valueclick, or otherwise have a currently-unknown third-party relationship." (*Id.* (emphasis added).) One reason Lapin cannot identify the John Doe senders, and thus cannot identify their relationship with WCM, is that each spam email has garbled sender, reply to, and CC domain information. (*Id.* ¶¶ 4-5.)

Like Lapin, WCM states that it has no information concerning the sending of the spam emails at issue, and thus WCM does not concede that someone it has a contractual relationship with sent the spam emails. (*See* Aff. of Robert Tolbert ¶ 11.) WCM's affidavit does, however, provide additional information concerning its relationship with its authorized email marketers. WCM has a standard contract it uses with "media partners" to send marketing emails promoting

WCM products. (FAC ¶ 12 & Exhibit A.) WCM's obligation under the contract is to provide links to a media partner that a media partner can put in emails to link the email with, for example, a website operated by WCM. (*Id.* Ex. A, Contract, *Obligations of the Parties* § 1.) WCM must pay commission to its media partners when a person uses a link in an email sent by the media partner to access a WCM website and the person purchases something from WCM. (*Id. Obligations of the Parties* §§ 2-6.)

The contract refers to WCM's authorized email marketers as a "Partner" but defines the parties' relationship as an independent contractor relationship:

> 4. Relationship of the Parties. The parties hereto are independent contractors. There is no relationship of partnership, agency, employment, franchise or joint venture between the parties. Neither party has the authority to bind the other, or incur any obligation on its behalf.

Id. WCM's media partners have "sole responsibility" for the development of marketing media, which includes emails. (*Id. Obligations of the Parties, Partner* § 1.) The media partners must use marketing media that is not illegal. (*Id.* §§ 2, 5.) They must download WCM's "Suppression List" and may not send emails to addresses on that list. (*Id. Obligations of the Parties, Program Specific Terms* § 1.) The media partner "must strictly comply with the federal CAN-SPAM Act of 2003" and it "is solely Partner's obligation to ensure that the email complies with the Act." (*Id. Anti-Spam Policy.*) The media partner is prohibited from using fraud or falsifying information. (*Id. Fraud.*) The media partner "represents and warrants" that it will also comply with "all applicable . . . state or local laws." (*Id. Representations and Warranties.*) The contract is governed by Georgia law and has a Georgia forum selection clause. (*Id. Governing Law & Miscellaneous* § 3.) If the media partner enters into agreements with other entities to send emails, the media partner must require the third-party marketer to accept the WCM contractual terms. (*Id. Obligations of the Parties, Program Specific Terms* § 3.)

WCM states that its media partners not only work with WCM but send emails for multiple companies. (Aff. of Robert Tolbert ¶ 8.) The media partners "control all aspects of transmitting the e-mails." (*Id.*) Accordingly, other than the prohibitions in the contract, WCM "does not know, does not direct, and has no control over" the recipients to whom its media partners choose to send emails. (*Id.* ¶ 9.) WCM therefore maintains that it did not develop the headers or content of the spam emails at issue.

During the motion to dismiss hearing, Lapin, for purposes of arguing jurisdiction, accepted that the contract attached to the Tolbert Affidavit accurately reflects the agreement WCM uses with email marketers, and did not present any contrary evidence concerning WCM's descriptions of that relationship. Lapin does contend that the sample contract shows the email marketers are WCM's agents based on the repeated contractual refences to them as "media partners" or "Partners." Lapin alternatively contended that the exact nature of WCM's relationship with its email partners does not matter because WCM knew its affiliates would be sending emails and some of those emails reached South Dakota. Lapin cites the personal jurisdiction section of Judge Schrier's opinion in *Lapin v. EverQuote*, 2023 WL 2072059 (D.S.D. Feb. 17, 2023), *aff'd w/o op.* 2024 WL 1109067 (March 14, 2024), which found personal jurisdiction in a spam email lawsuit based upon a "stream of commerce plus" theory.

Analysis

Lapin readily agrees that WCM is not subject to general jurisdiction in South Dakota, but contends that he can satisfy the test for specific jurisdiction.

1. **South Dakota's Long Arm Statute is co-extensive with the Due Process Clause.**

For a court to exercise specific personal jurisdiction over a defendant, that defendant must engage in an act covered by South Dakota's long arm statute, SDCL § 15-7-2, and the

exercise of personal jurisdiction must be consistent with due process. *See Davis v. Otten*, 2022 S.D. 39, ¶ 12, 978 N.W.2d 358, 363. The last subpart of Section 15-7-2, however, extends the long arm statute to the "commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States." SDCL § 15-7-2(14). The Court agrees with Lapin that if WCM committed acts sufficient to make the exercise of personal jurisdiction consistent with due process, then those same acts would satisfy South Dakota's long arm statute. *See Kustom Cycles*, 2014 S.D. 87, ¶ 9, 857 N.W.2d at 406 ("Bowyer concedes that the reached of South Dakota's Long-Arm Statute, SDCL 15-7-2, is coextensive with the constitutional limitations of the Due Process Clause in this case."); *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 501 (S.D. 1977) (quoting *Ventling v. Kraft*, 161 N.W.2d 29, 34 (1968)). The Court's analysis will therefore focus on whether the exercise of personal jurisdiction in this case would be consistent with due process.

2. South Dakota's Three-Part Due Process Test

The South Dakota Supreme Court has articulated a three-step analysis to determine whether specific personal jurisdiction is consistent with due process:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Davis, 2022 S.D. 39, ¶ 20, 978 N.W.2d at 366 (quoting *Kustom Cycles*, 2014 S.D. 87, ¶ 10, 857 N.W.2d at 407). "These contacts must be substantial enough to cause a non-resident defendant to reasonably anticipate being haled into court" in South Dakota. *Id.* ¶ 21, 978 N.W.2d at 366. "The contacts cannot be random, isolated, or fortuitous and must arise from the defendant's activities." *Id.* "Where a court seeks to exercise personal jurisdiction over a party not based

within the forum state, the party must have purposefully availed itself to the privileges and contacts within the forum state." *Id.* "Jurisdiction cannot be exercised on the basis of 'unilateral activity of another party or a third person,' but rather is proper where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum." *Id.*

Although unilateral actions of third parties cannot create specific jurisdiction, sometimes the actions of a defendant's agent(s) are jurisdictionally relevant. *Daimler AG v. Bauman*, 571 U.S. 117, 134-35 & n. 13. This principle requires careful application, however, because a third party "may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose." *Id.* at 135.

The facts section shows that, if the 23 spam emails at issue are ignored, WCM has literally no jurisdictionally significant contacts with South Dakota. It is not incorporated here, it is not physically located here, it is not registered to do business here, and has not done any business here. Accordingly, unless Lapin can connect WCM to the sending of the 23 spam emails, none of the three elements of South Dakota's jurisdictional test would exist in this case. The critical issue thus is whether Lapin has prima facie evidence that WCM committed some act making it jurisdictionally responsible for sending those emails, or, alternatively, whether the unknown sender(s) of those emails is WCM's agent for purposes of jurisdictin.

3. **Lapin has not established a prima facie case of specific personal jurisdiction based on WCM's actions.**

Lapins contends that WCM is jurisdictionally responsible for sending the 23 spam emails based on decisions rejecting the notion that the sender of an email to a plaintiff can avoid personal jurisdiction because it did not the recipient's physical location. Alternatively, Lapin relies on a stream of commerce plus theory.

Lapin cites a host of decisions finding that a defendant's act of sending an unlawful electronic communication to a plaintiff was a sufficient form of purposeful availment to create specific jurisdiction. As WCM points out, however, in each of these decisions the plaintiff had established at least a prima facie case that the defendant had sent the communication to the plaintiff. *Aitken v. Comm. Workers of Am.*, 496 F. Supp. 2d 653, 659 (E.D. Va. 2007) ("There can be no doubt that Arnold and Tronsor purposefully availed themselves of the privilege of conducting affairs in Virginia by (i) intentionally sending scores of emails to "@verisonbusiness.com' email addresses, the servers for which are located in Virgina."); *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 604 (E.D. Va. 2002) ("Crediting the allegations in Verizon's Amended Complaint, Defendants deliberately transmitted millions of [unsolicited bulk e-mail] to and through Verizon's e-mail servers in Virginia."); *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 779 (S.D. Miss. 2001) ("As stated above, specific *in personam* jurisdiction can be supported by a single contact. Accordingly, the Court finds that Davis' act of sending the complained of e-mail to a Mississippi resident is that single contact, and Davis has the requisite 'minimum contacts' with Mississippi."); *MaryCLE v. First Choice Internet, Inc.*, 890 A.2d 818, 832 (Md. App. 2006) ("MaryCLE's claims are based upon First Choice's action in sending emails to MaryCLE in Maryland."); *Ferron v. E360Insight, LLC*, 2008 WL 4411516, *3 (S.D. Ohio Sept. 29, 2008) (unpublished) ("In this case, plaintiff alleges that defendants were responsible for purposefully and intentionally sending more than 900 allegedly deceptive email advertisements to plaintiff in Ohio through his internet service providers, which were also located in Ohio.").

The Court takes no issue with the logic of cases finding that a defendant who had sent allegedly unlawful spam email(s) to a plaintiff was subject to specific personal jurisdiction.

Those cases are simply irrelevant because here it is undisputed that WCM did not send the 23 spam emails at issue, and Lapin does not know who sent them.

Lapin alternatively responds that, even if WCM did not send the 23 spam emails itself, it should be subject to jurisdiction on a "stream of commerce plus" theory. Lapin analogizes WCM to a manufacturer who places a defective product into the stream of commerce by selling it to a distributor who then sells the product to a South Dakota resident. Lapin cites a federal case involving himself called *Lapin v. EverQuote*, 2023 WL 2072059 (D.S.D. Feb. 17, 2023), *aff'd w/o op.*, 2024 WL1109067 (8th Cir. March 14, 2024).

Lapin is correct that *EverQuote* concluded South Dakota would accept a "stream of commerce plus" theory of personal jurisdiction, and relied on that theory to deny the defendant EverQuote's motion to dismiss. But there are important factual distinctions. EverQuote was an out-of-state company that generates leads for auto insurance carriers. *Id.* at *1. Unlike WCM, EverQuote was registered to do business in South Dakota, had a South Dakota registered agent, and advertised South Dakota specific auto insurance on its website. *Id.* Judge Schreier specifically relied on those facts, which are absent here, to find that EverQuote had purposefully availed itself of the privilege of doing business in South Dakota. *Id.* at *5-*6. In addition, even though Lapin did not allege that EverQuote had sent the spam email at issue in that case, Judge Schreier found "it reasonable to infer that regardless of who actually sent the emails, EverQuote enlisted some entity to do so. If EverQuote did not send the emails, someone had to have, and that someone would not have had access to EverQuote's advertisements except for EverQuote giving them the access." *Id.* at *6. Judge Schrier found that EverQuote "placed its advertisements with senders, hoping and knowing the emails would reach South Dakota

residents." She therefore concluded that "Lapin's action is based on e-mail advertisements that EverQuote placed into the stream of commerce and that advertise auto insurance." *Id.* at 7.

In contrast, in this case, Lapin has not established a prima facie case that WCM created the content of the 23 spam emails at issue or that it "enlisted" someone to send those spam emails. Lapin has not contradicted WCM's affidavit and sample contract, which assert that WCM does not send marketing emails itself. (Tolbert Aff. ¶ 8.) Instead, WCM contracts with media partners who are solely responsible for developing emails and determining the recipients of emails. (*Id.* ¶¶ 8-9 & Ex. A, Contract, *Obligations of the Parties, Partner* § 1.) WCM merely provides links to its website that the media partner inserts into emails. (*Id. Obligations of the Parties* § 1.)

Importantly, WCM's contract specifically requires media partners to use marketing media that is not illegal. (*Id.* §§ 2, 5.) They must download WCM's "Suppression List" and may not send emails to addresses on that list. (*Id. Obligations of the Parties, Program Specific Terms* § 1.) The media partner "must strictly comply with the federal CAN-SPAM Act of 2003." (*Id. Anti-Spam Policy.*) The media partner is prohibited from using fraud or falsifying information. (*Id. Fraud.*) The media partner "represents and warrants" that it will also comply with "all applicable . . . state or local laws." (*Id. Representations and Warranties.*) If the media partner enters into agreements with other entities to send emails, the media partner must require the third-party marketer to accept the WCM contractual terms. (*Id. Obligations of the Parties, Program Specific Terms* § 3.)

At first glance, the 23 spam emails sent to Lapin appear to violate multiple provisions of state law, including SDCL §§ 37-24-42(2) (emails are unsolicited ads but subject line does not begin "ADV:") and 37-24-47(2) (header information is garbled and therefore misrepresented).

For similar reasons, the 23 spam emails appear to violate the CAN-SPAM Act. *See* 15 U.S.C. § 7704(a)(1) to (3).

On this record, it would be reasonable to infer that WCM has entered into contracts with media partners to send emails containing links that comply with applicable laws. But because WCM's contract specifically prohibits sending spam emails that violate state or federal law, and the 23 spam emails at issue appear inconsistent with state and federal anti-spam laws, it would not be reasonable to infer that WCM created or authorized the 23 spam emails at issue here without some evidence that WCM ignores the provisions in its own contract. The record, however, contains no evidence that WCM encourages sending spam emails generally or that it authorized the 23 spam emails sent to Lapin. *See State v. Grand River Enters., Inc.*, 2008 S.D. 98, ¶¶ 33-34, 757 N.W.2d 305, 318 (because contract between Canadian cigarette manufacturer and a Native-American distributor located in New York made distributor responsible for manufacturing specifications, the manufacturer was not responsible for those specifications). One possibility is that an unknown media partner of WCM, or an unknown subcontractor of a WCM media partner, independently decided to send spam emails that did not comply with the WCM contract.[1] Whether that occurred, however, is speculation. In these circumstances, the Court finds and concludes that Lapin has not established a prima facie case that WCM placed the 23 spam emails into the stream of commerce. This distinguishes the *EverQuote* case and makes its stream of commerce theory irrelevant.

[1] If WCM discovered such unauthorized action, WCM's remedies would potentially include terminating the media partner, freezing unpaid commissions, and attempting to charge back paid commissions. (Tolbert Aff., Ex. A, Contract at *Termination* and *Suspension*.) It appears, however, that a media partner could receive a commission if someone clicked on a link in a spam email that violated the contract conditions if WCM did not detect that the person had accessed WCM's website from a link embedded in a spam email. (*Id. Obligations of the Parties* §§ 1-2.) On the current record, however, it would require improper speculation to find that WCM had paid any commissions resulting from an illegal email.

Lapin cites *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994), another stream of commerce decision. *Barone* held that Nebraska could exercise specific jurisdiction over the Japanese firework manufacturer that made an allegedly defective firework purchased in Nebraska that injured a Nebraska resident in Nebraska. *Id.* at 615. The firework manufacturer sold the firework at issue to a distribution company based in Sioux Falls called Rich Bros. Interstate Display Fireworks Co. *Id.* at 610-11. Rich Brothers was one of nine American distributors used by firework manufacturer to sell fireworks throughout the United States. *Id.* at 611. Rich Brothers had six salespeople, including in Nebraska and sold $16,000 of fireworks per year in Nebraska over the six-year period before the accident. *Id. Barone* held that the firework manufacturer should have known its distribution network would result in Nebraska sales, and thus the firework manufacturer purposefully availed itself of doing business in Nebraska. *Id.* at 615.

Like *EverQuote*, *Barone* is factually distinguishable. In *Barone*, it was undisputed that the firework manufacturer had made and sold the firework that caused injury in Nebraska. Here, WCM did not send the 23 spam emails, and, because its contracts prohibit media partners from sending illegal spam emails, there is not even any evidence that WCM enlisted the unknown party who sent the 23 spam emails. In addition, Lapin does not allege that he purchased anything from WCM due to the 23 spam emails, nor is there any record evidence that WCM has received income from spam emails sent to other South Dakota residents. Lapin's position is equivalent to a consumer who cannot establish a prima facie case that the product that injured him was actually manufactured by the defendant.

The Court acknowledges, without deciding, that the South Dakota anti-spam statutes may create liability for "advertisers" even if the advertiser did not send a spam email. *See EverQuote*,

2023 WL 2072059 at *3 (Concluding "South Dakota has deemed the advertiser liable for its commercial e-mails, even if the advertiser is not the one who sent the emails.") But substantive liability is a distinct issue from personal jurisdiction. Even if Lapin might be able to establish a viable claim against WCM under South Dakota's anti-spam statutes without knowing who sent the 23 spam emails, to sue WCM in South Dakota, Lapin must also establish that WCM engaged in actions giving rise to personal jurisdiction in South Dakota. Because Lapin concedes that WCM did not send the 23 spam emails, that Lapin does not know who did send them, and that WCM's contract only authorizes media partners to send emails that are not illegal spam, this record does not contain a prima facie case that WCM placed the 23 spam emails into the stream of commerce.

In sum, because WCM did not send the emails at issue and there is not even any evidence that WCM placed the 23 spam emails in the stream of commerce, WCM's own actions do not satisfy any element of South Dakota's specific jurisdiction test. First, WCM has not purposefully availed itself of the privilege of acting in South Dakota. Second, there is no evidence connecting Lapin's claims based on the 23 spam emails with any action by WCM directed at South Dakota. Third, Lapin has not identified any act by WCM that is related to Lapin's claims and has a substantial connection with South Dakota.

4. **Lapin has not established a prima facie case that WCM has a jurisdictionally significant agency relationship with the unknown third party or parties who sent the 23 spam emails.**

Lapin alternatively argues that WCM can be subject to South Dakota jurisdiction because the unknown sender of the 23 spam emails should be viewed as WCM's agent. WCM denies the existence of an agency relationship with the unknown sender. The Court agrees with WCM.

The United States Supreme Court recognized that actions taken by a defendant's agent(s) can be jurisdictionally relevant. *Daimler AG* , 571 U.S. at 134-35 & n. 13. Other than rejecting the Ninth Circuit's test as too lenient, *Daimler* did not set forth a test for determining what type of relationship is sufficient to make someone an agent for jurisdictional purposes. The parties have not identified any South Dakota Supreme Court cases on jurisdictional agency, although, as indicated above, *Grand River Enterprises* held that a manufacturer could not be held responsible for a distributor's actions when the contract between the two made the distributor solely responsible for the actions at issue. *Grand River Enters.*, 2008 S.D. 98, ¶¶ 33-34, 757 N.W.2d at 318.

WCM cites an unpublished California decision, *Durward v. One Technologies LLC*, 2019 WL 4930229 (C.D. Cali. Oct. 3, 2019), that shares some critical facts with this case. In *Durward*, the California plaintiff alleged that she received 90 unlawful spam emails advertising defendant One Technologies' services. *Id.* at *1. The record showed that One Technologies did not send emails to customers if they did not already have a relationship. *Id.* at *5 n.1. One Technologies did contract with publishers to send marketing emails. *Id.* The publishers controlled all aspects of transmitting the emails, but were required "to comply with applicable laws and regulations and follow One Technologies' email compliance policy." *Id.* Because One Technologies did not control where emails were sent and prohibited unlawful emails, *Durward* held that "emails sent by third-party marketing publishers could not be attributed to the defendant for purposes of establishing purposeful availment for specific personal jurisdiction. *Id.* at *5.

