APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 30597

Joshua Lapin,

Plaintiff and Appellant,

v.

Zeetogroup LLC,

Defendant and Appellee.

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 January 17, 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 December 7, 2023, hearing is referred to simply as "the hearing." The final order in this matter is referred to simply as the "Final Order," or as AX, Ext. A. The transcript of the December 7th 2023 Motion Hearing will be referred to as T, or alternatively as AX, Ext.B; the page and line number of the transcript will follow the designation. The Brief in Opposition to the *since-granted* motion for summary judgment is referred to simply as "the

Opposition Brief," "Opp. Brief," or as AX, Ext. D, which is not to be confused with *its own* exhibits (A-H), which will follow the designation (e.g. the Opposition Brief, Ext. B, pg 2, or alternatively as AX, Ext. D, Ext. B, pg 2.) The affidavit of Joshua Lapin, filed therewith his Opposition Brief in support of the same, is referred to simply as the "Lapin Aff.," or as (AX, Ext. E), with a Pilcrow designating the relevant sworn statement.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Joshua Lapin accused defendant Zeetogroup LLC of ("Advertising") in spam e-mails sent by an unknown third party (former defendant John Doe Sender). 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." At times material, Lapin was one of the tens of thousands of South Dakota residents who A: live in an RV, B: travel full-time, C: are in the military, or D: otherwise lack a traditional fixed dwelling

and must maintain a legal existence during their temporary, nomadic lifestyle. Indeed, tens of thousands of such folks were registered to vote at the same&similar PMB Mailbox Addresses in this state as of 2023:

Business	Physical Address	District	County	Registered Voters
Dakota Post	3916 N Potsdam Ave, Sioux Falls, SD 57104	District 09	Minnehaha	4332
Buffalo Chip Campground LLC	20622 Fort Meade Way, Sturgis, SD 57785	District 29	Meade	6
Americas Way	514 Americas Way, Box Elder, SD 57719	District 33	Pennington	13,206
Walmart	1200 N Lacrosse St Rapid City, SD 57701	District 35	Pennington	46
Escapees	316 Villa Dr, Box Elder, SD 57719	District 29/31	Pennington	1432
Hart Ranch	23756 Arena Dr, Rapid City SD 57701	District 30/33	Pennington	453
Your Best Address	401 E 8th Street, Sioux Falls, SD 57103	District 15	Minnehaha	2291

At times material to the receipt of the instant spam e-mails, appellant was one of these "traveling-residents," filed the "residency affidavit" with the SD DPS, completed the required overnight stay, registered to vote, and obtained a driver's license (*Opposition Brief*, Ext. C); such actions matching those of the other such "RV Residents," (*Id*, Ext. G "Keloland Article"). Appellee Zeetogroup LLC moved for summary judgment on the basis that appellant was not a "resident of this state" within the meaning of SDCL § 37-24-41(14)(C), and thus lacked standing. Oral argument was held before the Court in Sioux Falls, South Dakota, on December 7th, 2023, and on 12/19/23, the final order in this matter was entered, and appellant filed the notice of appeal on Jan. 17th 2024; he was granted leave to order transcripts late on 3/15/24. The endorsed order of transcripts was filed on 5/8/24, and

on 6/24/24, appellant moved for multiple extensions, the final of which rendered the deadline for the filing and serving of this brief August 12th, 2024.

STATEMENT OF ISSUES

I. WHETHER APPELLANT WAS A "RESIDENT OF THIS STATE," FOR THE PURPOSES OF SDCL § 37-24-41(14)(C), AT TIMES MATERIAL TO RECEIVING THE COMPLAINED-OF SPAM EMAILS (Suggested Ans.: Yes)

Trial Court held in the negative.

Most Relevant Cases:

Ellis v. Southeast Construction Co., 260 F.2d 280 (8th Cir. 1958)

Lewis Clark Rural Water System v. Seeba, 709 N.W.2d 824 (S.D. 2006)

Root v. Toney, No. 12-0122 (Iowa Dec. 13, 2013)

Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984)

II. [The Former Question Rephrased]: Is a US Citizen Who Lacks a Fixed Dwelling in any U.S State/Territory a "Resident of [The] State" of their domicile? (Suggested Answer : Yes)

III. [The Former Question Rephrased] Is a Person Who Filed The South Dakota DPS's "Residency Affidavit," (without perjury), Lacks a Fixed Dwelling Anywhere, has a South Dakota Driver's License, Is Registered To Vote in South Dakota, Could Have Been Summoned to Jury Duty [in Minnehaha Cnty] at any time throughout their travels, and Who Returns to South Dakota at the conclusion of said travels, a "Resident of This State," where undefined, for the purposes of this state's laws? (Suggested Answer: Yes)

STATEMENT OF THE CASE

The trial court was the Honorable James A. Power. A motions hearing on summary judgment was held December 7th 2023, and was granted to defendant. Therein, the trial court held that Lapin was not a "resident of this state" a times material for the purposes of the anti-spam law.

The final order was signed by Judge Power on 12/18/23 and [NOE] was filed on December 19, 2023. Plaintiff Joshua Lapin filed his Notice of Appeal on January 17, 2024, appealing from the final order, seeking reversal of the finding that he was not a "resident of this state," Re: SDCL 37-24-41(14)(C), and thus lacked standing under the spam-law at times material.

STATEMENT OF THE FACTS

The parties agree, and the court likewise found, that "The material facts as it pertains to whether Plaintiff was a 'resident of this state' are not genuinely disputed by the parties" (*Final Order*, ¶12). Agreeing the only issue on appeal is a *purely legal* one: in relevant part whether those undisputed material facts render him a 'resident of this state' at times material for the purposes of the anti-spam law...appellant confines the statement of the facts to

those relevant to the legal issue at bar, and factually undisputed in appellee's since-prevailing motion for summary judgment.

1. Appellant stayed for 30 nights in South Dakota in February-March of 2021, with the then-present intention of becoming a South Dakota resident before traveling the world for years, like those described in the Keloland article in *Opposition Brief*, Ext. G). (*Id*, Ext. C "AirBnb Receipt in Rapid City," pg.5).

2. Appellant signed and filed the DPS's "Residency Affidavit" with the Agency, wherein he swore [in the affirmative to] 1. South Dakota is your State of Residence?, 2. Is South Dakota the State you intend to return to after being absent?, [and in the negative to] 3. Do you maintain a residence in another state? (*Id*, Ext. C, pg. 1).

3. Appellant surrendered his prior [Colorado] driver's license and voter registration, as required, in order to obtain a South Dakota driver's license and voter registration. (*Opposition Brief*, pg. 10, lines 1-3)

4. Appellant obtained a Personal Mailbox (PMB) at Sioux Falls-based "Your Best Address", as prerequisite to filing the "Residency Affidavit," and maintained it for the duration of his one year, nine-month worldly travels. (*Id*, Ext. C, pg. 2-4).

5. Appellant was issued a South Dakota Driver's License, containing the PMB address (*Id*, Ext. C, pg. 6), and held it throughout his travels.

6. Appellant Was A Registered Voter in South Dakota throughout his Travels, and was issued such registration simultaneously with his driver's license. (*Id*, Ext. C, pg. 7), and remained a registered South Dakota voter throughout his travels.

7. Appellant did not become a resident or domiciliary of Any Other U.S State-or-Territory, or of any foreign country, during his travels. (*Lapin Aff.*, ¶¶ 7,13)

8. Appellant could have been summoned for Jury Duty in Minnehaha County, South Dakota, at any point throughout his travels. (*Opposition Brief*, pg. 14 ¶F, - 15), (Id, Ext. A+B & Ext. C, pg. 1).

9. Appellant Returned Home to South Dakota in January of 2023, got an apartment, and has lived in downtown Sioux Falls ever since, up to and including the time of writing; the apartment being a 10 minute walk from the PMB Mailbox that is-and-was on his driver's license, which he held throughout his travels, and to which he

continues to receive some of his mail up to present date. (*Lapin Aff.* ¶¶ 9,10).

SUMMARY OF THE ARGUMENT

The lower court err'd when it found plaintiff-appellant was a "resident of this state" at times material, for the purposes of SDCL § 37-24-41(14)(C). This Court's Parsley and Rush residency standards concerned the particularities of a strictly-construed *divorce* statue, is inapposite, and not *in pari materia* with the instant, liberally-construed remedial statute and purposes. Further, the decision runs afoul of equal protection, and other garden-variety 14th amendment defenses. As if there was any doubt, recent amendments to the residency statute at This court has recognized the residency of a full-time Traveler before, and should do the same here. The 8th Circuit (applying South Dakota law) similarly finds that during a long period of military service, "one may not be viewed as occupying, in a residential sense, 'no man's land,' this very court has recognized full-time traveler's residency, and another court Pitts v Black, *supra* upheld the very equal protection challenge to a similar residency requirement for homeless individuals which the lower court did not directly address. Appellant was a "resident of this

state" for the purposes of SDCL § 37-24-41(14)(C) at all times material; this court should reverse and remand.

ARGUMENT

I. This Court's Residency Holding in *Parsley* and *Rush* (Divorce Cases) Construing SDCL § 25-4-30 Is Inapposite to Residency Re: the Anti-Spam statute at SDCL § 37-24-41(14)(C)

A. Summary of Parsley and Rush's Construction of "Resident of This State"

The only other time this court has ever interpreted the phrase "resident of this state," was in two divorce cases: *Parsley v. Parsley*, 2007 S.D. 58, ¶ 18, 734 N.W.2d 813, 818 "Parsley" and *Rush v. Rush*, 2015 S.D. 56, ¶ 14, 866 N.W.2d 556, 561 "Rush," both of which interpreted the phrase as it appeared in the divorce statute SDCL § 25-4-30. In relevant part, Parsley, *supra,* at 818 reads:

"[I]t follows that the residence must be an actual residence as distinguished from a temporary abiding place, and, further than this, it must not be a residence solely for the purpose of procuring a divorce only. In Hinds v. Hinds, [1 Iowa 36 (1855)], it was held that a legal residence, not an actual residing alone, but such a residence as that, when a man leaves it temporarily on

business, he has an intention of returning to, and which, when he has returned, becomes, and is, de facto and de jure, his domicile."

B. Lower Court Erroneously Believes Parsley's Construction of "Resident of This State" is NOT a strict definition and that it follows the Plain-Meaning of the Rule.

The lower court believes that *Parsley* and *Rush's* interpretation of "resident of this state" is not a strict one, and follows the ordinary meaning of the phrase (*Final Order*, ¶ 10) (*T*, pg. 13, lines 6-8). Intending no disrespect to the Hon. James A. Power, this is erroneous and can be demonstrated. As appellant argued (*Opposition Brief*, pg. 18 ¶ I), and as the lower court, in turn, conceded (*T*, pg. 30, lines 2-8), divorce statutes are strictly construed, especially in times past; the quoted text above defining "resident of this state" can be traced all the way back to an 1855 case *Hinds v. Hinds*, [1 Iowa 36 (1855)], in which divorce statutes were even more strictly construed. But the lower court believed this court in *Parsley* and *Rush* were not "interpreting resident in our divorce statutory strictly...[and are] basing it on a definition that is consistent with the ordinary

dictionary definition." (*T*, pg. 30, lines 12-15).