Durward's conclusion that the third party publishers' sending of a spam email cannot be attributed to a defendant when the defendant did not control the sending of the email and the

defendant's contract prohibited unlawful spam is consistent with the rationale of *Grand River Enterprises* and other decisions involving marketing communications where the defendant had not made the communication itself and had a contract prohibiting its third-party marketer from making that type of contact. *Moore v. Chater Comms., Inc.*, 523 F. Supp. 3d 1046, 1052 (N.D. Ill. 2020) (Because defendant did not make unlawful telemarketing call and its contract prohibited its marketing partner from making telemarketing call, the allegedly illegal telemarketing call to plaintiff could not be attributed to defendant for personal jurisdiction); *Powers v. One Technologies, LLC*, 2021 WL 3519282, *4 (W.D.N.C. Aug. 10, 2021) (unpublished) (Because defendant did not send marketing text at issue and contractually prohibited its contractors from sending texts, the unlawful marketing text sent to plaintiff could not be attributed to defendant for personal jurisdiction);

In contrast, Lapin cites *Bilek v. Federal Insurance Co.*, 8 F.4th 581 (7th Cir. 2021), a case involving robocalls. The Illinois plaintiff received two allegedly illegal unsolicited robocalls regarding health insurance. *Id.* at 584. The calls allegedly were made by a "lead generator" hired by a defendant named Health Insurance Innovations, which in turn had a contract to sell insurance provided by defendant Federal Insurance Company. *Id.* Health Insurance Innovations did not dispute that the lead generators who initiated the phone calls to the Illinois plaintiffs would be subject to personal jurisdiction in Illinois, but contended that contact should not be attributed to Health Insurance Innovations. *Id.* at 590. The Seventh Circuit held that "attributing an agent's acts to a principal which are intertwined with the very controversy at issue is consistent with the purposeful availment requirement" for jurisdiction. *Id.* at 591. The plaintiff met that standard because the record showed Health Insurance Innovations contracted with the lead generators to make marketing calls and "Health Insurance Innovations participated in the

calls in real-time by pairing the agents with Federal Insurance Company's health insurance quotes, emailing quotes to call recipients, and permitting its agents to enter information into its system." *Id.* Those well-pleaded allegations established a prima facie case that the lead generators acted with Health Insurance Innovation's actual authority when they made the calls at issue to Illinois. *Id.*

Lapin also cites *Advanced Dermatology v. Adv-Care Pharmacy, Inc.*, 2017 WL 5067576 (N.D. Ohio Nov. 1, 2017). In *Advanced Dermatology*, the defendant Canadian pharmacy named Adv-Care had contracted with a third party vendor to send marketing faxes. *Id.* at *2. The plaintiff was an Ohio dermatology practice that received an unsolicited fax. *Id.* at *1. The faxes contained Adv-Care's correct name, logo, and contact information. *Id.* at *5. Adv-Care argued it should not be responsible for the fax sent to the plaintiff because it did not know its vendor would send faxes to Ohio. *Id.* The Ohio District Court rejected that argument because Adv-Care admitted that it had sent faxes to four entities in Ohio, although its vendor did not retain records of the faxes it had sent. *Id.* at *2.

The Court concludes that the record in this case is more analogous to the decisions WCM cites. As discussed above, it is undisputed that WCM did not send the 23 spam emails, and Lapin has not contradicted WCM's evidence that WCM does not control to whom its media partners send emails, (Tolbert Aff. ¶¶ 7-8), and specifically prohibits them from sending illegal spam. (*See id.* & *id.*, Ex. A, Contract, *Obligations of the Parties* §§ 1, 2, & 5.) Lapin does not allege that WCM received any benefit from the 23 spam emails sent to him. It is also noteworthy that the identity of the sender remains unknown. In these circumstances, the Court concludes that Lapin has not presented a prima facie case that whoever sent the 23 spam emails

can be viewed as WCM's agent for jurisdictional purposes under any viable agency theory including actual, apparent, or ratification.

Lapin also argues that the actions of WCM's media partners should be attributed to WCM because WCM's contract repeatedly refers to them as a "partner" or "media partner." It is certainly true that the contract uses the term partner. But South Dakota courts have never relied solely on labels to determine whether contracting parties are partners (as Lapin contends) or independent contractors (as WCM contends).

In South Dakota, a partnership is "the association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intend to form a partnership." SDCL § 48-7A-202. "Since there is no arbitrary test for determining the existence of a partnership, each case must be governed by its own peculiar facts and the existence of the relationship is a question for the trier of fact except in a case where the evidence is conclusive." *McGregor v. Crumley*, 2009 S.D. 95, ¶ 20, 775 N.W.2d 91, 97-98. "A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment: . . . (ii) For services as an independent contractor or of wages or other compensation to an employee." SDCL § 48-7A-202(3)(ii); *see also Ins. Agents, Inc. v. Zimmerman*, 381 N.W.2d 218, 220 (S.D. 1986).

In contrast, the hallmarks of an independent contractor relationship are that the contractor "is performing services free of direction and control and that the individual is customarily engaged in an independently established occupation or business." *Jackson v. Lee's Travelers Lodge, Inc.*, 1997 S.D. 63, ¶ 11, 563 N.W.2d 858, 861. Whether a worker is an employee or independent contractor is a mixed question of fact and law. *Id.* ¶ 9, 563 N.W.2d at 861. "Each

case must be determined on its own facts, with all the features of the relationship considered." *Id.* ¶ 12, 563 N.W.2d at 861.

Here, Lapin has not established a prima facie case that WCM and whoever sent the 23 spam emails were partners, or even principal and agent, because he admittedly does not know who sent those emails. (*See* FAC ¶¶ 7, 13.) The record therefore contains no evidence concerning the nature of the relationship, if any, between WCM and the person or persons that sent the 23 spam emails to Lapin.

Assuming for the sake of argument that the sender was a media partner who had signed WCM's contract or someone who signed a subcontract with a WCM media partner, the only evidence concerning the nature of that relationship is the contract itself and Tolbert's uncontradicted representations. Despite the WCM contract's admittedly confusing use of "partner" to describe WCM's "media partners," the contract expressly states that the parties have an independent contractor relationship and disclaims any partnership or agency relationship:

> Relationship of the Parties. The parties hereto are independent contractors. There is no relationship of partnership, agency, employment, franchise or joint venture between the parties. Neither has the authority to bind the other, or incur any obligation on its behalf.

(Tolbert Aff., Ex. A, Contract at *Governing Law & Miscellaneous* § 4.) As noted above, the Court would not accept this description if the rest of the contract terms and factual evidence were contrary to an independent contractor relationship. The remaining record, however, is consistent with an independent contractor relationship.

Per Tolbert, WCM is a Georgia LLC, and he and Christy Tolbert are its sole members. (Tolbert Aff. ¶¶ 3-4.) The media partners work not only with WCM but multiple companies. (*Id.* ¶ 8.) The media partners are compensated based solely on commission; the contract does not provide for wages or the sharing of profits or losses. (*See id.*, Contract at *Obligations of the*

Parties §§ 2-4.) WCM prohibits sending unlawful emails and provides a "suppression list," but otherwise does not control how the media partners send emails. (Tolbert Aff. ¶¶ 8-9.) The media partners have sole responsibility for developing emails and deciding who will be sent emails. (*Id.*; *see also id.* Contract at *Partner also agrees that* § 1.) If a media partner subcontracts with someone else, the media partner must confirm that the third party accepts WCM's terms and is liable for any acts or omissions by the third party. (*Id.* at *additional program-specific terms* § 3.) Media partners are required to indemnify WCM for the emails they send and breaches of the contract. (*Id.* at *Indemnification.*) Based on the uncontroverted evidence provided by WCM, the Court finds and concludes that Lapin has not established a prima facie case that WCM's relationship with its media partners or third party subcontractors of media partners would be either a partnership. The record evidence is consistent with an independent contractor relationship. The nature of WCM's relationship with its media partners thus provides no basis for attributing the acts of the unknown sender of the 23 spam emails to WCM for purposes of personal jurisdiction.

Conclusion

The record reveals that WCM is a Georgia LLC that has no jurisdictionally significant contacts with South Dakota apart from this lawsuit. South Dakota would have personal jurisdiction over WCM only if Lapin could establish that sending the 23 spam emails can be attributed to WCM for jurisdictional purposes. Because WCM did not send the emails itself, it is unknown who did send the emails, and WCM contractually prohibited its media partners from sending the type of spam emails at issue, the Court concludes that Lapin has not established a prima facie case based on either WCM's own actions or an agency theory that WCM is jurisdictionally responsible for sending the 23 spam emails. Lapin thus has not made a prima

facie case concerning any element of South Dakota's three-part specific jurisdictional test. WCM's motion to dismiss is granted based on lack of jurisdiction, and the Court expresses no opinion concerning its other asserted grounds for dismissal.

Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

Defendant White Collar Media, LLC's motion to dismiss is GRANTED based on lack of personal jurisdiction and thus all claims against it are DISMISSED WITHOUT PREJUDICE.

Dated this 11 day of April, 2024.

BY THE COURT:

James A. Power

CIRCUIT COURT JUDGE

ATTEST: CLERK OF COURTS

By:

FILED

APR 11 2024

Minnehaha County, S.D.
Clerk Circuit Court

EXHIBIT

B

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

JOSHUA LAPIN, Plaintiff, vs. WHITE COLLAR MEDIA, LLC; JOHN DOE SENDER A; JOHN DOE SENDER B; JOHN DOES CO-ADVERTISERS 1-3, Defendants.	49CIV23-2808 **AFFIDAVIT OF ROBERT TOLBERT IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR PROTECTIVE ORDER**

STATE OF Maine)
:SS
COUNTY OF Hancock

I, ROBERT TOLBERT, being first duly sworn upon oath, do hereby declare as follows:

1. I am a member of White Collar Media, LLC ("WCM"), a named defendant in this action, and I am authorized to make this declaration on its behalf. I make this Affidavit in support of WCM's Motion to Dismiss and Motion for Protective Order.

2. I have personal knowledge of the facts in this declaration or base them on business records provided to me and, if called upon as a witness, could competently testify thereto, except as to those matters which are explicitly set forth as based upon my information and belief and, as to such matters, I am informed and believe that they are true and correct.

3. WCM is organized under the laws of the State of Georgia, and it operates out of the State of Georgia.

4. My wife Christy Tolbert and I are WCM's sole members, and we are Georgia residents.

5. WCM provides all services from its business location in Ellijay, Georgia.

6. WCM does not: (1) have a license to transact business in South Dakota; (2) have any members resident in South Dakota; (3) employ anyone in South Dakota; (4) own property or assets in South Dakota; (5) have an office or mailing address in South Dakota; (6) pay income taxes in South Dakota; (7) maintain a bank account in South Dakota; (8) transact business in South Dakota; or (9) have a public telephone listing in South Dakota.

7. I have reviewed the First Amended Complaint for Damages of Plaintiff Joshua Lapin: Violations of South Dakota Restrictions on Unsolicited Commercial Electronic Mail (23 counts) in this action. I have also reviewed the examples of the e-mails described in the Amended Complaint.

8. WCM relies solely on independent contractors known as "publishers" or "affiliates" to send e-mails advertising WCM's services. These publishers send e-mails advertising multiple companies, and not just WCM. WCM requires publishers to comply with applicable laws and regulations and follow WCM's anti-spam policy. However, publishers control all aspects of transmitting the e-mails, and make fundamental decisions concerning the e-mails themselves, including choosing each e-mail's recipient.

9. WCM does not decide the recipients of the e-mails that publishers send. WCM does not know, does not direct, and has no control over, where the e-mails are sent, other than to provide a suppression file and prohibit publishers from sending e-mail advertisements to e-mail addresses associated with recipients who have requested to "optout" of receiving e-mails advertising WCM.

10. WCM would not be able to identify the location of any given e-mail recipient because, unlike phone number area codes, e-mail addresses are not connected to any particular geographic location. Thus, WCM has no ability to differentiate South Dakota recipients from

recipients in any other state, and would not have the ability even if it knew in advance the e-mail addresses to which the e-mails would be sent.

11. With respect to the examples of the e-mails at issue in this action, as described by Plaintiff in the Amended Complaint, WCM has no information as to where the e-mails were sent, or in what states e-mail recipients resided in, or that the e-mails are even associated with WCM, other than as Plaintiff alleges as much in the Amended Complaint; allegations which WCM specifically denies.

12. Attached hereto as ***Exhibit A*** is a true and correct "cut-and-paste" copy of WCM's standard publisher terms and conditions as set forth at https://affiliates.whitecollarmg.com/terms. The publisher terms require a publisher to comply with the requirements of the CAN-SPAM Act of 2003, the federal law that regulates commercial e-mail advertising, as well as state laws that may regulate commercial e-mails, if applicable, and not preempted by CAN-SPAM Act of 2003.

I declare under penalty of perjury, pursuant to the laws of the United States of America, that the foregoing is true and correct.

Executed on this 3rd th day of November 2023, in the State of Maine.

ROBERT TOLBERT

Subscribed to and sworn to before me this 3rd day of November, 2023.

Chelsea M Sawyer [SEAL]

Notary Public, State of: Maine

My commission expires: 1/24/28

CHELSEA M. SAWYER
Notary Public-Maine
My Commission Expires
January 24, 2028

EXHIBIT

C

EXHIBIT A

This Partner Program Operating Agreement (the "Agreement") is made and entered into by and between White Collar Media ("White Collar Media " or "we"), and the party submitting an application to become a White Collar Media partner ("Partner"). The terms and conditions contained in this Agreement apply to Partner's participation with affiliates.whitecollarmg.com ("Partner Program"). In connection with the Partner Program, Partner may see offers (each, an "Offer") by White Collar Media or a third party (each such third party a "Client") that may link to a specific web site for that particular Offer ("Program Web Site"). Furthermore, each Offer may have additional terms that are incorporated as part of this Agreement. By submitting an application or participating in an Offer, Partner expressly consents to all the terms and conditions of this Agreement and the individual accepting this Agreement represents that he or she has the authority to bind the Partner to the terms of this Agreement.

Enrollment in the Partner Program

Partner must submit an Partner Program application from White Collar Media 's website. Partner must provide accurate and complete information in Partner's application. After White Collar Media reviews Partner's application, White Collar Media will notify Partner of Partner's acceptance or rejection to the Partner Program. White Collar Media may accept or reject Partner's application at White Collar Media 's sole discretion for any reason.

Obligations of the Parties

Subject to White Collar Media 's acceptance of Partner as an partner and Partner's continued compliance with the terms and conditions of this Agreement, White Collar Media agrees as follows:

1. White Collar Media will make available to Partner via the Partner Program graphic and textual links to the Program Web Site and/or other creative materials (collectively, the "Links") which Partner may display on web sites owned or controlled by Partner, in emails sent by Partner and in online advertisements (collectively, "Media"). The Links will serve to identify Partner as a member of White Collar Media 's Partner Program and will establish a link from Partner's Media to the Program Web Site.
2. White Collar Media will pay Partner for each Qualified Action (the "Commission"). A "Qualified Action" means an individual person who (i) accesses the Program Web Site via the Link, where the Link is the last link to the Program Web Site, (ii) is not a computer generated user, such as a robot, spider, computer script or other automated, artificial or fraudulent method to appear like an individual, real live person (as determined by White Collar Media), (iii) is not using pre-populated fields, (iv) completes all of the

information required for such action within the time period allowed by White Collar Media , and (v) is not later determined by White Collar Media to be fraudulent, incomplete, unqualified or a duplicate user.

3. White Collar Media will pay Partner any Commissions earned on a monthly basis, provided that the total Commissions White Collar Media owes you is greater than $0. Accounts with a balance of less than $0 will roll over to the next month and will continue to roll over monthly until the $0 minimum is reached. White Collar Media reserves the right to charge back to Partner's account any previously paid Qualified Actions that are later determined to have not met the requirements to be a Qualified Action.
4. Payment for Commissions is dependent upon Clients providing such funds to White Collar Media , and therefore, Partner agrees that White Collar Media shall only be liable to Partner for Commissions to the extent that White Collar Media has received such funds from the Clients.
5. White Collar Media shall automatically generate an invoice on behalf of Partner for all Commissions payable under this Agreement and shall remit payment to Partner based upon that invoice. All tracking of Links and determinations of Qualifed Actions and Commissions shall be made by White Collar Media in its sole discretion. In the event that Partner disputes in good faith any portion of an invoice, Partner must submit that dispute to White Collar Media in writing and in sufficient detail within thirty (30) days of the date on the invoice. If Partner does not dispute the invoice as set forth herein, then Partner agrees that it irrevocably waives any claims or challenges based upon that invoice. In the event that Partner is also tracking Qualified Actions and Partner claims a discrepancy, Partner must provide White Collar Media with Partner's reports within three (3) days after 30th day of the calendar month, and if White Collar Media 's and Partner's reported statistics vary by more than 10% and White Collar Media reasonably determines that Partner has used generally accepted industry methods to track Qualified Actions, then White Collar Media and Partner agree to make a good faith effort to arrive at a reconciliation. If the parties are unable to arrive at a reconciliation, then White Collar Media 's numbers shall govern.
6. If Partner has an outstanding balance due to White Collar Media under this Agreement or any other agreement between the Partner and White Collar Media , whether or not related to the Partner Program, Partner agrees that White Collar Media may offset any such amounts due to White Collar Media from amounts payable to Partner under this Agreement.

Partner also agrees that:

1. It has sole responsibility for the development, operation, and maintenance of, and all content on or linked to, the Media.
2. All materials posted on the Media or otherwise used in connection with the Partner Program (i) are not illegal, (ii) do not infringe upon the intellectual property or personal rights of any third party, and (iii) do not contain or link to any material which is harmful, threatening, defamatory, obscene, sexually explicit, harassing, promotes violence, promotes discrimination (whether based on sex, religion, race, ethnicity, nationality, disability or age), promotes illegal activities (such as gambling), contains profanity or otherwise contains materials that White Collar Media informs Partner that it considers objectionable (collectively, "Objectionable Content").
3. It will not make any representations, warranties or other statements concerning White Collar Media or Client or any of their respective products or services, except as expressly authorized herein.
4. The Media does not copy or resemble the look and feel of the Program Web Site or create the impression that the Media is endorsed by White Collar Media or Clients or a part of the Program Web Site, without prior written permission from White Collar Media .
5. It will comply with all (i) obligations, requirements and restrictions under this Agreement and (ii) laws, rules and regulations as they relate to its business, its Media or its use of the Links.
6. It will comply with the terms, conditions, guidelines and policies of any third-party services used by Partner in connection with the Partner Program, including but not limited to, email providers, social networking services and ad networks.
7. It will always prominently post and make available to end-users, including prior to the collection of any personally identifiable information, a privacy policy in compliance with all applicable laws that clearly and thoroughly discloses all information collection, use and sharing practices, including providing for the collection of such personally identifiable information in connection with the Partner Program and the provision of such personally identifiable information to White Collar Media and Clients for use as intended by White Collar Media and Clients.
8. It will always prominently post and make available to end-users any terms and conditions in connection with the Offer set forth by White Collar Media or Client, or as required by applicable laws regarding such Offers.
9. It will not place White Collar Media ads on any online auction platform (i.e. eBay, Amazon, etc).

The following additional program-specific terms shall apply to any promotional programs set forth below:

1. Email Campaigns. For all email campaigns, Partner must download the "Suppression List" from the Offers section of White Collar Media . Partner shall filter its email list by removing any entries appearing on the Suppression List and will only send emails to the remaining addresses on its email list. White Collar Media will provide an opt-out method in all Links, however, if any opt-out requests come directly to Partner, Partner shall immediately forward them to White Collar Media at robert@whitecollarmg.com. Partner's emails containing the Links may not include any content other than the Links, except as required by applicable law.
    1. Partner agrees that failure to download the Suppression List and remove all emails from the database before mailing may result in Commission withholdings, removal or suspension from all or part of the Partner Program, possible legal action and any other rights or remedies available to White Collar Media pursuant to this Agreement or otherwise. Partner further agrees that it will not mail or market to any suppression files generated through the White Collar Media network, and that doing so may result in Commission withholdings, removal or suspension from the Partner Program, possible legal action and any other rights or remedies available to White Collar Media pursuant to this Agreement or otherwise.
2. Advertising Campaigns. No Links can appear to be associated with or be positioned on chat rooms or message or bulletin boards unless otherwise agreed by White Collar Media in writing. Any pop-ups/unders used for the Partner Program shall be clearly identified as being served by Partner in the title bar of the window and any client-side ad serving software used by Partner shall only have been installed on an end-user's computer if the function of the software is clearly disclosed to end-users prior to installation, the installation is pursuant to an affirmatively accepted and plain-English end user license agreement and the software be easily removed according to generally accepted methods.
3. Partner Network Campaigns. For all Partners that maintain their own partner networks, Partner agrees to place the Links in its partner network (the "Partner Network") for access and use by those partners in the Partner Network (each a "Third Party Partner"). Partner agrees that it will expressly forbid any Third Party Partner to modify the Links in any way. Partner agrees to maintain its Partner Network according to the highest industry standards. Partner shall not permit any party to be a Third Party Partner whose web site or business model involves content containing Objectionable Content. All Third Party Partners must be in good standing with Partner. Partner must require and confirm that all

Third Party Partners affirmatively accept, through verifiable means, the terms of this Agreement prior to obtaining access to the Links. Partner shall promptly terminate any Third Party Partner who takes, or could reasonably be expected to take, any action that violates the terms and conditions of this Agreement. In the event that either party suspects any wrongdoing by a Third Party Partner with respect to the Links, Partner shall promptly disclose to White Collar Media the identity and contact information for such Third Party Partner. Partner shall promptly remove any Third Party Partner from the Partner Program and terminate their access to future Offers of White Collar Media in the Partner Network upon written notice from White Collar Media . Partner shall remain liable for all acts or omissions of any Third Party Partner.