1. *Rush* Indicated Divorce And Personal Injury Precedent Should Be Kept Separate

In Rush, *supra*, at 562, this court rejected Defendant Julie Rush's attempt to cite to a personal injury case[1] to control the application of the *forum non conveniens* doctrine to the divorce action, instead electing to follow a divorce case[2] cited by plaintiff Grant Rush to control the application of the same doctrine. While certainly not conclusive in and of itself, this demonstrates a willingness of this court to rely on *divorce* precedent for *divorce* cases, and *personal injury* precedent for *personal injury* cases. After all, "[c]haracterization of the object or purpose is more important than characterization of the subject matter in determining whether different statutes are closely related enough to justify interpreting one in light of another." *Goetz v. State*, 636 N.W.2d 675 (S.D. 2001). Using a divorce statute's construction of the now-infamous phrase "resident of this state" is not close enough to justify interpreting one in light of the other. "A law providing regulations conducive to public good or welfare, such as suppression of fraud, is ordinarily remedial, and as such liberally

[1] *Rothluebbers v. Obee*, 2003 S.D. 95, 668 N.W.2d 313
[2] *Lustig v. Lustig*, 560 N.W.2d 239 (S.D. 1997)

interpreted. *United States v. Stowell*, 133 U.S. 1, 10 S.Ct 244, 245-246, 33 L.Ed. 555; accordingly, the anti-spam law is remedial in nature and afforded liberal construction, whereas, "the requirements of the statute relating to divorce should be strictly construed," *Snyder v. Snyder*, 240 Iowa 239, 35 N.W.2d 32, 33–34 (1948) "Snyder," referring to *Smith v. Smith*, 4 (Greene) Iowa 266 "Smith." Synder, *supra*, is relied on for the definition of "resident of this state" in *Parsley*, whereas Smith is relied on in Rush, *supra*. We cannot use this wholly inapposite line of South Dakotan / Iowan Divorce cases to interpret the instant personal-or-property injury case, especially when more on-point authorities are available.

C. The Iowa Supreme Court Called *Its Own* Residency Holding in Divorce-case Hinds v Hinds, *supra* (Which Parsley/Rush Are Based On) "More Stringent" and "Inapposite" To Residency For Other Purposes Such As Restraining Orders

In *Root v. Toney*, No. 12-0122 (Iowa Dec. 13, 2013) "Root," the Iowa Supreme court considered the residency requirements for the purposes of a protection order. The plaintiff-abusee had just moved to Iowa in a temporary

shelter (*Id*, at 16), and sought an order of protection against her abusive ex husband. The abuser ex-husband opposed her petition that she couldn't satisfy the residency requirement of [Iowa's] Chapter 236 (governing protective orders); for this he cited heavily to the same, strict, residency requirement of Hinds v. Hinds, *supra,* the very same portion this court relied on in Parsley, *supra,* at 818. The *Root* court rejected Hinds's residency construction, and adopted a less stringent one, "This more stringent legal residency requirement for chapter 598 makes sense in the context of marital dissolutions involving residents of other states, because a more lenient actual residency test would allow litigants to maintain multiple residences to evade Iowa's minimum good-faith state residency requirement. Chapter 236, by contrast, lacks any equivalent provision imposing a minimum period or good-faith-test requirement for residency within Iowa. Accordingly, the chapter 598 cases are inapposite. We conclude a more relaxed residency requirement is appropriate to effectuate the purpose of chapter 236—protecting victims of domestic abuse." Id, at 15. As the instant anti-spam statute lacks a minimum "good-faith residency requirement" or "minimum period," a more relaxed residency requirement is warranted for the same reasons. *Root* also said, "We hold that parties

seeking orders of protection under chapter 236 need only demonstrate that they are currently living in the county, maintaining a "place of dwelling, which may be either permanent or temporary." (underline added).

D. This court Construes Residency More Liberally In Matters Outside Divorce (*Parsley & Rush),* precisely *as the* Iowa Supreme Court did *in* Root v. Toney, *supra*.

In *State ex Rel. Johnson v. Cotton*, 67 S.D. 63 (S.D. 1939), this court considered the residency requirement for children attending schools to a liberal construction, reviewed its prior holdings, and accordingly found, "In Grand Lodge Independent Order of Odd Fellows v. Board of Education, 90 W. Va. 8, 110 S.E. 440, 443, 48 A.L.R. 1092, the facts are essentially parallel to the facts in this case and under a law in effect similar to our law held that: "The right to attend school is not limited to the place of the legal domicile. A residence, even for a temporary purpose * * * is sufficient to entitled children to attend school there." Contrast this to the *divorce* residency requirement from Parsley, *supra*, at 818, which could not be more inapposite to (...but such a residence as that, when a man leaves it temporarily on business, he

has an intention of returning to, and which, when he has returned, becomes, and is, de facto and de jure, his domicile); this court should observe the similar rashionele as-in Root v. Tooney, *supra*. But in any event, appellant asserts he was both a domiciliary and resident of South Dakota at all times material throughout his travels, satisfying either interpretation.

E. Even if this Court finds Parsley and Rush's residency construction is applicable to the spam-law (which it should not), appellant satisfies its "de facto and de jure, his domicile" standard

The circuit court found "resident and domcile" are not synonymous. *Final Order,* ¶ 8. However, it also relied on this court's construction of residency from Parsley and Rush. (*T*, pg. 13, lines 6-8). If Parsley was to be the standard (which it should not), then appellant argues in the alternative that he satisfied the Parsley standard at all times material. Indeed, Parsley, *supra, at 818* and Rush, *supra* cites Snyder v. Snyder, *supra,* for the following:

"..it was held that a legal residence, not an actual

residing alone, but such a residence as that, when a man leaves it temporarily on business, he has an intention of returning to, and which, when he has returned, becomes, and is, *de facto and de jure, his domicile.*"(italic added)