Confidentiality

For purposes of the Agreement, "Confidential Information" shall mean all data and information, of a confidential nature or otherwise, disclosed during the term of the Agreement by one party ("Disclosing Party") to the other party ("Receiving Party"), as well as information that the Receiving Party knows or should know that the Disclosing Party regards as confidential including, but not limited to:

1. a party's business plans, strategies, know how, marketing plans, suppliers, sources of materials, finances, business relationships, personally identifiable end-user information, pricing, technology, employees, trade secrets and other non-public or proprietary information whether written, oral, recorded on tapes or in any other media or format;
2. the material terms of the Agreement; and
3. any information marked or designated by the Disclosing Party as confidential.

The Receiving Party agrees to hold all Confidential Information in trust and confidence and, except as may be authorized by the Disclosing Party in writing, shall not use such Confidential Information for any purpose other than as expressly set forth in the Agreement or disclose any Confidential Information to any person, company or entity, except to those of its employees and professional advisers:

1. who need to know such information in order for the Receiving Party to perform its obligations hereunder; and
2. who have entered into a confidentiality agreement with the Receiving Party with terms at least as restrictive as those set forth herein.

Confidential information shall not include any information that the Receiving Party can verify with substantial proof that:

1. is generally available to or known to the public through no wrongful act of the receiving party;
2. was independently developed by the Receiving Party without the use of Confidential Information; or
3. was disclosed to the Receiving Party by a third party legally in possession of such Confidential Information and under no obligation of confidentiality to the Disclosing Party.

The Receiving Party agrees that monetary damages for breach of confidentiality may not be adequate and that the disclosing party shall be further entitled to injunctive relief, without the requirement to post bond.

Limited License & Intellectual Property

Partner may not alter, modify, manipulate or create derivative works of the Links or any White Collar Media graphics, creative, copy or other materials owned by, or licensed to, White Collar Media in any way. Partner is only entitled to use the Links to the extent that Partner is a member in good standing of the Partner Program. White Collar Media may revoke Partner's license any time by giving Partner written notice. Except as expressly stated herein, nothing in this Agreement is intended to grant Partner any rights to any of White Collar Media 's trademarks, service marks, copyrights, patents or trade secrets. Partner agrees that White Collar Media may use any suggestion, comment or recommendation Partner chooses to provide to White Collar Media without compensation for any purpose. All rights not expressly granted in this Agreement are reserved by White Collar Media .

Termination

This Agreement shall commence on the date of White Collar Media 's approval of Partner's Partner Program application and shall continue thereafter until terminated as provided herein. Partner may terminate Partner's participation in the Partner Program at any time by removing all Links from Partner's Media and deleting all copies of the Links. White Collar Media may terminate Partner's participation in one or more Offers or this Agreement at any time and for any reason which White Collar Media deem appropriate with or without prior notice to Partner by disabling the Links or providing Partner with a written notice. Upon termination of Partner's participation in one or more Offers or this Agreement for any reason, Partner will immediately cease all use of and delete all Links, plus all White Collar Media or Client intellectual property, and will cease representing yourself as a White Collar Media or Client partner for such one or more Offers. All rights to validly accrued payments, causes of action and any provisions, which by their terms are intended to survive termination, shall survive any termination.

Suspension

In addition to any other rights and remedies available to White Collar Media under this Agreement White Collar Media reserves the right to delete any actions submitted through Partner's Links and withhold and freeze any unpaid Commissions or charge back paid Commissions to Partner's account if (i) White Collar Media determines that Partner has violated this Agreement, (ii) White Collar Media receives any complaints about Partner's participation in the Partner Program which White Collar Media reasonably believes is in violation this Agreement or (iii) any Qualified Action is later determined to have not met the requirements set forth in this Agreement or on the Partner Program. Such withholding or freezing of Commissions, or charge backs for paid Commissions, shall be without regard as to whether or not such Commissions were earned as a result of such breach. In the event of a material breach of this Agreement, White Collar Media reserves the right to disclose Partner's identity and contact information to appropriate law enforcement or regulatory authorities or any third party that has been directly damaged by Partner's actions. Such suspension will be in addition to White Collar Media 's available rights and remedies.

Anti-Spam Policy

Partner must strictly comply with the federal CAN-SPAM Act of 2003 (the "Act"). All emails sent in connection with the Partner Program must include the appropriate party's opt-out link. From time to time, White Collar Media may request - prior to Partner's sending emails containing linking or referencing the Partner Program that Partner submit the final version of Partner's email to White Collar Media for approval by sending it to Partner's White Collar Media representative and upon receiving written approval from White Collar Media of Partner's email the email may be transmitted to third parties.

It is solely Partner's obligation to ensure that the email complies with the Act. Partner agrees not to rely upon White Collar Media 's approval of Partner's email for compliance with the Act or assert any claim that Partner are in compliance with the Act based upon White Collar Media 's approval.

Fraud

Partner is expressly prohibited from using any persons, means, devices or arrangements to commit fraud, violate any applicable law, interfere with other partners or falsify information in connection with referrals through the Links or the generation of Commissions or exceed Partner's permitted access to the Partner Program. Such acts include, but are in no way limited to, using automated means to increase the number of clicks through the Links or completion of any required

information, using spyware, using stealware, cookie-stuffing and other deceptive acts or click-fraud. White Collar Media shall make all determinations about fraudulent activity in its sole discretion.

Representations and Warranties

The parties agree to the terms in the General Data Protection Regulation Data Processing Addendum, which is incorporated into this Agreement.

Partner represents and warrants that:

1. it has the power and authority to enter into and perform its obligations under the Agreement;
2. at all times, the Media and Partner itself will comply with all applicable foreign, federal, state or local laws, rules, regulations and ordinances including, without limitation, the Gramm-Leach Bliley Act, the Fair Credit Reporting Act, the Federal Trade Commission Act, CAN-SPAM, the Telephone Consumer Protection Act, the Fair Debt Collection Practices Act, the Federal Communications Act, and all rules and regulations promulgated under any of the foregoing, as well as all applicable state laws including, without limitation, the California Financial Privacy Act and the Vermont Consumer Protection Act, and all rules and regulations promulgated under such state laws (collectively, "Laws");
3. it owns and/or has any and all rights in the Media as contemplated by the Agreement;
4. at all times, the Media and Partner itself will not violate any applicable rights of any third party including, but not limited to, infringement or misappropriation of any copyright, patent, trademark, trade secret or other proprietary, property or other intellectual property right;
5. Partner has a reasonable basis for any and all claims made within the Media and possesses appropriate documentation to substantiate such claims;
6. Partner shall fulfill all commitments made in the Media;
7. no Media is targeted to end-users under the age of eighteen (18);
8. prior to loading any computer program onto an individual's computer including, without limitation, programs commonly referred to as adware and/or spyware, and cookies, Partner shall provide clear and conspicuous notice to, and shall obtain the express consent of, such individual to install such computer program and/or cookies;
9. the Media does not and will not:
    1. contain any misrepresentations or content that is defamatory;

2. contain content that is violent, obscene, offensive, including content that contains nudity or implied nudity or content that is morally or ethically offensive or sexually suggestive;
3. promote or support gambling or sweepstakes or contests; or
4. contain any "worm," "virus" or other device that could impair or injure any person or entity;

10. Partner is not, nor is Partner acting on behalf of any person or entity that is, prohibited from engaging in transactions with U.S. citizens, nationals or entities under applicable U.S. law and regulation including, but not limited to, regulations issued by the U.S. Office of Foreign Assets Control ("OFAC"); and
11. Partner is not, nor is Partner acting on behalf of any person or entity that is, a Specially Designated National ("SDN"), as OFAC may so designate from time to time.

Modifications

In addition to any notice permitted to be given under this Agreement, White Collar Media may modify any of the terms and conditions of this Agreement at any time by providing Partner with a notification by email. The changes will become effective ten (10) business days after such notice. If the modifications are unacceptable to Partner, Partner may terminate this Agreement without penalty solely on the account of such termination within such ten (10) business day period. Partner's continued participation in this Partner Program ten (10) business days after a change notice has been posted will constitute Partner's acceptance of such change.

In addition, White Collar Media may change, suspend or discontinue any aspect of an Offer or Link or remove, alter, or modify any tags, text, graphic or banner ad in connection with a Link. Partner agrees to promptly implement any request from White Collar Media to remove, alter or modify any Link, graphic or banner ad that is being used by Partner as part of the Partner Program.

Independent Investigation

Partner acknowledges that it has read this Agreement and agrees to all its terms and conditions. Partner has independently evaluated the desirability of participating in the Partner Program and each Offer and is not relying on any representation, guarantee or statement other than as set forth in this Agreement or on the Partner Program.

Indemnification

Partner shall irrevocably defend, indemnify and hold White Collar Media and Clients and each of their respective employees, officers, directors, members, managers,

shareholders, contractors and agents harmless from and against any and all liability, loss, damage or expense (including, without limitation, reasonable attorneys' fees, costs and expenses) arising out of or related to any allegation, claim or cause of action, involving:

1. Partner's breach of the Agreement;
2. the Media; and/or
3. any claim that White Collar Media is obligated to pay any taxes in connection with Partner's participation hereunder.

Disclaimers

THE AFFILIATE PROGRAM AND LINKS, AND THE PRODUCTS AND SERVICES PROVIDED IN CONNECTION THEREWITH, ARE PROVIDED TO AFFILIATE "AS IS". EXCEPT AS EXPRESSLY SET FORTH HEREIN, WHITE COLLAR MEDIA EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT, AND ANY WARRANTIES ARISING OUT OF COURSE OF DEALING, USAGE, OR TRADE. WHITE COLLAR MEDIA DOES NOT WARRANT THAT THE AFFILIATE PROGRAM OR LINKS WILL MEET AFFILIATE'S SPECIFIC REQUIREMENTS OR THAT THE OPERATION OF THE AFFILIATE PROGRAM OR LINKS WILL BE COMPLETELY ERROR-FREE OR UNINTERRUPTED. WHITE COLLAR MEDIA EXPRESSLY DISCLAIMS ANY LIABILITY FOR ANY ACT OR OMISSION OF A CLIENT OR THEIR PRODUCTS OR SERVICES. WHITE COLLAR MEDIA DOES NOT GUARANTEE THAT AFFILIATE WILL EARN ANY SPECIFIC AMOUNT OF COMMISSIONS.

Limitation of Liability

IN NO EVENT SHALL WHITE COLLAR MEDIA BE LIABLE FOR ANY UNAVAILABILITY OR INOPERABILITY OF THE LINKS, PROGRAM WEB SITES, TECHNICAL MALFUNCTION, COMPUTER ERROR, CORRUPTION OR LOSS OF INFORMATION, OR OTHER INJURY, DAMAGE OR DISRUPTION OF ANY KIND BEYOND THE REASONABLE CONTROL OF WHITE COLLAR MEDIA . IN NO EVENT WILL WHITE COLLAR MEDIA BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PERSONAL INJURY / WRONGFUL DEATH, SPECIAL OR EXEMPLARY DAMAGES, INCLUDING BUT NOT LIMITED TO, LOSS OF PROFITS OR LOSS OF BUSINESS OPPORTUNITY, EVEN IF SUCH DAMAGES ARE FORESEEABLE AND WHETHER OR NOT WHITE COLLAR MEDIA HAS BEEN ADVISED OF THE

POSSIBILITY THEREOF. WHITE COLLAR MEDIA 'S CUMULATIVE LIABILITY TO AFFILIATE, FROM ALL CAUSES OF ACTION AND ALL THEORIES OF LIABILITY, WILL BE LIMITED TO AND WILL NOT EXCEED THE AMOUNTS PAID TO AFFILIATE BY WHITE COLLAR MEDIA IN COMMISSIONS DURING THE SIX (6) MONTHS IMMEDIATELY PRIOR TO SUCH CLAIM.

Force Majeure

Other than with respect to payment obligations arising hereunder, neither party will be liable, or be considered to be in breach of this Agreement, on account of such party's delay or failure to perform as required under the terms of this Agreement as a result of any causes or conditions that are beyond such party's reasonable control and that such party is unable to overcome through the exercise of commercially reasonable diligence (a "Force Majeure Event"). If any such Force Majeure Event occurs including, without limitation, acts of God, fires, explosions, telecommunications, Internet or Partner Network failure, results of vandalism or computer hacking, storm or other natural occurrences, national emergencies, acts of terrorism, insurrections, riots, wars, strikes or other labor difficulties, or any act or omission of any other person or entity, the affected party will give the other party notice and will use commercially reasonable efforts to minimize the impact of any such event.

Governing Law & Miscellaneous

1. Assignment. Partner may not assign, transfer or delegate any of its rights or obligations under the Agreement without the prior written consent of White Collar Media , and any attempts to do so shall be null and void; provided, however, that either party may assign the Agreement or any portion hereof/thereof, to:
    1. an acquirer of all or substantially all of such party's equity, business or assets;
    2. a successor in interest whether by merger, reorganization or otherwise; or
    3. any entity controlling or under common control with such party.
2. Choice of Law/Venue. The Agreement shall be construed in accordance with and governed by the laws of the State of Georgia. In the event that any suit, action or other legal proceeding shall be instituted against either party in connection with the Agreement, each hereby submits to a court of competent jurisdiction located in Gilmer County, Georgia, and further agrees to comply with all the requirements necessary to give such court jurisdiction.
3. Non-Waiver/Severability. No waiver of any breach of any provision of the Agreement shall constitute a waiver of any prior, concurrent or subsequent

breach of the same or any other provisions hereof, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party. If any provision contained in the Agreement is determined to be invalid, illegal or unenforceable in any respect under any applicable law, then such provision will be severed and replaced with a new provision that most closely reflects the real intention of the parties, and the remaining provisions of the Agreement will remain in full force and effect.

4. Relationship of the Parties. The parties hereto are independent contractors. There is no relationship of partnership, agency, employment, franchise or joint venture between the parties. Neither party has the authority to bind the other, or incur any obligation on its behalf.

By submitting and application to Partner Program, Partner affirms and acknowledges that Partner has read this Agreement in its entirety and agrees to be bound by all of its terms and conditions. If Partner does not wish to be bound by this Agreement, Partner should not submit an application to Partner Program. If an individual is accessing this Agreement on behalf of a business entity, by doing so, such individual represents that they have the legal capacity and authority to bind such business entity to this Agreement.

GDPR Data Processing Addendum

This General Data Protection Regulation Data Processing Addendum ("GDPR Addendum") is incorporated by reference into the Partner Program Operating Agreement by and between You ("Partner"), and Us ("Network" or Processor"), (collectively, the "Agreement"). This GDPR Addendum is entered into as of the date of the Partner Program Operating Agreement.

This GDPR Addendum sets out the terms that apply when Personal Data, as defined in the Data Protection Legislation, is processed by Network under the Agreement. The purpose of the GDPR Addendum is to ensure such processing is conducted in accordance with applicable laws, including EU Data Protection Legislation, and with due respect for the rights and freedoms of individuals whose Personal Data are processed.

DEFINITIONS

Capitalized terms used but not defined in this GDPR Addendum have the same meanings as set out in the Agreement.

Data Protection Legislation: (i) unless and until the GDPR is no longer directly applicable in the UK, the General Data Protection Regulation ((EU) 2016/679) and any national implementing laws, regulations and secondary legislation, as amended or updated from time to time, in the UK and then (ii) any successor legislation to the GDPR or the Data Protection Act 1998.

Applicability

Applicability. This GDPR Addendum shall only apply to the extent Partner is established within the European Union ("EU") or Switzerland or the United Kingdom and/or to the extent Network processes Personal Data of Data Subjects located in the EU or Switzerland or the United Kingdom on behalf of Partner.

Data Protection

Both parties will comply with all applicable requirements of the Data Protection Legislation. This Section 1 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.

The parties acknowledge that for the purposes of the Data Protection Legislation, the Partner is the data controller and Network is the data processor (where Data Controller and Data Processor have the meanings as defined in the Data Protection Legislation).

Without prejudice to the generality of clause 1.1, the Partner, as Controller, shall be responsible for ensuring that, in connection with Partner Personal Data and the Services, (i) it has complied, and will continue to comply, with all applicable laws relating to privacy and data protection, including EU Data Protection Legislation; and (ii) it has, and will continue to have, the right to transfer, or provide access to, the Personal Data to Network for processing in accordance with the terms of the Agreement and this GDPR Addendum.

Without prejudice to the generality of clause 1.1, Network shall, in relation to any Personal Data processed in connection with the performance by Network of its obligations under this agreement:

1. process that Personal Data only for the purposes set forth in the Agreement and Schedule 1 and only in accordance with the lawful, documented instructions of Partner, except where otherwise required by applicable law. Any processing

required outside of the scope of these instructions (inclusive of the rights and obligations set forth under the Agreement) will require prior written agreement of the parties. Where Network is relying on laws of a member of the EU or EU law as the basis for processing Personal Data, Network shall promptly notify the Partner of this before performing the processing required by the Applicable Laws unless those Applicable Laws prohibit Network from so notifying the Partner;

2. ensure that it has in place appropriate technical and organizational measures, available for review and approval by the Partner, to protect against unauthorized or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorized or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organizational measures adopted by it);
3. ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and Network complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred;
4. assist the Partner, at the Partner's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators. For the avoidance of doubt, Partner is responsible for responding to Data Subject request for access, correction, restriction, objection, erasure or data portability of that Data Subject's Personal Data;
5. notify the Partner without undue delay on becoming aware of a Personal Data breach;
6. upon termination or expiration of the Agreement, in accordance with the terms of the Agreement and within a reasonable amount of time, delete or make available to Partner for retrieval all relevant Personal Data in Network's possession; except to the extent that Network is required by any applicable law to retain some or all of such data. Network shall extend the protections of the Agreement and this GDPR Addendum to any such Personal Data and limit any further processing of such Personal Data to only those limited purposes that require the retention; and

7. maintain complete and accurate records and information to demonstrate its compliance with this Section 2.4.

The Partner consents to Network appointing third-party processors of Personal Data under this agreement, including TUNE ("Sub-processors"). Network confirms that it has entered or (as the case may be) will enter with the third-party processor into a written agreement substantially similar to those set out in this Agreement. As between the Partner and Network, Network shall remain fully liable for all acts or omissions of any Sub-processor appointed by it pursuant to this Section 2.5.

Network may, at any time on not less than 30 days' notice with email sufficing, add or make changes to the Sub-processors. Partner may object in writing to Network's appointment of a new Sub-processor within five (5) business days of such notice, provided that such objection is based on reasonable grounds relating to data protection. In such event, the parties will discuss such concerns in good faith with a view to achieving resolution. If Network cannot provide an alternative Sub-processor, or the parties are not otherwise able to achieve resolution as provided in the preceding sentence, Partner, as its sole and exclusive remedy, may terminate the Agreement.

Miscellaneous

Except as stated in this GDPR Addendum, the Agreement will remain in full force and effect. If there is a conflict between the Agreement and this GDPR Addendum, the terms of this GDPR Addendum will control.

Any claims brought under this GDPR Addendum shall be subject to the terms and conditions, including by not limited to, the exclusion and limitations set forth in the Agreement.

Schedule 1 Processing, Personal Data and Data Subjects

Details of Data Processing

1. **Subject Matter:** The subject matter of the data processing under this GDPR Addendum is the Partner Personal Data.
2. **Duration:** As between Network and Partner, the duration of the data processing under this GDPR Addendum is until the termination of the Agreement in accordance with its terms.
3. **Purpose:** The purpose of the data processing under this GDPR Addendum is the provision of the Services to the Partner and the performance of Network's obligations under the Agreement (including this GDPR Addendum) or as otherwise agreed by the parties in mutually executed written form.

4. **Nature of the processing:** Network provides performance marketing solutions and such other Services as described in the Agreement, which process Partner Personal Data upon the instruction of the Partner in accordance with the terms of the Agreement.
5. **Categories of data subjects:** Partner may submit Partner Personal Data to the Services, the extent of which is determined and controlled by Partner in its sole discretion, and which may include, but is not limited to, Personal Data relating to the following categories of data subjects:
    a. Employees, agents, advisors, freelancers of Partner (who are natural persons); and/or
    b. Partner's end-users authorized by Partner to use the Services.
6. **Types of Personal Data:** Partner may submit Partner Personal Data to the Services, the extent of which is determined and controlled by Partner in its sole discretion, and which may include, but is not limited to identification and contact data; financial information; and/or certain information about Partner's end users (such as IP address and device identifier).
7. **Sensitive Personal Data (if applicable):** Partner shall not send Network any Sensitive Personal Data (as defined in the Data Protection Legislation).