These are irreconcilable: resident and domicile are either synonymous, or they are not. Neither Appellee nor the circuit court contended appellant was not domiciled in South Dakota at times material, nor could they. Appellant was required to surrender his previous [Colorado] driver's license, in order to gain one from South Dakota; he had to swear he maintained no residence in any other U.S. State, that South Dakota was his state of residence, and that he intended to return here after his travels. *Opposition Brief*, pg. 10, ¶1. Further, he did not establish domicile elsewhere at any point throughout his travels. *Lapin Aff.*, ¶¶ 12,13. See *Cox, Cox, Filo, Camel & Wilson, LLC v. Sasol North America, Inc.*, CIVIL ACTION NO.: 2:11-CV-856, at *9 (W.D. La. Jan. 30, 2012), "The simple fact is that, at the time this action was filed, and then removed, Dick Rogers had established a *residence* in Texas (the fact that it is in a R.V. does not change this) and manifested an intention to remain there indefinitely. That is enough for this court to find that Dick Rogers is *domiciled* in Texas." (ital. added) See also *McHenry v. Astrue*, No. 12-

2512-SAC, at *5 (D. Kan. Dec. 14, 2012), "In determining the domicile of homeless individuals, the court should consider where the individual last lived before becoming homeless, place of prior employment, state of registration to vote, income tax returns, location of church or social organizations that he belonged to, and where he was licensed or had registered an automobile. In light of this jurisprudence, it is clear that South Dakota was at all times material, "de facto and de jure, his domicile".

II. Language of The Statute And Its Chapter Supports Liberal Construction of "Resident of this State" As Used in SDCL § 37-24-41(14)(C)

A. Legal Standard

1. Statutory Construction Derived From "Total Content of Legislation"

"The purpose of the rules of statutory construction is to discover the true intention of law, and that intention must be ascertained primarily from the language expressed in the statute." State v. Kaiser,526 N.W.2d 722 (S.D. 1995)." "When called upon to construe statutes, this court may look to the legislative history, title, and the total content of the legislation to ascertain the

meaning." LaBORE v. MUTH, 473 N.W.2d 485 (S.D. 1991). Accordingly, it is appropriate to turn to subsections (A) and (B), in order to help determine the intention of the pertinent subsection (C).

2. Statutory Construction Derived from Language of the Enacting Chapter

Further, this court habitually resorts to the greater chapter to interpret a statute arising therefrom, and to ascertain legislative intent. See *Save Our Neighborhood-Sioux Falls v. City of Sioux Falls*, 849 N.W.2d 265 (S.D. 2014) at *268 (resorting to Chapter 9-4 to discern "such" for the purposes of SDCL 9-4-5); *Olson v. Butte Cnty. Comm'n*, 925 N.W.2d 463 (S.D. 2019) at *466 (reviewing SDCL chapter 31-3 to attempt to construe "effective date" for the purposes of SDCL 31-3-34), *Schupp v. S. Dakota Dep't of Labor & Regulation*, 2023 S.D. 4 (S.D. 2023) at *3 (citing to the definition of "captive insurance company" from SDCL chapter 58-46 for the purposes of SDCL 58-46-31), see also *Farmland Ins. Companies v. Heitmann*, 498 N.W.2d 620 (S.D. 1993) (recognizing legislative intent from chapter 58, that contractual provisions not inconsistent with may be included in policies, in order to find SDCL 58-11-9.5 applies to UIM policies sold in South Dakota)

B. SDCL §§ 37-24-41(14)(A)-(B) Supports a Liberal Construction of "Resident of This State" as used in (C).

SDCL § 37-24-41(14) defines "South Dakota electronic mail address" as including:

(a) 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;
(b) An e-mail address ordinarily accessed from a computer located in this state; or
(c) An e-mail address furnished to a *resident of this state*. (italics added)

1. Subsection (A) Supports Liberal Construction of "Resident of This State"

This subsection would grant standing to a person, regardless of their residency or domicile, whose internet service provider merely sends paper bills to a mailing

address (which could be a PO Box) located in this state, without regard to the legal status of the recipient or their fortuitous physical location at the time they received the spams, revealing extraterritorial application to spams with a FAR more attenuated connection to South Dakota than appellant at times material. The lower court rejected the significance of a PO Box qualifying for subpart A, "I think that's an exception, and that the run-of-the-mill of mailing address [sic] in this state is going to be someone who has some sort of apartment or residence that they own, and they get bills at that residence, and that's the physical connection" T, pg. 33, lines 19-23. Intending no disrespect, this is improperly speculative and effectively deletes and adds words into subpart a "to a ~~mailing address~~ *fixed dwelling* in this state" (ital. and strikethrough added). See Olson v. Butte, *supra,* at 466: rejecting a proffered interpretation of a statute when it would require the court to "add language that simply is not there." The lower court believes the legislature had in mind a person who receives the bill for their e-mail address at their home, but such a person with a fixed dwelling would alternatively qualify under subpart C; the court's construction renders subpart A as mere surplusage and co-extensive only with the class of persons that would qualify under subpart C

independently, ignoring the significance of subpart A's broad, wide-net language which includes e-mail addresses whose only connection to the state being a bill sent into it annually or biannually. In fact, such an e-mail address could receive actionable spams in the midst of a biannual billing for funishing that e-mail address, a time period approximately the same as appellant's one year and nine month worldly travels which began and ended in South Dakota; the court's "physical connection" concept as quoted is misguided. "We therefore follow the paramount rule of statutory construction and simply declare 'what the legislature said, rather than what the courts think it should have said' Goetz v. State, supra, at 682. See Id at 681-682, rejecting similar additions and deletions in interpreting SDCL 23A-27-47.

2. Subsection (B) Supports Liberal Construction of "Resident of This State"

This subpart would render a South Dakota e-mail address one which "ordinarily" was accessed from a computer located in this state. Necessarily, this would qualify an e-mail address which is often "accessed" outside of South Dakota, or whose owner (the recipient) is located outside the state. The implications of this are similar to the

ones in subpart a. The lower court had this to say, "[T]he legislature based on that language was imagining a computer sitting in someone's apartment or house in South Dakota on an ordinary basis, but I think they were recognizing that we still want to protect the South Dakota resident if they are their laptop go on vacation to Florida, get a spam mail while they're on vacation. I think they would want that South Dakota resident to still be able to sue. But, to me, both those indicate they're trying to find ways to attach email addresses to a real physical connection with South Dakota." T, pg. 34, lines 6-17. This suffers from the same defects: adds and deletes words from the subpart, improperly speculates beyond the words used by the legislature, renders subpart b as mere surplusage and light of c, and reveals a concept of "physical connection" unsupported by the text. In other words, the lower court should have "simply declare[d] 'what the legislature said, rather than what the cour[t] think it should have said' Goetz v. State, *supra*, at 682.

C. This Court Relies on the Enacting Chapter to Interpret Statutes Within It

Given the plentiful examples of this court relying on Chapters to interpret statutes within them (See s. II(A)

(2) of this brief), it's no surprise this court has done the same for the relevant Chapter: 34. Moss v. Guttormson, 551 N.W.2d 14 (S.D. 1996) at *17, "While SDCL Chapter 37-24 obviously assists consumers seeking relief as victims of deceptive trade practices, the broad statutory language includes more than only consumers. The statute provides, " [a]ny person who claims to have been adversely affected by any act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." SDCL 37-24-31 (emphasis added). "Person" includes natural persons, partnerships, corporations (domestic or foreign), trusts, incorporated or unincorporated associations, and "any other legal entity." SDCL 37-24-1(8). Hence, an employee is a "person" within the purview of SDCL 37-24-31 who may be adversely affected by practices declared unlawful under SDCL 37-24-6." From this, we see that a strict definition of resident does not fit into the statute itself nor in the chapter it's located in, a liberal construction would best-advance the legislature's goals. "When faced with a choice between two possible constructions of a statute, the court should apply the interpretation which advances the legislature's goals." *State v. Schempp*, 498 N.W.2d 618 (S.D. 1993).

III. Throughout the SDCL, People Like Appellant Are Considered Residents

A. Such Travelers Are Hauled To Jury Duty

When full-time traveling South Dakotans, including the instant plaintiff and the tens of thousands of others similarly situated, sign the aforementioned "Residency Affidavit," (Opp. Brief, Ext. C) it contains the following language:

"PLEASE NOTE: South Dakota Driver Licensing records are used as a supplemental list for jury duty selection. Obtaining a South Dakota driver license or non-driver ID card will result in you being required to report for jury duty in South Dakota."

It isn't lying. South Dakota codifies its "Qualifications of Jurors" at SDCL § 16-13-10 which reads as follows:

"Any citizen of this state, who is a resident of the county or jury district where the jury is selected, eighteen years of age or older prior to January first of the year of jury service, of sound mind and who is able to read, write, and understand the English language, is

eligible to serve as a juror..."

Accordingly, the Minnehaha County Circuit Court routinely summons other full time travelers at the same PMB address as appellant, to appear on a jury of their peers. See Opp Brief, Ext. A+B, for a true-and-correct copy of a summons for a Juror at the same PMB provider as plaintiff. See also Lapin Aff. ¶ 14, attesting to its origin and legitimacy. The lower court reject the significance of this *T*, pg. 16, lines 3-15. , "[If] I were a lawyer, um, especially in a criminal case, I would object to that being resident and you actually being seated on a jury...the way we [get] our pools is based off driver's licenses...I would argue that ain't a jury of my client's peers…"

But this is likewise speculative about a hypothetical which hasn't been litigated. In fact, the lower court admitted as such. *T*, pg. 15 line 24. In any event, the language on the "residency affidavit," and the practice of the circuit court in hauling such folks to jury duty, ratifies the notion that such travelers are deemed residents and have the responsibilities of state residency imposed on them.

B. Driver's license revocation Statute

SDCL § 32-12-56 "Suspension or revocation for out-of-state conviction" reads, "The Department of Public Safety may suspend or revoke the driving privilege or driver license of any resident of this state or the privilege of a nonresident to drive a motor vehicle in this state upon receiving notice of the conviction of such person in another state of an offense which, if committed in this state, would be grounds for the suspension or revocation of the driving privilege or driver license." Excluding appellant would mean he can never have his driver's license revoked, regardless how horrifically he drove in-or-out of South Dakota. This doesn't seem to be directly addressed in the transcript.

C. South Dakota Legislature Recently Admitted [Those Situated To] Appellant were South Dakota Residents. The Recently Amended and Tightened "Residency For Purposes of Voting Law," at SDCL § 12-1-4 is evidence of it's *Inclusion* of Appellant Prior to '23 Amendment.

Senate Bill 139

HOUSE ENGROSSED

Introduced by: Senator Deibert

An Act to revise residency requirements for the purposes of voter registration.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 12-1-4 be AMENDED:

12-1-4. For the purposes of this title, the term, residence, means the place in which a person ~~has fixed his or her habitation~~ is domiciled as shown by an actual fixed permanent dwelling, establishment, or any other abode ~~and~~ to which the person ~~whenever absent, intends to return~~ returns after a period of absence.

A person who ~~has left home and gone~~ leaves the residence and goes into another county of this state or another state or territory ~~or county of this state~~ for a temporary purpose ~~only~~ has not changed ~~his or her~~ residence.

A person is considered to have gained ~~a~~ residence in any county or municipality of this state in which the person actually lives, if the person has no present intention of leaving.

A person retains residence in this state until another residence has been gained. If a person moves from this state to another state, or ~~to any of the other territories~~ territory with the intention of making it ~~his or her~~ the person's permanent home, the person ~~thereby~~ loses residence in this state.