EXHIBIT

D

Joshua Lapin, Pro Se Plaintiff

401 E 8th ST
STE 214 PMB 7452
Sioux Falls SD 57103

Email: thehebrewhammerjosh@gmail.com

Facsimile: (605) 305-3464

STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

Joshua Lapin Plaintiff vs. White Collar Media LLC John Doe Sender A John Doe Sender B John Doe Co-Advertisers 1-3 Defendants	Case No.: 49CIV23-2808 **PLAINTIFF JOSHUA LAPIN'S SUPPORTING BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR A PROTECTIVE ORDER**

Shorthand

Defendant White Collar Media, hereinafter "WCM"

Defendant White Collar Media LLC's 11/07/23 Brief ISO Motion To Dismiss and For Protective Order, hereinafter "Brief ISO MTD"

Argument

1. White Collar Media and its Counsel *Knowingly* Failed To Confer As Required By SDCL § 15-6-26(c); Protective Order Must Be Denied; Discovery is Late, RfA Must Be Deemed Admitted

A. Protective Order Must Be Denied Because Counsel *Knowingly* Failed to Confer

Rosenthal/Morgans were too busy levying *ad-hominem* attacks against the character of the 26 year old, high-school-degree-earning , *pro se* plaintiff[1] to follow the very rules that he copied into his brief.[2] SDCL § 15-6-26(c) begins with , "Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by **a certification that the movant has in good faith conferred or attempted to confer** with other affected parties in an effort to resolve the dispute without court action…" Morgans knew of this because he quoted the same in his brief (n.2) *and* because co-counsel[3] responded to Lapin's inquiry re: the timeliness of the same discovery, with the following false, poorly-aged statement, 5 days prior to the procedurally-defective motion for a protective order:

Gmail Joshua Lapin <thehebrewhammerjosh@gmail.com>

Lapin v White Collar, Case No. 49CIV23-2808

John Rosenthal <john@tilg.us> Wed, Nov 1, 2023 at 9:47 PM
To: Joshua Lapin <thehebrewhammerjosh@gmail.com>
Cc: Kavon Adli <kavon@tilg.us>, John Rosenthal <john@tilg.us>, Berkley Fierro <bfierro@myersbillion.com>, Steve Morgans <smorgans@myersbillion.com>

Mr Lapin
Please include our local counsel all communications going forward
You will have our response to the complaint and discovery in sufficient time under SD's rules
Regards
John Rosenthal

Sent from my iPhone

Neither Morgans or Fierro of Meyers Billion LLP, nor Adli or Rosenthal The Internet Law Group,

[1] (*Brief ISO MTD*, Intro ¶), calling Lapin a professional pltf, who uses spam law as a "bludgeon" [sic].
[2] (Brief ISO MTD, pg. 14, final ¶, pasting SDCL § 15-6-26(c) including its "confer" requirement)
[3] CA atty. John Rosenthal of The Internet Law Group selected Morgans and Berkley Fierro as SD co-counsel.

or any of their assistants/paralegals, ever called/texted/faxed/mailed plaintiff heretofore regarding the protective order[4]. Plaintiff first heard of the protective order when he was served with the motion. Interpreting the similar conference requirement of SDCL § 15-6-37(a)(2) in *Krueger v. Grinnell Mut. Reinsurance Co.*, 921 N.W.2d 689 (S.D. 2018), the South Dakota Supreme Court reversed a circuit courts order granting a motion to compel because the movant's isolated letter "demanding answers," *Id* at *693*, "...did not meet the requirements of SDCL 15-6-37(a)(2) to "confer[ ] or attempt[ ] to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action[ ]' in good faith.' " *Id*, 696. In *Twin City Tech. v. Williams Cnty. & Williams Cnty. Comm'n*, 2022 N.D. 63 (N.D. 2022), the North Dakota Supreme Court construed its own very similar rule,N.D. R. Civ. P. 37(a)(1). Notably, it relied on its prior interpretation of the similar "good faith [conferral]" requirement of Fed.R.Civ.P. 37(a)(1): *Id*, at 11, " "Good faith" under [Fed.R.Civ.P. 37(a)(1)] contemplates, among other things, honesty in one's purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action. "Good faith" is tested by the court according to the nature of the dispute, the reasonableness of the positions held by the respective parties, and the means by which both sides conferred.

Accordingly, good faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means," quoting from *PHI Fin. Servs., Inc. v. Johnston Law Office, P.C.*, 881 N.W.2d 216 (N.D. 2016). Three months ago in *Buergofol GmbH v. Omega Liner Co.*, 4:22-CV-04112-KES (D.S.D. Aug. 3, 2023), the Federal Court down the street from *this* court denied a motion for a protective order because movant's timing "left the

[4] How many attorney's does it take to screw in a lightbulb?

parties with just over a week...to schedule a time to meet and confer telephonically and attempt to resolve the matter without involving the court. Such a late effort to resolve the dispute weighs against a finding that Buergofol attempted to meet and in good faith." *Id,* at 12. But at least the movants in Krueger and *Buergofol GmbH* [supra] made *some* effort to meet-and-confer, notwithstanding how isolated or tardy those failed attempts were. Rosenthal/Morgans/Fierro did nothing. While the plaintiff recognizes that the three attorney's representing WCM are, admittedly, non-attorney *pro se* litigants and should be afforded *some* leniency and deference[5], courts deny protective orders under the same circumstances (See n.5). In *Bailey v. First Transit Inc.*, 20-cv-1238 (DWF/TNL) (D. Minn. Dec. 7, 2021), the court denied *pro se* plaintiff Bailey's motion for a protective order because he failed to meet-and-confer. Reminding non-attorney Bailey of his obligations, "The Court first reminds Plaintiffs that their pro se status does not alleviate them of the responsibility to comply with all applicable rules, laws, orders of the Court, and the like in this case. (citations omitted)" *Id,* at 4. It then denied the motion for a protective order and forewarned them against failing to confer thereafter, *Id* at 5, "The Court agrees with First Transit's assessment. The Federal Rules of Civil Procedure require a party to include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed.R.Civ.P. 37(a)(1)...[i]n any future discovery motion practice, Plaintiffs must demonstrate that they meaningfully met and conferred with First Transit. Should they fail to do so, the Court will summarily deny their motions and may impose additional remedies and sanctions as may be appropriate." Indeed, this is not a lesson the *instant* pro se plaintiff Joshua Lapin has learned the easy way. *Lapin v. NortonLifeLock Inc.*, No. CV-22-00759-PHX-MTL (D. Ariz. Oct. 14, 2022),

[5]This is not a literal statement. Steve Morgans is an attorney, practicing law in South Dakota 29 years, first in Rapid City @ Lynn, Jackson, Shultz & Lebrun, P.C. 1994-2014 and Sioux Falls @ Myers Billion LLP 2014 – Present.

at 2 "Plaintiff [Joshua Lapin] did not provide the required certification or attempt to meet and confer with Defendant Flex Marketing prior to the filing of his [discovery-related] motion, as required by LRCiv 7.2(j). (citations omitted)...[*Id*, at 3] Thus, the Court denies Plaintiff's Motion for failure to comply with LRCiv 7.2(j)." This court should deny White Collar Media's motion to the extent it seeks a protective order, and should treat the combined interrogatories, requests for admissions, and requests for production served contemporaneously therewith the complaint as un-responded.

2. This court has Personal *Specific* Jurisdiction over White Collar.

A. § 15-7-2 is Co-extensive With The Limits of Due Process, Collapsing The Inquiry Into a Single Due-Process Analysis; But It Authorizes Jurisdiction Anyway

Off to a great start, counsel next contends that South Dakota lacks personal jurisdiction over those who advertise within it, to its residents, in violation of its laws. Plaintiff never plead allegations, which if accepted as true, supports of the notion this court has personal *general* jurisdiction over defendant, only personal *specific* jurisdiction (FAC, ¶ 16). Therefore, to the extent counsel argues that this court lacks personal *general* jurisdiction over White Collar Media, (*Brief ISO MTD*, pg. 8, ¶ C), he conducts his symphony to an empty audience as he defends against allegations never made. Counsel recites the common legal standard that courts must ensure jurisdiction is authorized by the forum state's long-arm statute AND that it's not restricted by due process. "[T]he court must determine whether the legislature granted the state court jurisdiction over the non-resident defendant who does not meet the traditional bases for personal jurisdiction...Next, the court must determine whether the proposed assertion of personal jurisdiction comports with federal due process requirements (citations omitted)" (*Brief ISO*

MTD, pg. 6 ¶ 2). He then uses this legal standard to set up his theory that "[the] Amended Complaint Does Not Contain Allegations Sufficient for the Court to Exercise Personal Jurisdiction Over White Collar Pursuant to SDCL § 15-7-2. [the South Dakota long-arm statute]" (*Brief ISO MTD*, pg. 7, ¶ "B"). But Morgans' continues conducting his symphony to an empty audience; he does not realize that the South Dakota long-arm statute is co-extensive with the limits of Due Process, thereby collapsing the exercise of jurisdiction into a single due-process inquiry. See *Ventling et al. v. Kraft*, 83 S.D. 465, 474 (S.D. 1968), "We believe the legislature by enacting the 'long arm' statute intended to provide South Dakota residents with maximum protection of South Dakota courts from damages and injuries occasioned them through the acts or omissions, both contractual and tortious, of a nonresident when that nonresident has had the necessary minimal contacts with the state to comply with federal due process. In general this has been the accepted construction by state courts of similar 'long arm' statutes." We also know § 15-7-2 is coextensive with due process because it *says as much* in its catch-all provision, § 15-7-2(14) "The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States." But even if it were not co-extensive with due process (which it is), it *does* authorize jurisdiction in § 15-7-2(2), " The commission of any act which results in accrual within this state of a tort action." SDCL § 37-24-47 imposes a civil penalty onto those who ("advertise") in a commercial email with misrepresented headers, without respect to whether they ("Initiate[d]"), or sent, the spams themselves. Accordingly, the FAC alleges that White Collar Media committed a tort within this state and authorizes jurisdiction *even if* it was more limited than the 14th amendment and due process restrictions itself.

B. White Collar Media has Sufficient Minimum Contacts With South Dakota

Regarding a non-resident defendant's minimum contacts with the forum state to satisfy due process requirements for *specific* jurisdiction over them, the South Dakota Supreme Court has articled a three-prong test, "First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one." *Davis v. Otten*, 2022 S.D. 39 (S.D. 2022), quoting from *Kustom Cycles, Inc. v. Bowyer*, 857 N.W.2d 401 (S.D. 2014). This test originates from *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Precisely 40 years thereafter, the U.S. Supreme court updated the traditional concept of minimum contacts in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), to meet the needs of our "modern commercial life [in which] 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 [for minimum contacts]...[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. (citations omitted)" *Id*, 476. WCM tries to plead ignorance to the location of its spam recipients as it derives benefits from *federally* unlawful spams sent to all fifty states, 34+ of which have anti-spam laws on the books, for the proposition that it can only be sued in its far-flung domicile notwithstanding its burdening of folks all across the country in *their* homes. The *Burger King* supreme court also forewarned against the very stunt WCM tries to pull, "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Id., at 223; see also *Keeton v. Hustler Magazine, Inc.*, supra, at

776. Moreover, where individuals 'purposefully derive benefit' from their interstate activities, *Kulko v. California Superior Court,* 436 U.S. 84, 96 (1978), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. McGee v. International Life Insurance Co., *supra,* at 223," *Id,* 473. This is especially true in *this* court where "zoom court" appearances are routinely allowed for residents and non-residents alike (upon timely motion,) and the aforementioned "modern transportation and communications," which make it "much less burdensome for a party to be sued where they engage in economic activity", was recognized by the 1985 U.S. Supreme Court, long before the advent of zoom court.

C. White Collar Media Cannot Plead Ignorance to the Physical Location of Spam Recipients To Defeat Personal Jurisdiction, Joining Many Spammers who Tried and Failed

WCM claims it "would not be able to identify any given recipient's location in advance of the commercial email being sent, because unlike a physical address for a home, or a phone number with an area code, email addresses are not connected with, and do not disclose, any particular geographic location. Id. As such, White Collar had no ability to differentiate between South Dakota recipients of commercial emails from recipients of other states, and could not make such a differentiation, even if it knew in advance of such commercial emails being sent." (*Brief ISO MTD,* pg 10, ¶ 2). This argument is over 20 years old and has been rejected by courts ever

since. *Internet Doorway, Inc. v. Parks,* 138 F. Supp. 2d 773, 779 (S.D. Miss. 2001), "[S]he [the defendant] apparently manipulated this e-mail to show that it was being sent from an Internet Doorway account. She then sent the e-mail to persons presumably all over the country and the world. By doing this, Davis had to have been aware that the e-mail would be received and opened in numerous fora, including Mississippi. Accordingly, the Court finds that it would be neither "unfair" nor "unjust" to subject her to personal jurisdiction in Mississippi. By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation." In *Verizon Online Services, Inc. v. Ralsky,* 203 F. Supp. 2d 601 (E.D. Va. 2002), spammers tried to escape personal jurisdiction by claiming they didn't know the physical location of Verizon's servers [in Virginia], to which they directed their spams, and therefore couldn't be hauled into a Virginia court to answer for violations of the Virginia Computer Crimes Act, VA. CODE § 18.2-152.2 committed against Verizon. The court was unimpressed. Relying on the same portions of *Burger King* plaintiff cited to in ¶B herein, it delivered the following resounding blow: *Id,* 620, "Defendants allegedly purposefully transmitted millions of UBE to Verizon's e-mail servers. They cannot seek to escape answering for these actions by simply pleading ignorance as to where these severs were physically located. To do so would constitute a manifest injustice to Verizon and Virginia. This is a case where Defendants allegedly "`purposefully deriv[ed] benefits' from their interstate activities" at the expense of Verizon. *Burger King,* 471 U.S. at 473. It would be "unfair to allow individuals who purposefully engage in interstate activities for profit to escape having to account in other states for the proximate consequences of their actions." *CompuServe,* 89 F.3d at 165 (citing Burger King, 471 U.S. at 473). Such is the case

here. Defendants' alternative would allow spammers to send UBE with impunity, avoiding personal jurisdiction simply by alleging that they did not know the exact location of an ISPs' e-mail servers, yet knowing full well that their conduct harmed those computers and the ISP's business. Fundamental fairness does not favor that result and neither does the Due Process Clause of the Constitution. See *Cybersell*, 130 F.3d at 419 (defendants "should not be permitted to take advantage of modern technology via the Internet or other electronic means to escape traditional notions of jurisdiction.") (citations and internal quotations omitted)." See also *Aitken v. Communications Workers of America*, 496 F. Supp. 2D 653, 660 (E.D. Va. 2007), "[C]ourts have sensibly recognized that a spammer may not avoid personal jurisdiction by 'simply pleading ignorance of where these servers were physically located,' nor by pleading ignorance of the email recipient's location. See [Verizon v Ralsky, *supra*] (discussing purposeful availment in spam cases at length). A contrary result would permit spammers and other tortfeasors to escape jurisdiction simply by turning a blind eye to the natural consequences of their actions." See *Ferron v. E360INSIGHT, LLC*, Civil Action 2:07-CV-1193, 4 (S.D. Ohio Sep. 29, 2008), "The parties to this action disagree on whether or not defendants knew, and the significance of any such knowledge, that its emails would be received by a resident of Ohio. A number of courts, including this Court, have found that sending numerous emails to a recipient in a forum state satisfies the purposeful availment requirement. See, e.g., *Ferron v. Echostar Satellite LLC*, supra; *Verizon Online Serv., Inc. v. Rawlski*, 203 F.Supp. 2d 601, 611-20 (E.D. Va. 2002); Internet Doorway, Inc. v. Parks, 138 F.Supp. 2d 773, 779-80 (S.D. Miss. 2001)...the argument that emailers have not purposefully availed themselves of the privilege of conducting affairs in the forum state fails because it ignores the essential nature of spamming and other intentional torts committed via computers and the harm these torts cause....[t]hose who commit these torts via computer and the Internet know, or reasonably should know, that servers are either

targets of their conduct or the means by which their tortious conduct is given effect. Thus, courts have sensibly recognized that a spammer may not avoid personal jurisdiction by 'simply pleading ignorance as to where these servers were physically located,' nor by pleading ignorance of the email recipient's location..." In *Marycle v. First Choice Internet, Inc.*, 166 Md. App. 481 (Md. Ct. Spec. App. 2006),a Maryland corporation MaryCLE, LLC brought an action under MCEMA, Maryland's anti-spam law, against a New York spammer First Choice Internet, Inc. Finding personal jurisdiction, the MD Special Court of Appeals explains, "[Defendant] maintains in its brief that there is no way of knowing where the owner of an email address resides or where he might open up his email...[a]t oral argument, First Choice conceded that it knew some emails would be opened in Maryland, but insisted that, because its emails were being distributed across the country, it was not purposefully availing itself of any particular jurisdiction." The Maryland Special Court of appeals *SAVAGELY* ended defendant's latter argument, *Id*, 508 "We also reject First Choice's claim that jurisdiction is not proper because, even if it knew where the recipients reside, it had no idea where the emails would be opened. This allegation has little more validity than one who contends he is not guilty of homicide when he shoots a rifle into a crowd of people without picking a specific target, **and someone dies.** See *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F.Supp. 456, 469 n. 27 (D.Mass. 1997) (likening the sending of advertisements via the Internet to a gunman 'repeatedly firing a shotgun into a crowd across the state line, not aiming at anyone in particular, but knowing nonetheless that harm in the forum state may be caused by its actions outside it')." MaryCLE, *supra*, 509 "Although First Choice did not deliberately select Maryland or any other state in particular as its target, it knew that the solicitation would go to Maryland residents. Its broad solicitation of business 'instantiates the purpose that makes the connection more than an attenuated nexus,' and thus it should be

subject to jurisdiction 'wherever its email[s] were received. (citations omitted.)'"

D. WCM Can't Escape Jurisdiction By Having Its *Affiliates* Send Spam Into South Dakota

Morgans argues "the independent conduct of third-party publishers and affiliates of White Collar as to allegedly sending the commercial emails to Lapin in South Dakota, cannot be imputed to White Collar, as a matter of law, because they are independent contractors, not controlled by or agents of White Collar" (*Brief ISO MTD*, pg. 11, second-to-last ¶) and "White Collar does not, and did not in Lapin's case, make decisions as to which recipients to direct commercial emails to, but relies on third party publishers and affiliates to send commercial email advertisements to consumers, like those alleged by Plaintiff in his Amended Complaint. Tolbert Aff., ¶ 8." But WCM cannot contract away their strict liability in tort. Where a company like WCM "purposefully derive[s] benefit from their interstate activities, (citation omitted), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. *Burger King,* 471 U.S. at 473. Nor can WCM "Russian Doll" its way out of the courts of the state's whose laws they have directly broken by ("advertising") in spams with misrepresented headers sent by their admitted-publishers&affiliates, and those affiliate's *own* down-stream affiliates. Plaintiff depicts WCM's "Russian Doll" strategy on the next page:

Morgans claims that Defendant's admitted "publishers" and "affiliates" *Tolbert Aff.*, ¶ 8 are not "agents" of WCM for the purposes of the long-arm statute at SDCL § 15-7-2. Setting aside that we've already established the South Dakota Supreme Court has recognized 15-7-2's extension to the limits of due process, the *Tolbert Aff.*, ¶12 debunks it; the Partner Program Operating Agreement "Ext. A" referenced therein repeatedly refers to the "affiliate" or "publisher" as a "Partner [of WCM]." Construing WCM's admittedly-spam-sending affiliate, publisher, and partner as anything other than an agent of WCM would be nonsensical. Courts have responded to this bizarre tactic in predictable fashion. "Here, Plaintiff argues that Defendant has purposefully availed itself of Ohio's jurisdiction because Defendant retained an agent to send unsolicited communications (allegedly in violation of the TCPA), and even if Defendant did not send the faxes itself, it could reasonably anticipate that its agent using its name, logo, and correct contact information would be sending communications to Ohio. (ECF #12 at 11) Moreover, the

Bannis declaration makes clear that Defendant's contacts with Ohio, either directly or through an agent, were intentional, not random, fortuitous or accidental. While the number of Defendant's contacts with Ohio are minimal, these contacts are intentional, caused Plaintiff's injury in Ohio and form the basis of Plaintiff's cause of action. As such, Defendant's contacts with Ohio meet the purposeful availment prong..."*Advanced Dermatology v. Adv-Care Pharmacy, Inc.*, No. 1:17 CV 251, 11 (N.D. Ohio Oct. 31, 2017). The 7th circuit recently held in a similar TCPA claim over illegal telemarketing phone calls that a Telemarketers' alleged conduct establishes personal jurisdiction over principal with no direct forum ties. The "telemarketer" is the one who actually sent the allegedly illegal phone calls, analogous to John Doe Sender and/or WCM's admitted affiliates & publishers *Tolbert Aff.*, ¶ 8, whereas the "principal" is the one who has a product or service to sell, analogous to WCM in the instant case. "[Defendant] Federal Insurance Company [the principal, analogous to WCM] brought a motion to dismiss for failure to state a claim under Rule 12(b)(6), arguing that Bilek [plaintiff-recipient of robocalls] failed to plausibly allege an agency relationship between itself and the lead generators [analogous to WCM's affiliates and publishers who "send" the spams/robocalls]. Making the same agency arguments, Health Insurance Innovations [the other principal] moved for dismissal for lack of personal jurisdiction under Rule 12(b)(2). It argued that without alleging a plausible agency relationship, Bilek failed to connect Health Insurance Innovations to Illinois through the lead generators' conduct." [spam/robocall sender analogous to WCM's publisher's and affiliates's] *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 587 (7th Cir. 2021). *Id*, 591"[A]ttributing an agent's actions to a principal which are intertwined with the very controversy at issue is consistent with the purposeful availment requirement underlying the Supreme Court's specific personal jurisdiction precedent. See *Burger King Corp.* , 471 U.S. at 474, 105 S.Ct. 2174. Here, the lead generators' alleged conduct forms the basis of Bilek's TCPA and IATDA [Illinois state anti-robocall law]

claims. Bilek plainly alleges that the lead generators [aka WCM's publishers and affiliates]made the illegal phone calls to Bilek in Illinois. And just as with Federal Insurance Company [principal, like WCM], Bilek's supporting agency allegations adequately allege that the lead generators acted with Health Insurance Innovations' [other principal] actual authority. Morgans tries to weaken the actual authority WCM has over its affiliates/publishers [aka agents] with, "White Collar has no direct involvement in, or control over, the transmission or delivery of commercial email advertisements to consumers. [Tolbert Aff.,]. at ¶ 9. Additionally, White Collar does not know the locations or the recipients to which the publishers or affiliates send or direct commercial emails, other than to prohibit publishers or affiliates from sending commercial emails to email addresses of persons that have opted out of receiving them." But the 7th Circuit in *Bilek* rejected this argument as well, Bilek, *supra*, 588 "RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (explaining that "a person may be an agent although the principal lacks the right to control the full range of the agent's activities"). *Id*, 592, "[Health Insurance Innovations, the principal, analogous to WCM] contends that a plausible agency relationship is lacking because Bilek did not allege that Health Insurance Innovations controlled the timing, quantity, or geographic location of the alleged phone calls. But for the same reasons addressed with respect to Federal Insurance Company—which we need not repeat here—such allegations are not necessary to allege an agency relationship between the lead generators and Health Insurance Innovations at the pleading stage."

E. Advertising in Forum State Renders WCM amenable to suit related to that Advertising

Counsel's reliance on "Kustom Cycles, Inc. v. Bowyer [sic]," to which plaintiff assumes he meant *Kustom Cycles, Inc. v. Bowyer*, 857 N.W.2d 401 (S.D. 2014), is misguided to the extent it is supposed to stand for the proposition that sending emails into a forum is insufficient for

specific jurisdiction. Morgans quotes from *Kustom* as follows, "Plaintiff and Defendant entered into an agreement for a custom motorcycle in exchange for promotional and endorsement pieces and special event access. 2014 SD 87 at ¶ 3. When the deal fell through, Plaintiff, a SD corporation, attempted to bring suit against Defendant, a North Carolina resident, for unpaid payments. Id. at ¶ 2. The South Dakota Supreme Court found that a "bare handful of communications" were not sufficient to establish minimum contacts with the state when the Defendant had exchanged approximately seven correspondences with Plaintiff." The *Kustom Cycles* matter was a suit about an agreement for a "custom motorcycle in exchange for promotional and endorsement pieces," and accordingly the seven emails were unrelated, such that the suit did not arise out of, or relate to, Bower's email-sending conduct. *Id*, at 409, "The communications at issue here do not establish jurisdiction because they in no way change the quality and nature of Bowyer's contact with this forum." But when the emails *themselves* form the basis of the suit, the quality and relevance of the email-sending contacts skyrockets, and defendants are amenable to suit to answer to suits related to the emails themselves, " 'because of their nature and quality and the circumstances of their commission,' to subject the defendant to the jurisdiction of the state as to causes of action arising out of the act. *International Shoe*, 326 U.S. at 318-20, 66 S.Ct. at 159-60, 90 L.Ed. At 103-05. In *State v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371 (Iowa 1990), the Iowa Supreme Court held advertising by Nebraska dealerships within this state, while not sufficient to establish jurisdiction for all causes of action, was sufficient to render them amenable to suit in Iowa where the action was premised on the advertising. *Id*, 377 "[defendants] acts in advertising within this state are sufficient, however, to render them amenable to suit here in an action which seeks to halt that advertising on the ground that it is unlawful. The acts of advertising also establish in personam jurisdiction over these defendants for that portion of the attorney general's action which seeks to invoke the other

sanctions which are provided in the relevant regulatory statutes for injuries which flow directly from the alleged unlawful advertising." See also *Norton v. Local Loan*, 251 N.W.2d 520 (Iowa 1977), finding personal jurisdiction over "defendant's agent in Nebraska [making a phone call] to plaintiffs in Iowa" which allegedly violated the Iowa consumer credit code, *Id*, 521 "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and the individual's relationship to the state make the exercise of such jurisdiction unreasonable." The US Supreme Court agrees. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017), "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.' *Goodyear*, 564 U.S., at 919, 131 S.Ct. 2846 (internal quotation marks and brackets omitted). For this reason, 'specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.' Ibid. (internal quotation marks omitted)."

F. "Stream of Commerce Plus" Theory of Personal Jurisdiction Applies to WCM

Plaintiff wouldn't normally cite to *Lapin v. EverQuote Inc.*, 4:22-CV-04058-KES (D.S.D. Feb. 17, 2023) because it is on still on appeal and plaintiff believes that A) it will be vacated in its entirety due to lack of Article III standing (subject matter jurisdiction), and B) It incorrectly found plaintiff was not a "resident of this state" during his one year, nine month nomadic world travels from 3/5/21 – 1/15/23 prior to his return home to SD thereafter. However, plaintiff cites to the still-on-appeal *Everquote* because Mr. Morgans' (or whomever wrote the Brief ISO MTD) does the same (Brief ISO MTD, pg 2, first ¶). In *Everquote*, Judge Schreier agreed with plaintiff that the stream of commerce plus theory as articulated in

Barone v. Rich Bros. Interstate Display, 25 F.3d 610 (8th Cir. 1994) applied to spam-advertiser EverQuote, even though the spams were sent by a third party such as John Doe Sender, not EverQuote directly, just like WCM. "South Dakota's law makes advertisers liable for non-compliant e-mail advertisements, even if the advertisers themselves are not the one who sent the emails. Thus, just as a manufacturer places a defective product into a stream of commerce with a distributor, and such products eventually make their way to an end-user who can sue the manufacturer for any defects, advertisers of commercial emails place its emails into the stream of commerce with various senders, who then send out such advertisements to recipients who can sue such advertisers for non-compliant emails. The court finds it appropriate to analyze personal jurisdiction using the stream of commerce theory." This is notable because it renders spam ("advertisers") like WCM/EverQuote analogous to manufacturers, and spam senders such as WCM's Publishers&Affiliates, to distributors, for use in a stream of commerce plus theory of personal jurisdiction. Notwithstanding Morgans's opposition, the court found personal jurisdiction over Everquote under the stream of commerce plus theory, adapting Barone, *supra*, to a new, mordern area of law. In *Barone*, the court that Nebraska had jurisdiction over Japanese manufacturer [Hosoya] under a "stream of commerce" theory based upon network of nine regional distributors that resold manufacturer's products in the midwestern United States, including Nebraska, even though manufacturer had no direct knowledge that its products would be sold in Nebraska. (summary of Barone from *OneBeacon Insurance Group v. Tylo AB*, 731 F. Supp. 2d 250 (D. Conn. 2010)). " Hosoya certainly benefited from the distribution efforts of Rich Bros., [its distributor] and although Hosoya claims to have had no actual knowledge that Rich Bros. Distributed fireworks into Nebraska, such ignorance defies reason and could aptly be labeled 'willful.' " This is consistent with the long string of cases rejecting spammers' attempts to plead ignorance to the location of spam recipients, listed here in ¶2(C). *Id*, 615"[I]n this case

the defendant poured its products into regional distributors throughout the country, and now would have this court believe that it had no idea its products were being distributed into neighboring states. Hosoya has reaped the benefits of its network of distributors, and it is only reasonable and just that it should now be held accountable in the forum of the plaintiff's choice (as long as that choice of forum comports with due process, which we believe it does). " Likewise it is time for WCM to 'now be held accountable' in plaintiff's forum.

3. The Instant Claims Are NOT Preempted by the CAN-SPAM Act of 2003

A. Incorporation of Plaintiff's Anti-Preemption Argument from his Brief ISO MSJ

Plaintiff is moving for complete summary judgment of all claims against Defendant White Collar Media LLC; he serves and files the same simultaneously therewith the instant brief in support of His Opposition to Defendant White Collar Media LLC's Motion To Dismiss and For a Protective Order.

Plaintiff has a multi-page subsection of his Brief in Support of His Motion For Summary Judgment dedicated to the argument against CAN-SPAM Preemption of the instant claims, Section V(8) entitled, "The CAN-SPAM Act of 2003 Does Not Preempt The Instant Claims."

Plaintiff incorporates this section in its entirety as if fully set forth herein, for the purposes of his opposition to Defendant's MTD re: CAN-SPAM Preemption.

Certificate of Service

This Brief will be served by electronic mail (e-mail), in lieu of mail, as stipulated by the parties, to South Dakotan Co-counsel Steve Morgans at smorgans@myersbillion.com

Certificate of Service

This motion will be served by electronic mail (e-mail), in lieu of mail, as stipulated by the parties, to South Dakotan Co-counsel Steve Morgans and Berkley Fierro of Meyers Billion LLP at smorgans@myersbillion.com and bfierro@myersbillion.com respectively.

/s/ Joshua A. Lapin
Joshua A Lapin
Pro Se Plaintiff 11/23/23

Signature

EXHIBIT

E

Joshua Lapin, Pro Se Plaintiff

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STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

Joshua Lapin Plaintiff vs. White Collar Media LLC John Doe Sender A John Doe Sender B John Doe Co-Advertisers 1-3 Defendants	Case No.: 49CIV23-2808 **PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL PLEADING RE: FIRST AMENDED COMPLAINT "FAC" PURSUANT TO SDCL § 15-6-15(d), OR IN THE ALTERNATIVE TO AMEND THE COMPLAINT PURSUANT TO SDCL § 15-6-15(a).**

COMES NOW Plaintiff Joshua Lapin, pro se, and hereby moves the court to grant him leave to file the attached (Ext. A) supplemental pleading Re: the "FAC," or alternatively to amend the FAC, incorporating the same additions.

A. Defendant WCM has produced Evidence Relevant to Pleading Agency

On 11/06/23, WCM filed a Motion To, *inter alia*, Dismiss this Action. To the extent it seeks dismissal for lack of personal jurisdiction, it produced a priceless Affidavit from its owner, Robert Tolbert, which incorporates by reference a copy of its "standard publisher terms and conditions." Tolbert Aff., ¶ 12, and in turn admits it "...relies solely on independent contractors known as 'Publishers' or 'Affiliates' to send e-mails advertising WCM's services." *Id*, ¶8. The publisher terms and conditions, in turn, allow its publishers/affiliates to run "Partner Network Campaigns," in pg. 4 ¶3. These additional facts, not available to plaintiff at the time of filing, allow him to plead [to the extent he hasn't already in the FAC] plausibly the existence of an agency relationship between:

Advertiser-WCM <> Publisher of WCM (Running a partner network) <> John Doe Sender

This would render the supplemental-pleading FAC wholly indistinguishable from 7th-circuit-upheld complaint in *Bilek v. Fed. Ins. Co.*, 8 F.4th 581 (7th Cir. 2021). "Bilek alleged that he received two unauthorized robocalls as a part of a telemarketing campaign initiated by Federal Insurance Company and Health Insurance Innovations to advertise and solicit Federal Insurance Company's health insurance. Federal Insurance Company contracted with Health Insurance Innovations to generate business. Health Insurance Innovations, in turn, contracted with lead generators to conduct telemarketing for Federal Insurance Company's health insurance." Bilek found personal jurisdiction through an agency theory, including *inter alia*, "[W]e recognize that an agent's conduct directed at the forum state has long been considered pertinent in the specific personal jurisdiction context both by the Supreme Court and this circuit. See Asahi Metal Indus. Co. v. Superior Ct. of California , 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)" *Id*, 590-591, "[F]or purposes of personal jurisdiction, the actions of an agent may be attributed to the

principal." *Id*, 590, "it follows that attributing an agent's suit-related contacts to a principal to establish specific personal jurisdiction poses no due process bar." *Id*, 591, and concluding with "Here, the lead generators' alleged conduct forms the basis of Bilek's TCPA and IATDA claims. Bilek plainly alleges that the lead generators made the illegal phone calls to Bilek in Illinois. And just as with Federal Insurance Company, Bilek's supporting agency allegations adequately allege that the lead generators acted with Health Insurance Innovations' actual authority. See RESTATEMENT (THIRD) OF AGENCY § 1.01 ; § 2.01 ; see Moriarty , 155 F.3d at 866. Bilek alleges not only that Health Insurance Innovations contracted with the agents directly to tele-market Federal Insurance Company's health insurance, but that Health Insurance Innovations participated in the calls in real-time by pairing the agents with Federal Insurance Company's health insurance quotes, emailing quotes to call recipients, and permitting its agents to enter information into its system. These well-pled factual allegations are enough to support an agency relationship on actual authority grounds at the pleading stage." *Id*, 591.

The agency in Bilek, which withstood the 7th circuit's scrutiny for personal jurisdiction purposes, can be summarized as follows:

Advertiser-Federal Insurance Co <> Health Insurance Innovations <> Lead Generator

which the instant case can easily parallel, given the new evidence:

Advertiser-WCM <> Publisher of WCM (Running a partner network) <> John Doe Sender

Plaintiff does not waive the belief that the standalone FAC contains sufficient allegations to confer personal jurisdiction over WCM. However, WCM's jarring admissions enable him to supplement such pleading with additional facts, and align it strongly with those of *Bilek*, rendering personal jurisdiction even-more proper.

B. Alternative Request For Leave To Amend the FAC

If the court finds that leave to amend to incorporate the foregoing into the FAC into a 2AC, then plaintiff can easily do the same.

C. Proposed Supplemental Pleading Attached As Ext. A Hereto

Certificate Of Service

This motion will be served by electronic mail (e-mail), in lieu of mail, as stipulated by the parties, to South Dakotan Co-counsel Steve Morgans and Berkley Fierro of Meyers Billion LLP at smorgans@myersbillion.com and bfierro@myersbillion.com, as well as to paralegal Nicole Young at nicole@myersbillion.com.

/s/ Joshua A. Lapin
Joshua A Lapin
Pro Se Plaintiff 12/18/23

Signature

EXHIBIT

F

Joshua Lapin, Pro Se Plaintiff

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STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

Joshua Lapin Plaintiff vs. White Collar Media LLC John Doe Sender A John Doe Sender B John Doe Co-Advertisers 1-3 Defendants	Case No.: 49CIV23-2808 **[PROPOSED] SUPPLEMENTAL PLEADING (COMPLAINT) RE: THE 10/06/23 FIRST AMENDED COMPLAINT**

This Court Has Personal Jurisdiction over Defendant White Collar Media Through, inter alia, an agency theory of personal jurisdiction

1) Plaintiff is informed and believes and hereon alleges that Defendant White Collar Media "WCM" "relies solely on independent contractors known as 'publishers' or 'affiliates' to send e-mails advertising WCM's services" 11/06/23 Tolbert Aff., ¶8, including the e-mails at issue in this case.

2) Plaintiff is informed and believes and hereon alleges that White Collar Media Recruits these Publishers and Affiliates on an agreement located at affiliates.whitecollarmg.com/terms 11/06/23 Tolbert Aff., ¶12, a true and correct copy of which was filed by WCM into this matter in the form of 11/06/23 Tolbert Aff., Ext. A

3) Plaintiff is informed and believes and hereon alleges that White Collar Media allows its Publishers and Affiliates to Run Their Own "Partner Network Campaigns" 11/06/23 Tolbert Aff., Ext. A, pg. 4 ¶3, in which such publisher/affiliate are authorized to have their own "third-party publishers," which are also known in the affiliate marketing industry as "down-stream affiliates."

3) Plaintiff is informed and believes and thereon alleges that WCM has a publisher, or alternatively an affiliate, which may-or-may not be New-York based ExactCustomer, LLC, which sent the e-mails at issue in this case. Therefore, Exact Customer is John Doe Sender as described in the FAC.

4) Alternatively, Plaintiff is informed and believes and thereon alleges that WCM has a publisher, or alternatively an affiliate, which may-or-may not be New-York based ExactCustomer LLC, which, in turn, runs its own "Partner Network Campaign," of which Defendant John Doe Sender is a part of. Therefore, Defendant John Doe Sender is a third-party publisher of WCM as described in 11/06/23 Tolbert Aff., Ext. A, pg. 4 ¶3.

5) White Collar Media provides material assistance to its publishers/affiliates, and by extension its third-party publishers, in order to help them "advertise WCM's services" 11/06/23 Tolbert Aff.,¶ 8. For example, it "make[s] available to Partner via the Partner Program graphic and textual links to the Program Web Site and/or other creative materials (collectively, the "Links")

which Partner may display on web sites owned or controlled by Partner, in emails sent by Partner and in online advertisements (collectively, "Media")." 11/06/23 Tolbert Aff., Ext. A, ¶1. When recipients click WCM's links in the spams complained of herein, "White Collar Media will pay Partner for each Qualified Action (the "Commission"). A "Qualified Action" means an individual person who (I) accesses the Program Web Site via the Link, where the Link is the last link to the Program Web Site," 11/06/23 Tolbert Aff., Ext. A, ¶2.

Certificate Of Service

This supplemental pleading will be served by electronic mail (e-mail), in lieu of mail, as stipulated by the parties, to South Dakotan Co-counsel Steve Morgans and Berkley Fierro of Meyers Billion LLP at smorgans@myersbillion.com and bfierro@myersbillion.com, as well as to paralegal Nicole Young at nicole@myersbillion.com.

/s/ Joshua A. Lapin
Joshua A Lapin
Pro Se Plaintiff 12/18/23

Signature

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 30696

JOSHUA LAPIN,
Plaintiff and Appellant,

vs.

WHITE COLLAR MEDIA, LLC; JOHN DOE SENDER
A John Doe Sender B; John Doe Co-Advertisers 1-3
Defendants and Appellees.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT COURT
IN AND FOR MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JAMES A. POWER
CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF APPELLEE WHITE COLLAR MEDIA, LLC

APPELLANT:

Joshua Lapin
Pro se
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PMB 7452
Sioux Falls, SD 57103

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Plaintiff's Notice of Appeal filed April 26, 2024.

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JURISICTIONAL STATEMENT

Appellant appeals from the Trial Court's *Memorandum Opinion And Order Granting White Collar Media LLC's Motion to Dismiss Re Personal Jurisdiction*, which was made and entered on April 11th, 2024. Appellant's *Notice of Appeal* was filed on April 26th, 2024, appealing said *Order* pursuant to SDCL § 15-26A-3(4).

The parties stipulated to allow one extension of time of fifteen (15) days for serving and filing the Appellee's initial brief, pursuant to SDCL § 15-26A-76. This stipulation was made and presented to the Clerk of the Supreme Court before expiration of the time for serving and filing the Appellee's brief, which was October 4th, 2024, as provided in SDCL § 15-26A-75(2). Consistent with the stipulation, the Supreme Court extended the time for filing and serving the Appellee's initial brief by fifteen (15) days, or until October 21st, 2024. This Appellee's Brief is filed and submitted pursuant to said stipulation for extension of time.

PRELIMINARY STATEMENT

Throughout this brief, the Plaintiff-Appellant, Joshua Lapin, will be referred to as "Lapin". The Defendant-Appellee, White Collar Media, LLC, will be referred to as "White Collar." References to the Trial Court's certified record will be as to the Chronological Index, and prefaced with the designation, "CR" (Certified Record), followed by the appropriate page number.