Not-long after times material to this suit, the legislature amended SDCL § 12-1-4 "Criteria For Determining Voting Residence" was Amended by S.L. 2023, ch. 42,s. 1, eff. 7/1/2023, whose changes are shown above. Voting residence was changed from the broad "fixed his or her habitation," to "domiciled as shown by an actual fixed permanent dwelling, establishment, and any other abode to which the person returns after a period of absence." The lower court erroneously concluded, "[T]he South Dakota legislature amend[ed] that statute to make it more clear. I think they were concerned about Rvers from other states voting, and they thought they needed to clarify that. I guess the quibble I have that I think you [appellant] and I [the court] are going to have to disagree on , is that I actually think the statutes were clear before they changed them, but what they were right about is that I think

people who were actually giving out voter registration cards were interpreting them to allow people like you to get registered to vote here, and so they wanted to make it clear to those people to stop doing that, and so they amended the language to make it super clear…" *T*, pg. 18, line 17 - pg. 19 line 2. To start, the lower court ignored this court's relevant tenant of statutory construction, "It is . . . an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a *different* construction" *Lewis Clark Rural Water System v. Seeba*, 709 N.W.2d 824 (S.D. 2006) (italics added). Secondly, the lower court is simply incorrect about the legislature's intent in the amendment. Appellant paid a freelancer to transcribe the "Second Reading and Final Passage of S.B. 139" in the legislature, and submitted the transcript (with highlights added) as Ext. D of the Opposition Brief, and is available in the appendix as the same (Opp. Brief, Ext. D). Therein, it is clear the legislature was not *clarifying* anything, rather *acknowleging* and *conceeding* that current law allows these "RV residents" to become South Dakota residents overnight and then vote in elections, and the bill sought to *change* that (and did, upon its passage). This is evident of the status of such RV/Digital Nomad

residents (including appellant at times material), as real South Dakota residents for the purposes of our statutes. Honorable mentions from the S.B. 139 transcript (Opp. Brief, Ext. D) include:

[the sponsor of SB. 139] Senator Deibert 00:59: "...[W]e have facilities in the state that *allow overnight residency* and therefore you can register to vote the next day and vote so that *this bill tries to offset that by requiring a 30 day residency* in the state before you vote" (italics added)

Senator Deibert: 02:04 "...[W]e have seen numerous new registrants using the one day residency…"

Senator Johnson: 04:14 "What this bill does is defines residency...[T]he way it is right now...you can claim residency if you're here past midnight. If you're here for 12 hours, you can claim residency and then you can hop on down to the ballot box and vote as [a] South Dakota citizen…"

Senator Deibert: 07:43 "I think 30 days is a reasonable time to be in the state to become a South Dakotan"

The prime-sponsor (Sen. Deibert) admits that under current law, (the statute in effect throughout the whole of appellant's travels), someone can claim residency in 12 hours, that 30 days is a "reasonable time" to become a South Dakotan, and that this bill defines residency. Therefore, it is clear that nothing was *clarified*, as the lower court concluded, rather something was *changed*, and with intention; this effectively concedes the legality of the "12 hour resident" prior to amendment, and is wholly consistent with the tenant of statutory construction that "where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different construction" Lewis Clark Rural Water System v. Seeba, *supra*.

1. Appellant was a Properly Registered, South Dakota Voter At All Times Material

Appellant was one of these registered voters that the legislature spoke negatively of. The lower court, while nice about it, wrongly thought appellant perhaps shouldn't have been given a voter registration card, T, pg. 31 lines 8-12 "The one thing I do question is whether he should have been given a South Dakota voters registration card…" However, this legislative transcript, which was well-in

the briefing as an exhibit, makes clear such RV/Mailbox residents were legally voting, at least prior to the '23 amendment. As such, the lower court concluded that appellant, a properly-registered South Dakota voter, was a non-resident of this state.

2. On this basis, SDCL § 2-14-4 is applicable; the lower court erroneously concluded was inapplicable

The lower court was kind enough to concede that appellant had a "good point" re: SDCL § 2-14-4, that where "resident" is defined elsewhere in the code, (e.g. pre-amended voter registration statute) it would apply where undefined in places, including SDCL 37-24-41(14)(C). T, pg. 36, lines 24-25. It ultimately found that "resident is used in so many different contexts that that [sic] principle doesn't work" T, pg. 37 lines 2-4. See also Final Order, ¶ 6. However, for the above-cited reasons, and the legislative transcripts which makes clear that A: the bill *does* "define residency" (generally) and B: that the lower court misunderstood the legislature in S.B. 139 by speculating in ways inconsistent with the legislative transcript, and C: the lower court improperly and

incorrectly speculated/believed that appellant shouldn't have been handed a voter registration card; on this basis, appellant briefly renews his SDCL § 2-14-4 argument in light of the corrected foundation, so this court can consider if these circumstances "shift the gears" back into utilizing SDCL § 2-14-4 for our purposes, and applying the pre- '23 amended voter registration statute to SDCL 37-24-41(14)(C).

IV The 8th Circuit, And This Court, On Traveler's Residency

A. A Solider Does Not Occupy "No Man's Land"

Ellis v. Southeast Construction Co., 260 F.2d 280 (8th Cir. 1958), "It has been pointed out, however, that during a long period of military service one may not be viewed as occupying, in a residential sense, `no man's land.'...A citizen of a state does not change his citizenship by entering military service even though he is assigned to duties in another state or country, and regardless of the term of service, unless he indicates an intent to abandon such original domicile and adopt a new one.," *Id.* Appellant never showed intent to abandon South Dakota while "stationed" in various countries while traveling abroad, having always intended to return home to SD

thereafter. This is further consistent with the residency for voter statute as it existed at times material *prior* to amendment "the place in which a person has fixed his or her habitation" (see earlier).

B. The One Year and Nine Month Travel Was, Essentially, an Extremely Long Vacation Immediately After Moving to South Dakota; A Person Need Not Immediately Settle Into a Place of Abode.