Lapin did not request a transcript in this appeal. Therefore, there is no transcript in the Certified Record of the December 21, 2023 Trial Court hearing on White Collar's *Motion to Dismiss and Motion for Protective Order*.

STATEMENT OF THE ISSUES

I. WHETHER WHITE COLLAR MEDIA, LLC HAS SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF SOUTH DAKOTA TO JUSTIFY THE EXERCISE OF PERSONAL JURISDICTION OVER WHITE COLLAR.

The Circuit Court concluded that Lapin failed to meet his burden to establish a prima facie case that White Collar was jurisdictionally responsible for sending the 23 commercial emails at issue, or that it had minimum contacts with South Dakota sufficient for the Circuit Court to exercise personal jurisdiction over non-resident defendant White Collar.

a. *Davis v. Otten*, 2022 SD 39, 978 N.W.2d 358.

b. *Kustom Cycles, Inc. v. Bowyer*, 2014 SD 87, 857 N.W.2d 401.

c. *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 501 (S.D. 1977).

d. *State v. Grand River Enters., Inc.*, 2008 SD 98, 757 N.W.2d 305.

II. WHETHER LAPIN MET HIS BURDEN TO ESTABLISH THAT WHITE COLLAR HAD AN AGENCY RELATIONSHIP WITH THE UNKNOWN, UNIDENTIFIED EMAIL SENDER SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION OVER WHITE COLLAR IN SOUTH DAKOTA.

The Circuit Court determined that Lapin failed to meet his burden to submit evidence to establish a prima facie case that White Collar and unidentified third parties were in an agency relationship sufficient for the Circuit Court to exercise personal jurisdiction over White Collar.

a. *Durward v. One Technologies LLC*, 2019 WL 4930229 (C.D. Cal. Oct. 3, 2019).

b. *Jackson v. Lee's Travelers Lodge, Inc.*, 1997 SD 63, 563 N.W.2d 858.

III. WHETHER LAPIN MAY INTRODUCE NEW EVIDENCE ON APPEAL OR ARGUE A SUPPLEMENTAL PLEADING.

The Circuit Court did not consider four emails that Lapin now introduces on appeal, nor did it consider the supplemental/amended pleading of Lapin filed December 18, 2023.

a. *Husky Spray Services, Inc. v. Patzer*, 471 N.W.2d 146 (S.D. 1991).

b. *Peterson v. Burns*, 2001 SD 27, 635 N.W.2d 556.

STATEMENT OF THE CASE

The Circuit Court granted White Collar's motion to dismiss the Amended Complaint of Lapin based upon Lapin's failure to make a prima facie case that the Circuit Court could exercise personal jurisdiction over non-resident defendant White Collar. Lapin now appeals that decision. This Court should deny Lapin's appeal because he has not shown that the Circuit Court's decision was in error.

Lapin brought this action against non-resident, corporate defendant White Collar in Second Judicial Circuit Court, State of South Dakota. CR 2, 53. In the Amended Complaint, Lapin alleges that 23 commercial emails he received, admittedly sent by unknown third parties Senders "A" and "B," advertise White Collar's services in violation of SDCL § 37-24-41 *et seq*. CR 52-104. According to the allegations in the Amended Complaint, the 23 commercial emails at issue contain misrepresented header information, and use third party domains without consent. *Id.*

Lapin alleges in the Amended Complaint that White Collar and the other unknown defendants sent or caused to be sent such commercial emails, directly and/or through agents, to South Dakota residents. *Id.* The Amended Complaint contains such allegations despite admissions by Lapin that White Collar did not send any of the 23 commercial emails at issue, and allegations that the emails were sent by unknown, unidentified entities: "Sender A" and "Sender B." *Id.* Importantly, the Amended Complaint does not contain factual allegations to support the legal conclusions of Lapin

that White Collar was in an agency relationship with any of the unknown sender defendants when the 23 emails were sent. *Id.*

White Collar moved to dismiss the Amended Complaint based upon lack of personal jurisdiction over White Collar and for failure to state claim. CR 189-208. White Collar did not have the required minimum contacts with South Dakota sufficient for the Circuit Court to exercise personal jurisdiction over White Collar. CR 189-208. Lapin filed a variety of motions in response, including a Motion for Judicial Notice, a Motion for Summary Judgment, a Motion to Compel Discovery Response, a Motion for Leave to file a supplemental complaint or Amend his Amended Complaint, an Amended Motion for Summary Judgment, and an opposition to White Collar's Motion to Dismiss. CR at 528, 436, 365, 321, 233, and 129.

A hearing on White Collar's Motion to Dismiss, and some of Lapin's aforesaid motions, was held on December 21, 2023. The Circuit Court granted White Collar's Motion to Dismiss, and Lapin now appeals.

Based upon the undisputed facts, the Circuit Court correctly determined that Lapin failed to establish a prima facie case that White Collar had sufficient minimum contacts with South Dakota to justify the exercise of personal jurisdiction over White Collar. The sole basis for jurisdiction alleged by Lapin in his Amended Complaint were 23 commercial emails not sent by and not directed by White Collar at South Dakota residents, but sent or directed by unknown, unidentified third parties. The Circuit Court also correctly held that Lapin did not submit evidence sufficient to show that White Collar had an agency relationship with the unknown, unidentified entities that actually sent the 23 commercial emails at issue.

On appeal, Lapin fails to show that the Circuit Court committed reversible error in its decision. In addition, Lapin submits several new arguments and issues in his Appellant Brief. This Court should not review or consider new arguments or issues not raised by Lapin before the Circuit Court, and should not consider the new emails presented for the first time by Lapin on appeal.

Appellee White Collar respectfully requests that this Honorable Court affirm the Trial Court's dismissal of Lapin's Amended Complaint.

STATEMENT OF FACTS

Lapin is a pro se plaintiff. CR 189-208. Lapin has sued various companies in State and Federal Courts throughout the United States under South Dakota's email marketing statute SDCL §§ 37-24-41 to 48 *et seq.* CR 189-208. The present appeal involves Lapin's lawsuit against White Collar under the same statute.

White Collar is a Georgia limited liability company, with its principal place of business located in Ellijay, Georgia. CR 208-226. The two members of White Collar are both Georgia residents. *Id.* White Collar provides all of its services from Georgia. *Id.* White Collar is not licensed to transact business in South Dakota, does not employ anyone that lives in South Dakota, does not keep an office or mailing address in South Dakota, does not own property or have assets in South Dakota, does not pay taxes in South Dakota, does not have a bank account in South Dakota, and does not have a public telephone listing in South Dakota. *Id.*

White Collar is in the business of marketing, and provides its clients with multichannel solutions. CR 208-226. This business requires White Collar to use third party, independent contractors, known as publishers or affiliates, to send commercial

emails advertising the services of White Collar. *Id.* These publishers/affiliates send emails on behalf of multiple companies, not just White Collar. *Id.* White Collar requires its publishers/affiliates to enter into a written agreement known as a "Partner Program Operating Agreement" (the "Agreement") before they can conduct business with White Collar. *Id.* The Agreement clearly states that the "parties hereto are independent contractors. There is no relationship of partnership, agency, employment, franchise, or joint venture between the parties. Neither party has the authority to bind the other, or incur any obligation on its behalf." *Id.* In addition, under the Agreement, the publisher/affiliate agrees to comply with the federal CAN-SPAM Act, as well as "all applicable … state or local laws, rules or regulations[.]" CR 208-226. If the publisher/affiliate violates the terms of the Agreement, White Collar can terminate the Agreement. *Id.*

Under the Agreement with White Collar, publishers/affiliates control all aspects of transmitting emails, and make fundamental decisions concerning the emails themselves, including choosing the recipient. CR 208-226. White Collar does not decide the recipients of the emails, and does not know, does not direct, and has no control over where the emails are sent by the publishers/affiliates. *Id.* White Collar allows publishers/affiliates access to a suppression file and prohibits publishers/affiliates from sending emails to email addresses for which recipients have requested to "opt out" from receiving emails advertising White Collar. *Id.*

White Collar is not able to identify the location of a given recipient because, unlike phone numbers with area codes, email addresses are not connected to any particular geographic location. CR 208-226. As such, White Collar has no ability to

differentiate South Dakota recipients of emails from recipients of other states in advance of the emails being sent. *Id.*

On October 3, 2023, Lapin filed a summons and complaint against White Collar. CR 1-51.

On October 6, 2023, Lapin filed his Amended Complaint against White Collar, as well as John Doe Senders A and B, and John Doe Co-Advertisers 1-3. CR 53-105. The Amended Complaint alleges that Lapin received 23 commercial emails that violate SDCL § 37-24-47, as the emails allegedly contained misrepresented header information, or contained a third party's domain name without permission. *Id.*

In his Amended Complaint, Lapin alleges that various websites of White Collar were advertised by virtue of 23 commercial emails sent to his email address by unknown, unidentified John Doe Senders A and B. CR 52-105. In the Amended Complaint, Lapin specifically admits that White Collar "did not *send* the emails." CR 52-105 (emphasis in original). Rather, according to the allegations in the Amended Complaint, the 23 emails at issue were "sent by at least two third parties," but not White Collar. CR 52-105. Moreover, according to the allegations in the Amended Complaint, "White Collar Media and the Doe Senders have only an indirect relationship[.]" *Id.* The allegations in the Amended Complaint state specifically that John Doe Senders A and B, not White Collar, created the misrepresented header information in the emails. *Id.*

In the jurisdictional section of Lapin's Amended Complaint, he alleges that the defendants sent or caused to be sent, directly or through their agents, the 23 emails at issue. CR 52-105. The Amended Complaint lumps all the defendants together, and does not distinguish who did what, nor identify the alleged agents, nor which entity is

the principal of any such agency relationship. *Id.* Nor does the Amended Complaint contain any allegations supporting the legal conclusion that any of the parties (or non-parties) are agents of the other. *Id.*

On November 11, 2023, White Collar moved to dismiss the Amended Complaint under SDLC § 15-6-12(b) based upon lack of personal jurisdiction and failure to state a claim. CR at 189-226, & 304-320. In support of its motion, White Collar submitted the Affidavit of member Robert Tolbert. CR 208-226. In his Affidavit, Tolbert attested to the fact that White Collar had no contacts with South Dakota, did not direct emails to South Dakota, did not hire anyone to send emails to South Dakota, and did not know of the emails sent to Lapin. CR 208-226. Further, in its brief in support of the motion to dismiss, White Collar cited to numerous cases addressing the issue of whether having a third party send emails or electronic communications into a forum state is sufficient to exercise personal jurisdiction over an advertiser; the cases conclude that this is insufficient. CR 304-320 (citing *XMission L.C. v. Fluent, LLC*, 955 F.3d 833, 840 (10th Cir. 2020); *Durward v. One Tech. 's, LLC*, 2019 WL 4930229, *13 (C.D. Cal. Oct. 3, 2019); *Zoobuh, Inc. v. Williams*, 2014 WL 7261786, *6 (D. Utah Dec. 18, 2014); *Neurochemical, LLC v. Kiro Kids Pty., Ltd.*, 2011 WL 333337, *3 (D. Ariz. Jan 31, 2011)).

In its motion, White Collar also argued that the claims of Lapin were preempted by CAN-SPAM; the allegations in the Amended Complaint did not constitute material falsity; and/or that White Collar actually advertised in the emails as required under the statute. CR 304-320.

On November 29, 2023, Lapin filed his opposition to White Collar's motion to dismiss. CR 365-381. The opposition of Lapin did not seek leave to amend his Amended Complaint. *Id.* In his opposition brief, Lapin argued that because unknown and unidentified publishers/affiliates sent the emails to South Dakota, the courts in South Dakota should exercise personal jurisdiction over White Collar. *Id.* Lapin also argued that the unknown, unidentified publishers/affiliates of White Collar should be deemed agents of White Collar for purposes of personal jurisdiction, and their actions ascribed to White Collar, partially because the Agreement refers to them as 'partners.' *Id.* However, the terms of Agreement clearly show they are not partners. *Id.*

Lastly, in his opposition, Lapin argued that the Trial Court should apply the federal doctrine of "stream of commerce plus" as a basis to exercise personal jurisdiction over White Collar. CR 365-381.

On December 19, 2023, White Collar filed and served its reply brief in further support of its motion to dismiss. CR 446-456. White Collar argued in its reply that the case law cited by Lapin in his opposition brief was inapposite or involved facts distinguishable from the allegations in Lapin's Amended Complaint. *Id.*

On December 23, 2023, the Circuit Court heard the motion of White Collar to dismiss Lapin's Amended Complaint for lack of personal jurisdiction over White Collar. CR 230.

On April 11, 2024, the Circuit Court issued a Memorandum Opinion and Order granting the motion of White Collar to dismiss the action for lack of personal jurisdiction over White Collar. CR 572-591. The Trial Court held that Lapin had failed to carry his burden under the South Dakota Long-Arm Statute, SDCL § 15-7-2, to

make a prima facie case that the 23 emails at issue represented sufficient minimum contacts between White Collar and South Dakota for the court to exercise general or specific personal jurisdiction over non-resident White Collar. CR 572-591. Further considering the Affidavit of Robert Tolbert, the Trial Court determined it could not exercise general jurisdiction over White Collar. *Id.* The court also held that it could not exercise specific jurisdiction over White Collar, as Lapin had failed to submit evidence to show that White Collar sent the 23 emails to Lapin, nor evidence to show that any agent of White Collar sent such emails. *Id.*

Lapin now appeals the decision of the Circuit Court.

STANDARD OF REVIEW

"A motion to dismiss under SDCL 15-6-12(b)(2) 'is a challenge to the court's jurisdiction over the person and is a question of law that we review de novo.'" *Davis v. Otten*, 2022 SD 39, ¶ 9; 978 N.W.2d 358, 362 (quoting *Zhi Gang Zhang v. Rasmus,* 2019 S.D. 46, ¶ 17, 932 N.W.2d 153, 159 (quoting *Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, ¶ 8, 857 N.W.2d 401, 405)). Lapin's appeal of the Trial Court's decision dismissing his action for lack of personal jurisdiction over Appellee White Collar involves a question of law that is therefore reviewed *de novo* by this Court. As the party asserting that personal jurisdiction over White Collar is proper, Lapin bears the burden of establishing such personal jurisdiction by a prima facie case, and the burden does not shift to the party challenging jurisdiction. *Epps v. Stewart Info. Serv. Corp.*, 327 F.3d 642, 647 (8th Cir. 2003).

"We review a [circuit] court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party."

Otten, 2022 SD at ¶ 9 (quoting *Marschke v. Wratislaw*, 2007 S.D. 125, ¶ 9, 743 N.W.2d 402, 405). If the Trial Court made its determination as to personal jurisdiction based upon the submissions of the parties, without an evidentiary hearing, this Court reviews such submissions in the light most favorable to the nonmoving party. *Otten*, 2022 SD at ¶ 9. No evidentiary hearing was held in this matter. *See* CR at 230.

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED THAT IT LACKED PERSONAL JURISDICTION OVER WHITE COLLAR.

On appeal, Lapin argues that the Circuit Court was in error for dismissing his Amended Complaint for lack of personal jurisdiction over White Collar. Contrary to the opinion of the Circuit Court, Lapin argues that the unknown and unidentified publishers/affiliates that sent the 23 emails at issue must be deemed agents of White Collar under the Agreement, and the actions of those unknown and unidentified publishers/affiliates should be attributed to White Collar for the purpose of jurisdictional analysis. Lapin further argues on appeal that the supposed obligation of White Collar not to advertise in commercial emails which contain misrepresented headers is a non-delegable duty, requiring a finding of an agency relationship between White Collar and the unknown publishers/affiliates for purposes of personal jurisdiction.

On appeal, Lapin also argues that the Circuit Court erred in not giving the opinion of the 7th Circuit Court of Appeals in *Bilek v. Federal Insurance Co.*, 8 F.4th 581 (7th Cir. 2021) more weight, as opposed to the unpublished opinion cited to by the Circuit Court in its Memorandum and Opinion (*Durward v. One Technologies, LLC,*

2019 WL 4930229 (C.D. Cal. Oct. 3, 2019)). Lapin goes on to argue on appeal that new decisions in other jurisdictions issued after the Circuit Court issued its memorandum and opinion require reversal of that decision by this Court.

Lastly, Lapin argues that since the Circuit Court issued its memorandum opinion on April 11, 2024, he has received four more commercial emails, supposedly advertising a website of White Collar, and that such emails give rise to new jurisdictional allegations.

The undisputed evidence, as properly determined by the Circuit Court, shows that Lapin failed to carry his burden to make out a prima facie case that non-resident White Collar had sufficient minimum contacts with South Dakota, such that the exercise of personal jurisdiction did not violate State or Federal law. None of Lapin's arguments on appeal change such determination. In addition, this Court should not review any new issues or evidence not presented by Lapin to the Circuit Court, or heard by the Circuit Court in deciding the motion of White Collar.

A. South Dakota's Long-Arm Statute-Legal Standard.

South Dakota's long-arm statute is the basis upon which courts in South Dakota can properly exercise personal jurisdiction over a non-resident corporation. *Kustom Cycles, Inc.*, 2014 SD 87 at ¶ 9. Because South Dakota's long-arm statute is co-extensive with the constitutional limitations imposed by the Federal Due Process Clause, the dispositive issue is whether the proposed assertion of jurisdiction comports with the federal due process requirements. *Denver Truck & Trailer Sales, Inc. v. Design & Bldg. Servs., Inc.*, 2002 SD 127, ¶ 9, 653 N.W.2d 88, 91.

When evaluating whether to exercise specific personal jurisdiction over a defendant, the court first must determine whether the legislature granted the court jurisdiction pursuant to South Dakota's Long Arm Statute, SDCL § 15-7-2. *Id.* SDCL § 15-7-2(14) extends South Dakota's Long Arm Statute to the commission of any act, that basis of which is not inconsistent with the Constitution of South Dakota, or the U.S. Constitution. SDCL § 15-7-2(14); *Kustom Cycles*, 2014 SD 87 at ¶ 9.

Second, the assertion of jurisdiction by a South Dakota court over a non-resident defendant must comport with federal due process requirements and must not offend the notions of fair play and substantial justice. *Marschke v. Wratislaw*, 2007 SD 125, ¶ 14, 743 N.W.2d 402, 406. As observed by the U.S. Supreme Court, it is the defendant, not the plaintiff or third parties, who must create contacts with the forum state. *Walden v. Fiore*, 134 S.Ct. 1115, 1126 (2014).

Courts in South Dakota apply a three-step test to determine whether sufficient minimum contacts exist between the non-resident defendant and the forum state to exercise personal jurisdiction over the defendant. *Marschke*, 2007 SD 125 at ¶ 15. First, the court must determine if the defendant purposefully availed itself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. *Id.* Second, the cause of action must arise from the defendant's activities directed at the forum state. *Id.* Third, the acts of the non-resident defendant must have a substantial connection with the forum state to make the exercise of jurisdiction over the defendant a reasonable one. *Id.*

The contacts between the defendant and the forum state cannot be random, isolated, or fortuitous, and must arise from the defendant's activities. *Otten*, 2022 SD 39

at ¶ 21. Jurisdiction cannot be based upon the unilateral activity of another party or a third person, but upon whether the defendant deliberately engaged in significant activities within the forum state, or has created continuing obligations between himself and residents of the forum. *Id.*

B. The Circuit Court correctly determined that Appellant/Plaintiff Lapin failed to carry his burden to establish a prima facie case that personal jurisdiction could be exercised over non-resident Appellee/Defendant White Collar.

Lapin's appeal is based on the notion that the Circuit Court committed reversible error in finding that White Collar did not have sufficient minimum contacts with South Dakota for the Circuit Court to exercise personal jurisdiction over White Collar. A review of the Affidavit of Robert Tolbert in support of White Collar's motion to dismiss, and of the Memorandum and Opinion of the Circuit Court dismissing Lapin's action for lack or personal jurisdiction over White Collar, show the arguments of Lapin to be specious. *See* CR 572-591.

As determined by the Circuit Court, there is no basis to exercise general personal jurisdiction over White Collar; White Collar is not incorporated in South Dakota, is not physically located in South Dakota, is not registered to do business in South Dakota, and has not done any business in South Dakota. *See* CR 572-591.

The Circuit Court also correctly held that Lapin failed to meet his burden to show that the Circuit Court could exercise specific personal jurisdiction over non-resident White Collar. As determined by the Circuit Court, and admitted by Lapin in the Amended Complaint, White Collar did not send any of the 23 commercial emails, and did not place the emails into the stream of commerce; rather, unknown, unidentified

third parties did. CR 572-591. Merely because a third party directs emails into the forum state, without the knowledge or direction of the advertiser, which emails violated the contract between the advertiser and sender, is not a proper basis to exercise personal jurisdiction over the advertiser. *See Durward v. One Technologies, LLC*, 2019 WL 4930229 (C.D. Cal. Oct. 3, 2019); *see also State v. Grand River Enters.*, 2008 SD 98, ¶ 13, 757 N.W.2d 305, 310.

In addition, the Circuit Court correctly determined that publishers/affiliates cannot be deemed agents or partners of White Collar under the terms of the Agreement. Indeed, the Agreement contains specific provisions that state that the relationship between White Collar and its publishers/affiliates is one of independent contractors, the publishers must abide by applicable state laws pertaining to the sending of commercial emails, and the Agreement does not control how or to whom or by what methods the publishers/affiliates send the commercial emails to recipients. *See Jackson v. Travelers Lodge, Inc.* 1997 SD 63, ¶ 11, 563 N.W.2d 858, 861.

Because Lapin failed to meet his burden to make a prima facie case that White Collar had sufficient minimum contacts with South Dakota such that the Circuit Court could exercise specific personal jurisdiction over White Collar, the Circuit Court did not commit reversable error in dismissing Lapin's Amended Complaint against White Collar.

C. South Dakota's email law does not impose a nondelegable duty on advertisers in commercial emails.

Lapin argues for the first time on appeal that South Dakota's email marketing

law, SDCL § 37-24-41 et seq., imposes a nondelegable duty on advertisers, like White Collar, not to advertise in commercial emails with supposedly misrepresented headers. The nondelegable duty theory, Lapin argues, can be used to assert personal jurisdiction over a non-resident defendant. The statute imposes no such nondelegable duty on advertisers.

As an initial matter, the Court should not review this issue/argument, as Lapin failed to present this issue/argument to the Circuit Court in opposing the motion to dismiss of White Collar. Lapin raises this issue/argument for the first time on appeal. *See, e.g., Peterson v. Burns*, 2001 SD 27, ¶ 5 n. 1, 635 N.W.2d 556, 561 n.1 ("Absent a jurisdictional defect, this Court has repeatedly held that an issue may not be presented for the first time on appeal."); *Husky Spray Services, Inc. v. Patzer*, 471 N.W.2d 146, 153-54 (S.D. 1991); *Action Mech., Inc. v. Deadwood Hist. Pres. Comm'n,* 2002 SD 121, ¶ 50, 652 N.W.2d 742, 755. The failure of Lapin to raise the issue or argument before the Circuit Court as to a supposed nondelegable duty imposed on advertisers pursuant to SDCL § 37-24-41 et seq. in opposition to White Collar's motion to dismiss precludes him from now raising it for the first time on appeal before this Court.

Even if the Court were to review such issue or argument, Lapin's assertion that SDCL § 34-27-47 et seq. and provisions of the federal CAN SPAM Act impose nondelegable duties on White Collar finds no support in either statute or case law interpreting either statute. SDCL § 34-27-47 imposes liability on advertisers who advertise in commercial emails that violate the statute in one of three ways. The statute allows a limited class of recipients to then sue advertisers for alleged violations of certain specified prohibitions. The prohibitions contained in § 37-24-41 et seq. do not

create or impose a nondelegable duty on such advertisers. Nor do the prohibitions in CAN SPAM, a law under which Lapin has no standing to sue because he is not an internet service provider. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1050 (9th Cir. 2009).

In his brief, Lapin cites no case law from South Dakota, California, or the federal courts interpreting regulatory statutes for commercial emails that hold otherwise. Indeed, to interpret SDCL § 37-24-41's prohibitions in the manner argued by Lapin would cause every statute which contains prohibitions as to certain conduct to impose nondelegable duties on the unwary. This is not the law in South Dakota, and the Court should decline Lapin's invitation to interpret such new duties as nondelegable duties on advertisers.

Also, non-delegable duties are the exception and not the rule, and exist only in special situations, or where there is a special relationship between the parties. *Robe v. Ager*, 129 N.W.2d 47, 50-51 (S.D. 1964); *Santorii v. MartinezRusso, LLC*, 240 Ariz. 454, 381 P.3d 248 (Ct. App. 2016). Similar arguments under similar consumer protection statutes have been rejected. *See, e.g., Worsham v. Disc. Power, Inc.*, No. CV RDB-20-0008, 2022 WL 3100762 (D. Md. Aug. 4, 2022), *aff'd,* No. 22-1942, 2023 WL 2570961 (4th Cir. Mar. 20, 2023) ("district courts evaluating the [Telephone Consumer Protection Act] have routinely rejected the assertion that TCPA duties are non-delegable.").

SDCL § 37-24-41 et seq. does not create a special relationship between an advertiser and recipient of a commercial email, and the statute does not suggest it is designed to regulate a special situation; it is one of many statutes aimed at what are

deemed deceptive business practices. As such, SDCL § 37-24-41 et seq. does not create and impose a nondelegable duty on advertisers in commercial emails, like White Collar.

D. The prohibitions in SDCL § 37-24-41 et seq. do not cause White Collar to become a principal of unknown, unidentified publishers/affiliates.

Lapin next argues that because SDCL § 37-24-41 et seq. supposedly imposes a nondelegable duty on advertisers not to advertise in commercial emails with misrepresented headers, the statute then automatically converts any publishers/affiliates who sends such commercial emails into the agents of the advertiser.

White Collar disagrees. The statute simply does not impose an agency and principal relationship on advertisers and publishers/affiliates, and the out-of-state caselaw cited by Lapin in support of this argument does not hold otherwise.

To the contrary, the out-of-state cases cited by Lapin stand for the narrow proposition that a principal may be found vicariously liable under tort law, if an independent contractor retained by the principal breaches a nondelegable duty owed by the principal to a narrow, special class of persons. Yet, the doctrine of vicarious liability imposed on a principal in actions involving tort does not turn an independent contractor into an agent of that principal for purposes of personal jurisdiction just because the conduct involved or implicated a nondelegable duty of the principal.

Indeed, each of the cases cited by Lapin as to a nondelegable duty imposed on a principal for the acts of an agent or independent contractor involve the tort of negligence, or some species of negligence. Yet, unlike the out-of-state cases cited by Lapin, SDCL § 37-24-41 et seq. does not involve what are generally considered tort claims; a plaintiff need not allege or prove the elements of reliance, proximate damages,

or scienter, normally required for a successful tort claim. *See Hypertouch, Inc. v. Valueclick, Inc.*, 192 Cal.App.4th 805, 830 (2011) (analyzing Ann. Cal. Bus. & Prof. Codes §§ 17529.1 and 17529.5, which contains language identical to SDCL § 37-24-41 et seq.). In fact, the CAN SPAM Act addresses statutes like SDCL § 37-24-41 et seq. and claims made pursuant to such statutes, but does not regulate state tort laws. *See* 15 U.S.C. § 7707(b)(1), (2). Indeed, in his Amended Complaint, Lapin is not seeking actual damages, but statutory damages. CR 52-104.

As such, the narrow nondelegable duty theory of vicarious liability imposed on a principal for the acts of an agent or independent contractor does not apply to claims made under SDCL § 37-24-41, like Lapin's, and the statute does not automatically "convert" an unknown, unidentified third-party publisher/affiliate into an agent of an advertiser, like White Collar.

E. Lapin has failed to provide the Court with a case in which the nondelegable duty theory has been used to justify the exercise of personal jurisdiction over a non-resident defendant, like White Collar.

Lapin next argues that according to the decision in *Buckles v. Cont'l Res., Inc.*, 2020 MT 107, 462 P.3d 223 (MT 2020), a court in in South Dakota can exercise personal jurisdiction over a non-resident defendant based upon the action of an independent contractor, under the nondelegable duty theory. White Collar disagrees.

First, Lapin cites no decision in South Dakota for this broad proposition.

Second, the decision in *Buckles* does not implicate or rely on the theory of nondelegable duty for the purpose exercising personal jurisdiction over a non-resident, corporate defendant. Instead, the *Buckles* Court held only that under the inherently dangerous or intrinsically dangerous activity exception, the defendant Continental could

be held liable for the acts of its contractors and/or subcontractors if negligent. 462 P.3d 223 at 230. The *Buckles* Court went on to state that because Continental had extensive business in Montana, if the plaintiff could tie that presence to the actions of the contractors and subcontractors, that a Montana court could exercise personal jurisdiction over Continental. *Id.* at 232.

The *Buckles* decision did not implicate or rely on the theory of nondelegable duty as to liability of a principal for the acts of an independent contractor. Moreover, in *Buckles*, the non-resident defendant Continental had a significant presence in the forum state, Montana. *Id.* As such, the decision in *Buckles* is simply inapposite, and is not a reliable basis for a court in South Dakota to exercise personal jurisdiction over non-resident White Collar.

II. LAPIN FAILED TO SUBMIT EVIDENCE SUFFICIENT TO DEMONSTRATE THAT THE UNKNOWN AND UNIDENTIFIED SENDERS OF THE COMMERCIAL EMAILS WERE AGENTS OF WHITE COLLAR

Lapin next argues that the Circuit Court committed error when it held that the unknown and unidentified senders of the 23 commercial emails were not agents of White Collar for the purpose determining personal jurisdiction. According to Lapin, the Circuit Court incorrectly focused on whether White Collar actually interfered with the unknown, unidentified senders of the commercial emails, as opposed to whether White Collar had the right to control the actions of the senders. Lapin's argument is contradicted by the evidence White Collar submitted to the Circuit Court, and the findings of the Circuit Court.

A. Agency Legal Standard.

There are two types of agency relationships: actual agency and ostensible Agency. *A.P. & Sons Constr. v. Johnson*, 203 SD 13, ¶ 22, 657 N.W.2d 292, 297. Actual agency exists when a principal and agent expressly agree to enter into an agency relationship. *Id.* The factual elements necessary to establish an agency relationship are as follows: (1) manifestation by the principal that the agent shall act for him, (2) the agent's acceptance of the undertaking, and (3) the understanding of the parties that the principal is to be in control of the undertaking. *Id.*

In contrast, an independent contractor is a person or entity who contracts with another to do something for him, but is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. *Haufle v. Svoboda*, 416 N.W.2d 879 (S.D. 1987). The right of an employer to fire an independent contractor for good cause does not turn that independent contractor into an agent. *Jeitz v. Fleming*, 217 N.W.2d 868, 872 (S.D. 1974).

B. The Circuit Court correctly determined that Lapin failed to submit evidence to establish a prima facie case that unknown, unidentified senders of the 23 commercial emails were agents of White Collar.

Lapin argues on appeal that the Circuit Court incorrectly focused on whether White Collar actually interfered with the actions of the unknown, unidentified publishers/affiliates of commercial emails, rather than whether White Collar had the right to control their actions. First, as correctly determined by the Circuit Court, Lapin failed to submit any evidence of an agency or partnership relationship between White Collar and the unknown, unidentified senders of the 23 commercial emails. As described by the Circuit Court, admitted by Lapin, and alleged in the Amended

Complaint, Lapin had no idea who sent the emails at issue to him. CR 52-104. Determining the nuances of an alleged agency relationship is nearly impossible without knowing both parties to the alleged relationship. Lapin could not identify to the Circuit Court who sent him the commercial emails at issue, and failed to carry his burden to make a prima facie case that such unknown, unidentified entities were in an agency relationship with White Collar.

Second, as determined by the Circuit Court, even if it were to assume that the unknown, unidentified senders of the emails entered into the Partner Program Operating Agreement with White Collar, the terms of the Agreement, and the uncontradicted statements in the Affidavit of White Collar's member, Robert Tolbert, demonstrated that the unknown, unidentified persons were not agents of White Collar.

Under the terms of the Agreement, White Collar did not have the right to control how the publisher/affiliate performed the Agreement. The Agreement itself states that the "parties hereto are independent contractors. There is no relationship of partnership, agency, employment, franchise or joint venture between the parties. Neither has the authority to bind the other, or incur any obligation on its behalf." CR 208-226. In addition, the publisher/affiliate "has sole responsibility for the development, operation, and maintenance of, or all content on or linked to, the Media." *Id.* The Agreement provides that publisher/affiliate only gets paid a commission if White Collar gets paid, regardless of whether the publisher/affiliate has performed work. *Id.* Under the Agreement, the publisher/affiliate can terminate the Agreement at any time. *Id.*

As confirmed by the Tolbert Affidavit, a party to the Agreement, a publisher/affiliate, sends out commercial emails on behalf of multiple advertisers, not

just White Collar. CR 208-226. The publisher/affiliate controls all aspects of transmitting the emails, including choosing each recipient. *Id.* Lapin submitted no evidence to the Circuit Court to contradict the Agreement.

On appeal, Lapin argues that the Circuit Court got it wrong, and the publishers/affiliates that sent the emails at issue are agents or White Collar because White Collar had the right to control their conduct. While Lapin points to various provisions in the Agreement as 'proof' of an agency relationship between White Collar and the publishers/affiliates, none of these provisions demonstrate that White Collar had control over how the publishers/affiliates actually performed the work contemplated: the provisions do not dictate who the emails will be sent to, how the emails will be sent, what servers will be used to store and send the emails, where the emails will be sent from, what information will be placed in the subject lines or headers of the emails, nor what kinds of computers must be used to perform the Agreement. CR 208-226.

Lapin also argues that because the Circuit Court indicated that the emails at issue might violate SDCL § 37-24-41 or CAN SPAM, that this means the publishers/affiliates that sent the emails are or should be deemed as agents of White Collar. Lapin mistakenly puts the cart before the horse. Under South Dakota law, a principal may be liable for the fraud or deceit of an agent acting within the scope of that agent's actual or apparent authority. However, being engaged in fraud or deceit does not create an agency relationship between the two parties.

Lapin cites to the decisions in *Beyond Systems v. Keynetics, Inc.*, 422 F.Supp.2d 523 (D. Md. 2006), and *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal. App.4th 805 (2011) for the proposition that provisions in an agreement that preclude a party from

violating email marketing laws indicates an agency relationship for purposes of personal jurisdiction. Neither decision stands for that proposition. Unlike this action, the publishers/affiliates of the emails in *Beyond Systems* were known, and were direct affiliates of the named defendants. 422 F.Supp.2d 523 at 546. Lapin has admitted he has no idea who sent the emails at issue, and cannot even attest to whether the senders have any direct or indirect contractual relationship with White Collar. As such, the decision in *Beyond Systems* has no bearing on this matter.

Lapin's comparison to *Hypertouch* is also uninstructive; while *Hypertouch* stands for the proposition that statutes prohibiting advertising in a commercial electronic message that contains deceptive content is not limited to entities that actually send or initiate such e-mail, but applies more broadly to any entity that advertises in those e-mail, that case did not involve the issue of personal jurisdiction. 192 Cal. App.4th 805, 820-821 (2011). In other words, the *Hypertouch* court did not find that advertising in an email creates or leads to jurisdiction.

Lapin has failed to demonstrate that the Circuit Court committed reversable error in holding that Lapin failed to carry his burden to make a prima facie case that the unknown unidentified senders of the commercial emails can be deemed agents of White Collar.

C. The Circuit Court did not rely on unpublished opinions in holding that Lapin failed to make a prima facie case of personal jurisdiction over White Collar.

Lapin argues that in coming to its decision, the Circuit Court improperly relied on the unpublished decision in *Durward v. One Technologies LLC*, 2019 WL 4930229 (C.D. Cal. Oct. 3, 2019), and that the Circuit Court should have relied on or given

greater weight to the Seventh Circuit's decision in *Bilek v. Fed. Ins., Co.*, 8 F.4th 581 (7th Cir. 2021) instead. These arguments are without merit.

This argument by Lapin made for the first time on appeal should be disregarded. While Lapin asserts that he submitted this argument to the Circuit Court, this is not accurate; he supposedly made the argument as part of a summary judgment motion, which was not before the Circuit Court, and is directed to CAN SPAM preemption, not the issue of personal jurisdiction. Even if the Court were to review this argument, the decision in *In re Olson*, 2008 SD 4, ¶ 57, 744 N.W.2d 555, 572 did not preclude the Circuit Court from reviewing unpublished decisions from other jurisdictions as persuasive authority. The citation of Lapin in *Olson* was in the dissent, and does not stand for the broad proposition that it is reversable error for a lower court to look at the unpublished decisions of other jurisdictions as persuasive authority.

Moreover, while the Circuit Court considered the holding in *Durward* in its decision, it did not rely on it. Rather, the Circuit Court relied on the decision in *Grand River*, which held that marketing communications of a third party, which violate the terms of a contract, cannot be attributed to the defendant for purposes of personal jurisdiction. 2008 S.D. 98, ¶¶ 33-34, 757 N.W.2d 305, 318. Nor was the Circuit Court required to give more weight to the decision in *Bilek*, a non-binding decision from the Seventh Circuit, which did not interpret or apply South Dakota law.

Lapin then argues that on appeal, this Court should take into account two recent, non-binding, unpublished federal decisions, *Nater v. State Farm Mut. Auto. Ins. Co.*, 2024 WL 2155249 (C.D. Ill. May 14, 2024) and *Ewing v. Freedom Forever, LLC*, 2024 WL 3894044 (C.D. Cal. Aug. 21, 2024). This Court should decline Lapin's invitation

to consider the same, as neither case was before the Circuit Court at the time it heard White Collar's motion. In any event, neither decision is on point; both involve claims under the federal Telephone Consumer Protection Act, not email marketing laws. *Nater* involves allegations of actual authority to engage in the conduct at issue: State Farm was alleged to control geographic placement of the marketing, and make direction with respect to advertising and telemarking, in *Nater*, 2024 WL 2155249 at *10. And *Ewing* did not involve the issues of personal jurisdiction or agency. 2024 WL 3894044.

III. THE NEW EMAILS OF LAPIN ARE NOT PROPERLY BEFORE THIS COURT, NOR IS THE SUPPLEMENTAL PLEADING.

Lapin seeks to have this Court review four new commercial emails he claims are somehow associated with White Collar. Lapin admits that these four new emails were never before the Circuit Court as to White Collar's motion to dismiss.

Because these new emails were never before the Circuit Court, this Court should not consider them on appeal. *Peterson v. Burns*, 2001 SD 27, ¶ 5 n. 1, 635 N.W.2d 556, 561 n.1; *S. Dakota Subsequent Injury Fund v. Federated Mut. Ins., Inc.*, 2000 S.D. 11, ¶29, 605 N.W.2d 166, 172 (reiterating that the Court will not review a matter on appeal unless proper objection was made before the trial court); *Husky Spray Service, Inc. v. Patzer*, 471 N.W.2d 146, 153–54 (S.D. 1991) ("An issue may not be presented for a first time on appeal. The appellant must affirmatively establish a record on appeal that shows the existence of error. He [or she] must show that the trial court was given an opportunity to correct the grievance he [or she] complains about on appeal.") (internal citation omitted).

Lapin's remedy is not to present these newly discovered facts on appeal. *See* SDCL § 15-6-59(a); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (stating that a dismissal without prejudice "is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.").

Lapin further advises the Court on appeal of his motion to file a supplemental pleading before the Circuit Court, filed on December 18, 2023, just three days before White Collar's motion to dismiss was scheduled to be heard. CR 436. In his brief on appeal, Lapin states the supplemental pleading was intended to show the Circuit Court what he would further allege if allowed leave to amend or supplement his Amended Complaint.

This argument by Lapin is too little and too late. The Court should not review the proposed amended pleading of Lapin, as this issue was not before the Circuit Court as part of White Collar's motion to dismiss for lack of personal jurisdiction hearing. *Peterson v. Burns*, 2001 SD 27, ¶ 5 n. 1, 635 N.W.2d 556, 561 n.1. Indeed, Lapin failed to provide the Circuit Court or White Collar with sufficient notice of his motion to amend or supplement his Amended Complaint in advance of the hearing on White Collar's motion to dismiss, as is required under SDCL § 15-6-15(a) & (d), and SDCL § 15-6-6(d).

Moreover, the supplemental pleading proposed by Lapin does not cure the deficiencies in his Amended Complaint as to any alleged agency relationship between White Collar and any alleged publishers/affiliates. The proposed supplemental pleading does not contain facts which would show that the publisher/affiliate "ExactCustomer, LLC" was in agency relationship with White Collar as to the emails at issue; it "may-or-

may not" be ExactCustomer, LLC that sent the emails at issue. CR 436. In fact, the allegations in the proposed supplemental pleading of Lapin rely on the terms of the Agreement between White Collar and its publishers/affiliates, which the Circuit Court already was able to consider and correctly held were insufficient to establish an agency relationship between White Collar and its publishers/ affiliates for purposes of exercising personal jurisdiction over White Collar. CR 208-226.