Katcher v. Wood, 109 F.2d 751 (8th Cir. 1940) "a person may leave the state in which he has been domiciled and acquire a domicile in another state even though he establishes himself in temporary lodgings in a hotel and does not immediately settle in any particular building as a fixed place of abode." Plaintiff's steps to obtain SD residency took place through temporary lodgings. (*Opp. Brief*, Ext. C) Indeed, this is consistent with SDCL § 12-1-4 prior to amendment, whereas the *added* language, post-July 2023, is "is domiciled as shown by an actual fixed permanent dwelling, establishment, and any other abode," revealed the absence of such verbiage at times material, better-aligns the law at applicable times with the reasoning of *Katcher*. This contrasts with the lower

court's perception of the same, "[A]s soon as Mr. Lapin becomes a physical residen[t], physical resident of the state with an intent for South Dakota to be where he permanently resides, and so as soon as he gets an apartment lease here or something like that, which I think he's already done. I think any email after that point he can sue over." T, pg. 36, lines 7-12. However, appellant need not immediately settle into such apartment in order to become a South Dakota resident, and the one year and nine month continuous travel is best-characterized as an extremely long vacation for any relevant purpose.

C. Residence Has "Specific Legal Meanings apart from [its] Ordinary Usage"

Stoner v. State Farm Mut. Auto. Ins. Co., 780 F.2d 1414 (8th Cir. 1986), "The cases to which Stoner cites in her brief all deal with some variation of the terms 'residence' or 'domicile,' both of which have *specific legal meanings apart from their ordinary usage*. See Black's Law Dictionary 435-36, 1176-77 (5th ed. 1979). No contradiction exists, as Stoner would suggest, between the district court's statement, 'there is no question that Monica Stoner remained a legal resident of her parents' household.' " The 8th Circuit admits Monica (soldier's daughter), remained a legal resident of her parents home

even though she wasn't living with them. Court also admitting "residence" and "domicile" have legal meanings apart from their ordinary usage, in overwhelmingly direct contrast to the lower court's construction of the same.

D. This Court Has Recognized Full-Time Traveler's Residency Heretofore

Payne v. State Farm Fire & Cas. Co., 2022 S.D. 3 (S.D. 2022), Notably, at *3, "John and Robin were married on April 30, 2011. In May or June of 2011, the Paynes moved from Virginia to Florida in a recreational vehicle (RV), intending to establish a domicile in Florida while traveling in the RV around the continental United States...The Paynes set up a private mailbox in Florida at which they received all of their mail. Their mailbox service then forwarded mail to them during their travels as directed." Notwithstanding the Paynes's functionally-identical living situation to the instant plaintiff's at times material herein, the SD Supreme Court recognized them as both domiciles and residents of Florida, at *5 "Because the Paynes did not apply for their Policy while domiciled in Florida or make a written request for UM coverage from State Farm, the court concluded that State Farm did not violate Florida's UM statute," see also at

*2, "The Paynes, residents of Florida at the time of the accident, filed a declaratory action against State Farm seeking payment of $2,000,000 under Florida's UM statute, which they contend applies to this dispute." But this accident did not occur in Florida, as the Paynes had set up mail forwarding in Florida after establishing domicile in FL in an RV with in-state mail forwarding; the accident occurred in South Dakota, but the South Dakota Supreme Court recognized the Paynes as residents of Florida, notwithstanding their traveling lifestyles. The Payne's living situation was identical to appellant's at times material, and this court acknowledged they were residents of Florida, where they established domicile and received their mail. To this the lower court found little significance because the Payne's residency wasn't what was being decided. T, pg. 25, lines 21-23, and that appellant "[doesn't] need to talk about that case more" T, pg. 25, line 25 - first line of next page. That this court wasn't deciding the Payne's legal residency has no bearing on the simple truth that this court acknowleged that a couple under comparable circumstances are residents of the state to which they associated prior to their travels. This is further consistent with the Iowa Supreme Court's liberalization of "residency" for purposes other than divorce. Root v. Toney, *supra*, as argued earlier. In

other words, Root v. Toney took a more liberal residency construction for the purposes of a protective order than it did in divorce case Hinds v. Hinds, *supra*. It follows naturally that in the instant matter, this court would take a more liberal construction in the instant case than it took in its own, Hinds-based divorce cases (Parsley and Rush, *supra*). In fact, this court has already done so in *State ex Rel. Johnson v. Cotton*, 67 S.D. 63 (S.D. 1939), "The right to attend school is not limited to the place of the legal domicile. A residence, even for a temporary purpose * * * is sufficient to entitled children to attend school there," and similarly didn't think twice about the Payne's Floridian residency notwithstanding their life in an RV. A conclusion that appellant was a resident at times material for the purposes of the spam law fits the South Dakota / Iowa pattern of liberalizing residency for non-divorce purposes, especially remedial statutes.

V. Maryland Has Applied It's Spam Law to a Resident Who Was Away At College in D.C.

Marycle v. First Choice Internet, Inc., 166 Md. App. 481 (Md. Ct. Spec. App. 2006), "Recipient was a Maryland Resident but a law student in Washington D.C. 's George Washington Univeristy, received spams in D.C., but sued in

Maryland State court under Maryland's spam law 'MCEMA.' Recipient faced the same legal hurdle as the instant plaintiff herein, and pltf was found to have standing despite living in D.C and receiving spams there, because he was still a maryland resident. Out-of-state College students are away at college for years at a times, but are presumed to "return home" after their studies, and never lose their status as a resident of their *home* state, rather than the state of their learning institution. Opinion attached as Opposition Brief, Ext. H, with relevant findings of the Maryland Special Court of Appeals Highlighted. This appears to have been unaddressed by the court in the transcript.

VI. The Equal Protection / Durational Residency Requirement Constitutional Challenges Were Improperly Rejected

A. Lower Court Did Not Address Equal Protection Challenge, only the Durational Residency Requirement Challenge, finding Appellant's lack of a fixed dwelling, not the duration of his residency, was key to non-residency

The lower court believes that since the definition of

residency it adopted imposes no durational residency requirement, or "DRR's" (aka as soon as appellant got his apartment he could sue for spams received thereonout), that appellant's durational residency requirement challenge, according to the court, is inapplicable. *T*, pg. 36, lines 6-17 generally. In other words, the very moment appellant obtained a fixed dwelling in the state of South Dakota, to which he returns, he'd be a resident under his definition. Notably, the lower court did not address the *equal protection* challenge (as distinct from DRR's) vis-a-vis the lack of fixed dwelling within the state.