The new evidence should not be considered by this Court on appeal, and should be discarded. Additionally, the supplemental or second amended complaint may not be considered on this appeal, as it was not properly before the Trial Court and was not considered in the court's decision.

CONCLUSION

Defendant/Appellee White Collar respectfully requests that this Court affirm the Circuit Court's decision dismissing the Amended Complaint of Plaintiff/Appellant Lapin based on lack of personal jurisdiction over White Collar. White Collar lacks sufficient minimum contacts with the forum state to make exercise of personal jurisdiction over it in South Dakota just and proper. Furthermore, Lapin has not made a prima facie showing that White Collar is jurisdictionally responsible for sending the 23 commercial emails based on a theory of agency.

REQUEST FOR ORAL ARGUMENT

Appellee hereby respectfully requests Oral Argument in this matter.

Dated this 21st day of October, 2024.

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CERTIFICATE OF COMPLIANCE PURSUANT TO SDCL 15-26A-66(b)

The undersigned attorney hereby certifies that Microsoft Word 2021 was used in the preparation of the foregoing Brief of Appellee, and that the word count done pursuant to that word processing system shows that there are 7,280 words in the foregoing Brief of Appellee from the Statement of the Case through the Request for Oral Argument.

Dated this 21st day of October, 2024.

Steven J. Morgans

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the 21st day of October, 2024, a true and correct copy of the foregoing ***Brief of Appellee White Collar Media, LLC*** was served upon the Appellant, Joshua Lapin, via electronic mail as follows:

Joshua Lapin
thehebrewhammerjosh@gmail.com

and upon the Clerk of the Supreme Court via Odyssey File & Serve, and via electronic mail, as follows:

Clerk of the South Dakota
Supreme Court
SCClerkBriefs@ujs.state.sd.us.

Dated this 21st day of October, 2024.

Steven J. Morgans

INDEX TO APPELLEE'S APPENDIX

Appendix to Appellee's Brief

Appeal No. 30696

EXHIBIT 3

United States Code Annotated
Title 15. Commerce and Trade
Chapter 103. Controlling the Assault of Non-Solicited Pornography and Marketing (Refs & Annos)

15 U.S.C.A. § 7707

§ 7707. Effect on other laws

Effective: January 1, 2004
Currentness

(a) Federal law

(1) Nothing in this chapter shall be construed to impair the enforcement of section 223 or 231 of Title 47, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) Nothing in this chapter shall be construed to affect in any way the Commission's authority to bring enforcement actions under FTC Act for materially false or deceptive representations or unfair practices in commercial electronic mail messages.

(b) State law

(1) In general

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

(2) State law not specific to electronic mail

This chapter shall not be construed to preempt the applicability of--

(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or

(B) other State laws to the extent that those laws relate to acts of fraud or computer crime.

(c) No effect on policies of providers of Internet access service

Nothing in this chapter shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

CREDIT(S)

(Pub.L. 108-187, § 8, Dec. 16, 2003, 117 Stat. 2716.)

Notes of Decisions (9)

15 U.S.C.A. § 7707, 15 USCA § 7707
Current through P.L. 118-106. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 7. General Business Regulations (Refs & Annos)
Part 3. Representations to the Public (Refs & Annos)
Chapter 1. Advertising (Refs & Annos)
Article 1.8. Restrictions on Unsolicited Commercial E-Mail Advertisers (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 17529.1

§ 17529.1. Definitions

Effective: January 1, 2005
Currentness

For the purpose of this article, the following definitions apply:

(a) "Advertiser" means a person or entity that advertises through the use of commercial e-mail advertisements.

(b) "California electronic mail address" or "California e-mail address" means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) "Commercial e-mail advertisement" means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) "Direct consent" means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

(e) "Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) "Electronic mail" or "e-mail" means an electronic message that is sent to an e-mail address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval. "Electronic mail" or "e-mail" includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) "Electronic mail address" or "e-mail address" means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An "electronic mail address" or "e-mail address" consists of a user name or mailbox and a reference to an Internet domain.

(h) "Electronic mail service provider" means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) "Initiate" means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

(j) "Incident" means a single transmission or delivery to a single recipient or to multiple recipients of an unsolicited commercial e-mail advertisement containing substantially similar content.

(k) "Internet" has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

(*l*) "Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to "opt-out" from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail advertisements sent by the provider of the e-mail service.

(m) "Recipient" means the addressee of an unsolicited commercial e-mail advertisement. If an addressee of an unsolicited commercial e-mail advertisement has one or more e-mail addresses to which an unsolicited commercial e-mail advertisement is sent, the addressee shall be deemed to be a separate recipient for each e-mail address to which the e-mail advertisement is sent.

(n) "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. "Routine transmission" shall not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements.

(*o*) "Unsolicited commercial e-mail advertisement" means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive advertisements from the advertiser.

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (*l*), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

Credits

(Added by Stats.2003, c. 487 (S.B.186), § 1. Amended by Stats.2004, c. 183 (A.B.3082), § 14.)

West's Ann. Cal. Bus. & Prof. Code § 17529.1, CA BUS & PROF § 17529.1
Current with urgency legislation through Ch. 1002 of 2024 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 7. General Business Regulations (Refs & Annos)
Part 3. Representations to the Public (Refs & Annos)
Chapter 1. Advertising (Refs & Annos)
Article 1.8. Restrictions on Unsolicited Commercial E-Mail Advertisers (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 17529.5

§ 17529.5. Unlawful activities relating to commercial e-mail advertisements; additional remedies

Effective: January 1, 2006
Currentness

(a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.

(2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

(b)(1)(A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:

(i) The Attorney General.

(ii) An electronic mail service provider.

(iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.

(B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:

(i) Actual damages.

(ii) Liquidated damages of one thousand dollars ($1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars ($1,000,000) per incident.

(C) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(D) However, there shall not be a cause of action under this section against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.

(2) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this section, the court shall reduce the liquidated damages recoverable under paragraph (1) to a maximum of one hundred dollars ($100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars ($100,000) per incident.

(3)(A) A person who has brought an action against a party under this section shall not bring an action against that party under Section 17529.8 or 17538.45 for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

(B) A person who has brought an action against a party under Section 17529.8 or 17538.45 shall not bring an action against that party under this section for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

(c) A violation of this section is a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000), imprisonment in a county jail for not more than six months, or both that fine and imprisonment.

Credits

(Added by Stats.2003, c. 487 (S.B.186), § 1. Amended by Stats.2004, c. 571 (S.B.1457), § 1; Stats.2005, c. 247 (S.B.97), § 1.)

Notes of Decisions (45)

West's Ann. Cal. Bus. & Prof. Code § 17529.5, CA BUS & PROF § 17529.5
Current with urgency legislation through Ch. 1002 of 2024 Reg.Sess. Some statute sections may be more current, see credits for details.

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APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30696

Joshua Lapin,

Plaintiff and Appellant,

v.

White Collar Media LLC; John Doe Sender A
John Doe Sender B; John Doe Co-Advertisers 1-3

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE JAMES A. POWER
CIRCUIT JUDGE

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Notice of Appeal Filed April 26, 2024

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Defendants and Appellees.

I. LOWER COURT HELD LONG-ARM STATUTE IS CO-EXTENSIVE WITH THE LIMITS OF DUE PROCESS

Appellant ought to point out a relevant, erroneous contention in *Appellee's Brief*, pg. 9-10, ¶5 "The Trial Court held that Lapin had failed to carry his burden under the South Dakota Long-Arm Statute, SDCL § 15-7-2." WCM made this same argument unsuccessfully in the lower court. To the contrary, the lower court agreed with appellant that the long-arm statute is co-extensive with the limits of due process. In fact, it entitled a section after precisely that in its memorandum & order of dismissal. *Final Order*. pg. 5, [Section] 1:

"South Dakota's Long Arm Statute is co-extensive with the Due Process Clause." Thus, the personal jurisdiction question is solely a due process inquiry.

II. WCM FAILS TO REBUTE THAT A NON-DELEGABE DUTY IS IMPOSED ON IT BY LAW

Appellee argues, in its brief, "Lapin's assertion that

SDCL § 34-27-47 et seq. and provisions of the federal CAN SPAM Act impose nondelegable duties on White Collar finds *no support in either statute or case law* interpreting either statute." (italics added) pg. 16, ¶ 3. This is simply false, and appellant cited to such caselaw for the same purpose. Twice. *Appellant brief*, pg. 3, ¶1, *"Lapin v. EverQuote Inc.*, 4:22-CV-04058-KES, at *7-8 (D.S.D. Feb. 17, 2023), '[I]t follows that South Dakota has deemed the advertiser liable for its commercial e-mails, even if the advertiser is not the one who sent the emails.' And for the second time in *Appellant Brief*, pg. 9, "An earlier case interpreting that California copy of the same language [is] "[Hypertouch, Inc. v. Valueclick, Inc., 191 Cal.App.4th 1209 (Cal. Ct. App. 2011)], [in which] the court noted that '[S]ection 17529.5 was intended to apply to entities that advertise in [deceptive commercial e-mails, not only the spammers who send them.' The lower court "acknowledged" both cases stand for this proposition as well:

Final Order, pg. 12, "The Court acknowledges, without deciding, that the South Dakota anti-spam statutes may create liability for "advertisers" even if the advertiser did not send a spam email. [then it cited to the same

portion of EverQuote for the same purpose]," and *Final Order*, pg. 24, ¶ 2, "Hypertouch [*supra*] stands for the proposition that statutes prohibiting advertising in a commercial electronic message that contains deceptive content is not limited to entities that actually send or initiate such e-mail, but applies more broadly to any entity that advertises in those e-mail."

Appellee goes on to argue, "Similar arguments under similar consumer protection statutes have been rejected." *Appellee Brief*, pg. 17, ¶3. It then cites to a slew of cases which it contends stand for the proposition that a non-delegable duty is imposed by the TCPA. However, also according to WCM, "neither decision is on point; both involve claims under the federal Telephone Consumer Protection Act, not email marketing laws." *Appellee Brief*, pg. 26, p 1. There are three key points from this paragraph: A: We're dealing with the South Dakota Spam Law, not the TCPA. B: WCM admitted to point A, and cannot have it both ways. C. WCM probably should have read the appellant brief.

Appellee then admits, "Determining the nuances of an

alleged agency relationship is nearly impossible without knowing both parties to the alleged relationship" *Appellee Brief*, pg. 22, ¶1. WCM is correct, and it admits the necessity of the two cases, decided after the motion to dismiss was briefed, which agree with WCM's good point:

"Nater alleges that its insurance agents contracted with the unknown entity to place the Robocall to communicate with consumers...It is unnecessary for Plaintiff to settle on an exact agency theory as, until discovery is complete, it would be almost impossible for her to know this information."*Appellant Brief*, pg. 35. (Citation from *Nater v. State Farm Mut. Auto. Ins. Co.*, 23-cv-1408-JES (C.D. Ill. May 14, 2024)). As to the second authority decided after the motion to dismiss was briefed: *Appellant Brief*, pg. 36, ¶2, "'the precise details of the agency relationship need not be pleaded to survive a motion to dismiss, sufficient facts must be offered to support a reasonable inference that an agency relationship existed.' This standard is a flexible one, as 'the information necessary to connect all the players is likely in [the defendant's] sole possession.'"

(citation from *Ewing v. Freedom Forever*, LLC, 23-CV-1240 JLS (AHG) (S.D. Cal. Jan. 19, 2024)).

This supports the notion A: the lower court got it wrong B: subsequently-released authorities all agree with appellant. C: apparently WCM agrees too.

III. APPELLEE & LOWER COURT MATERIALLY MISINTERPRET GRAND RIVER

Appellee argues, "the Circuit Court relied on the decision in Grand River, which held that marketing communications of a third party, which violate the terms of a contract, cannot be attributed to the defendant for purposes of personal Jurisdiction. 2008 S.D. 98, 1 33-34, 757 N.W.2d 305, 318." *Appellee Brief*, pg. 25, ¶3. The lower court agreed with WCM: *Final Order*, pg. 14, p.1 "Grand River Enterprises held that a manufacturer could not be held responsible for a distributor's actions when the contract between the two made the distributor solely responsible for the actions at issue. *Grand River Enters.*, 2008 S.D. 98, 9 33-34, 757 N.W.2d at 318."

WCM and the Lower Court's reliance is misplaced, and they're both overlooking a huge material distinction.

Long Story short: WCM is analogous to NTD/NWS in the *Grand River* case; WCM is NOT analogous to Grand River (the party), uprooting the lower court's *Final Order*. The importance of this cannot be overstated.

As to why, Let's see what the facts *actually were* in *Grand River,* as articulated by none other than *this* very court:

Id, 307 "Grand River began manufacturing 'Seneca' brand cigarettes under a 1999 'Cigarette Manufacturing Agreement' (Agreement) with Native Tobacco Direct.2 In June 2000, Native Tobacco Direct (NTD) assigned the Agreement to Native Wholesale Supply (NWS). NTD and NWS are owned by Arthur Montour, Jr. Both companies are separate Native legal entities located on an Indian reservation in the State of New York[.]" (underline added)

Id, 316 "the State has failed to prove that Grand River

was involved in the distribution system by which Seneca cigarettes were expected to be sold in South Dakota. Grand River's activities were limited to those of a licensee for NTD/NWS. Further, Grand River's activities ended when the cigarettes were shipped FOB Ohsweken per NTD's/NWS's instructions to a free trade zone in New York. Finally, the State did not prove that Grand River knew or should have known that NTD/NWS was selling to HCI.

Id, 317-318 "it is essential in each case that there be 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. [citation omitted]. This factor also relates to the unilateral activities of independent third parties, not Grand River. NTD/NWS, without direction or control of Grand River, sold the cigarettes to HCI, a second-level, independent wholesaler. HCI then unilaterally stamped the cigarettes so HCI could sell them in South Dakota. HCI subsequently sold the cigarettes to Yankton Sioux tribal businesses for sale to an ultimate consumer. Thus, the cigarettes passed through a number of independent

wholesalers including HCI, and the State failed to prove that Grand River had knowledge, direction or control of HCI's unilateral activities for the three years at issue." (underline added)

Id, 317 It must be emphasized that under the Agreement...although Grand River was responsible for paying all taxes, charges, fees, duties and tariffs arising out of the export from Canada, NTD/NWS was responsible for those matters relating to importation into the United States. [citation omitted] And more importantly, under the Agreement, NTD/NWS—not Grand River—was the party responsible for the United States and Nebraska requirements because NTD/NWS alone dictated the relevant manufacturing specifications, like blending, quality, and packaging. Therefore, in this case, Grand River cannot be charged with those activities...Because NTD/NWS and HCI alone were responsible for the activities necessary to meet United States, Nebraska and South Dakota requirements, their independent acts cannot be attributed to Grand River. (underlines added).

The *Grand River* relationship between the parties is visually depicted as follows:

Grand River (assigned Cig. Manuf. Agt.) ---> NTD/NWS

Then, wholly on NTD/NWS's own initiative:

NTD/NWS (hires Nebraska Distributor) ---> HCI Dist. Co

This wholly severs Grand Rivers Involvement in the *distribution* OR *manufacture* of the product, or liability for that product, leading this court to conclude Grand River wasn't even the correct party to be charged! (*Id*, 317)

Now let's see *White Collar Media*'s relationship with its distributors:

White Collar Media ---> publishers/affiliates

OR Alternatively

White Collar ---> publishers/affiliates---sub-affiliate

Key takeaways include:

A) The "agreement" between Grand River and NTD/NWS was an assignment of the Cigarette Manufacturing Agreement, which is NOT analogous to White Collar Media's agreement with its publishers/affiliates...NTD/NWS's agreement with the distributor (HCI Dist. Co) *is* analogous to WCM's agreement. The lower court confused the former with the latter.

B) The "unilateral activity of another person" in *Grand Rivers* involved NTD/NWS's agreement with the distributor HCI Dist. Co being imputed onto Grand Rivers, which is impossible. However, this court readily imputed the distributor's actions onto NTD/NWS, and would do the same as to White Collar Media, for the same reasons.

C) The law in *Grand Rivers, SDCL § 10-50B-7,* imposes liability onto Cigarette Manufacturers who sell to consumers in this state "whether directly or through a distributor." The Court found NTD/NWS was the correct party to be "charged," Grand River was not, given the

particulars of the relationship between the three entities. *Id*, 317, "NTD/NWS and HCI alone were responsible for the activities necessary to meet United States, Nebraska and South Dakota requirements." The *instant* cause of action imposes strict liability onto "advertisers," regardless if the e-mails were sent by a third party. White Collar Media enlisted the "distributor" just as NTD/NWS enlisted the distributor, and WCM is likewise the correct party to be "charged" (sued) for violations of the act.

IV. THE [PROPOSED] SUPPLEMENTAL PLEADING WAS IN THE LOWER COURT'S RECORD AND IS PROPERLY CONSIDERED BY THIS COURT

WCM argues, "Lapin further advises the Court on appeal of his motion to file a supplemental pleading before the Circuit Court, filed on December 18, 2023, just three days before White Collar's motion to dismiss was scheduled to be heard." *Appellee Brief*, pg. 27, p 2. But there exists no requirement that items in the record be scheduled for hearing in order to be considered on appeal. SDCL § 15-26A-10 reads:

Scope of review on appeal from order.

When the appeal is from any order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous. (underline added). WCM cited no authority for the proposition that items in the record must be scheduled for hearing in order to be considered. Also notable, Appellant and the lower court discussed the supplemental pleading in the context of the citation to *Bilek* and agency, and expressly informed Judge Power that his intention with the supplemental pleading was to show what could be done with leave to amend; we know this because the Order of dismissal refers to appellant's agency theories in great detail. *Final Order*, pg. 5, ¶2 "Lapin does contend that the sample contract shows the email marketers are WCM''s agents…" *Id*, pg. 13, ¶3, "Lapin alternatively argues that WCM can be subject to South Dakota jurisdiction because the unknown sender of the 23 spam emails should be viewed as WCM's agent."

V. THE NEW EMAILS ARE PROPERLY CONSIDERED BY THIS COURT, ESPECIALLY FOR PURPOSES OF REMAND

WCM next contends that the evidence resulting from the "new emails" should not be considered by this court..even though they were received long after the lower court dismissed this case and the filing of the notice of appeal. This is without basis, and this court retains the authority to remand *sua sponte* for a new "trial" whenever it seems it would best-serve the ends of justice. In relevant part, SDCL § 15-30-1 reads:

15-30-1. Remand to trial court to permit motion for new trial.

Whenever, after appeal to the Supreme Court, it shall appear to the satisfaction of the Supreme Court upon application of a party that the ends of justice require that such party should be permitted to make a motion for a new trial for a cause set forth in subdivision 15-6-59(a)(1), (2), (3), or (4), and that sufficient excuse exists for not having made said motion prior to the appeal, the Supreme Court may remand the record to the trial court for the purpose of making such motion...

Good cause exists for not making the motion prior to the appeal...because the emails didn't come in until months after filing the notice of appeal, long-after this matter was out of the hands of the lower court, and appellant's impromptu request in the brief in chief should be a sufficient invitation for this court to use its inherent power to remand for consideration of the new evidence resulting from the new emails, and its effect on specific jurisdiction. Unless of course, the Grand River misinterpretation is sufficient in-and-of itself to grant remand.

VI Conclusion

WCM had a non-delegable duty to see that it did not advertise through spams with misrepresented headers and misleading subject lines. *Grand River,* when properly interpreted and applied, supports a finding of jurisdiction. The proposed supplemental pleading and subsequent e-mails are properly considered on appeal, but the non-delegable duty and *Grand River* theories render the issue moot. This court should find that personal specific jurisdiction exists over White Collar, and reverse and remand with instructions to enter an order consistent with this court's opinion.

Dated this 18th day of November 2024.

Respectfully submitted,

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Certificate of Compliance

1. I certify that the Reply Brief is within the typeface volume limitations provided for in SDCL 15-26A-66(b) using Cambria Font in proportional 12 point type. Appellant's Brief contains approximately 2,822 words.

2. I certify that the word processing software used to prepare this brief is LibreOffice 24.8.2.1 on the openSUSE Tumbleweed Operating System (a distribution of Linux, different from the one appellant used in writing the Brief in Chief).

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Appellant (Pro Se)

Certificate of Service

The undersigned hereby certifies that on this 18th day of November 2024, one copy of the foregoing brief was served by e-mail, in lieu of United States mail, as expressly stipulated by the parties, on Steven Morgans at <smorgans@myersbillion.com> and Berkley Fierro at <bfierro@myersbillion.com>

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