B. The Unaddressed Equal Protection Challenge raised by appellant Re: lack of fixed dwelling, Has Prevailed In Comparable Circumstances

Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984) was an on-point civil rights case this court should consider in the interest of justice. The plaintiff's were homeless New York residents seeking declaratory&injunctive relief against the New York City Board of Elections, and prohibiting them from applying the New York State Election Law as to disenfranchise plaintiff's from the right to vote. Not unlike appellant, the *Pitts* plaintiffs "allege[d] that they are 'homeless' persons in that they do not have traditional residences. They further allege that they reside in the State of

New York and but for the fact that they do not live in traditional residences they meet the statutory requirements for eligibility to register to vote in all other respects. Plaintiffs claim that the defendants' application of the Election Law in such a manner as to disenfranchise plaintiffs' class, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." *Id*, 697-698.

Pitts centered around an issue almost-identical to the case at bar, "The issue for determination in this lawsuit is the constitutionally permissible definition of the term "residence" used in Section 1-104(22) of the Election Law. The term "residence" is defined in that Section as, "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." Id, 698.

The Pitts defendant's position was similar to that of the lower court and appellee, "Defendants maintain that the term "residence" necessarily implies the occupancy of a fixed premises." *Id*, 698.

The court, rejecting the above, reasoned, "Defendants' definition of the term 'residence' excludes an entire group of otherwise eligible voters." *Id*, 699.

Ultimately, the *Pitts* court granted the relief and, in relevant part, made the following conclusions of law:

"Plaintiffs are entitled to a Declaratory Judgment declaring that defendants' application of New York Election Law Sections 1-104(22), 5-102 and 5-104, to the extent that this application effectively disenfranchises homeless individuals, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983; and are further entitled to a permanent injunction enjoining defendants from refusing to allow homeless individuals to vote, solely on the ground that the residency requirement of the New York Election Law cannot be met by those who inhabit a non-traditional residence." Id, 708. "State statutes, such as New York Election Law §§ 5-102, 1-104(11) and 5-104, as applied by defendants, which effectively disenfranchise one class of voters, while granting the right to vote to another class of voters, are constitutionally invalid as applied, unless the exclusions are " necessary to promote a compelling state interest" (citations omitted) Id, 709. Where a compelling interest exists, statutory restrictions on voting must be narrowly tailored to the articulated State interest and the State must show that the interest cannot be served by a means less restrictive of the right to vote. Id, 709. (citations omitted, but relying, inter alia, on *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), not unlike the instant appellant in Opp. Brief, pg. 16-17.

Pitts essentially relied on the same/similar 14th amendment, equal protection challenge made by appellant before the lower court in the present case, which was not directly addressed in the transcript, while only the durational residency requirement

portion of such argument was rejected by the circuit court. The lower court admitted no such durational residency requirement exists for the purposes of the spam law, and limited the issue to the existence of the fixed dwelling at times material. However, Pitts reveals that such distinction does not stand up to strict scrutiny/equal protection; as such, this court should reverse and remand.

Appellee may attempt to distinguish on the basis that the *Pitts* plaintiff's were physically present in New York, whereas appellant traveled the world for one year nine months. However, the lower court admitted there's no durational residency requirement for the spam law "[T]here's no duration to this..." T, pg. 36 lines 6-7 (in the context of physical residence, and distinguishing appellant's DRR challenge). This centers the equal protection and constitutional issue to that of the *fixed dwelling* debacle, rather than time spent at home. Said differently, the question is whether appellant can constitutionally be disenfranchised from the spam law based on his lack of fixed dwelling.

Appellee may further attempt to distinguish Pitts by arguing that, unlike in SDCL 37-24-41, "residence" was defined in Section 1-104(22) of the Election Law, whereas no such definition exists in SDCL 37-24-41. However, this is misguided as the definition provided in the latter, at *698, as:

"that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located,

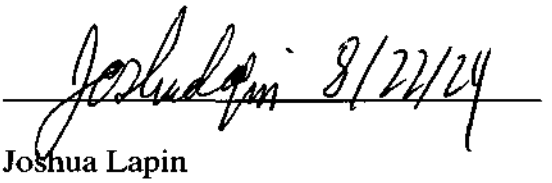
always intends to return."

This definition is essentially identical to the one adopted by the lower court in the instant case. T, pg. 36 lines 6-12. See also Final Order, ¶¶ 5, 13. It is further, functionally identical to the residency voter registration statute (as argued earlier), incorporating elements from before and after the '23 amendment, and the legislature transcripts (Opposition Brief, Ext. D) make clear that the bill "defines residency," and *changes* those requirements, to the misunderstanding of the lower court. T, pg. 18, line 16 - pg. 19, line 7. As such, this is not a sufficient basis upon which to distinguish Pitts.

Finally (re: Pitts), appellee may try to distinguish the homeless plaintiffs in Pitts from present-appellant on the basis that "at least the homeless regularly return to their tent or park bench, and spend most of their time in the state." However, the lower court also correctly decided that there's no durational residence requirement in the anti-spam law *T*, pg. 36, lines 6-7, and that at *any* point after becoming a South Dakota resident, "any email after that point he can sue over." T, pg. 36, lines 11-12. For any relevant purpose, appellant took a very long vacation after becoming a resident of this state. In fact, that wraps it up so well that appellant will "leave it at that" in lieu of a separate conclusion paragraph. Appellant thanks the South Dakota Supreme Court for the extensions, for leave to order the transcript late, and for it's consideration of this appeal which means so much to him; it's now in your hands and those of God's.

Dated this 21st day of August 2024.

Respectfully submitted,



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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 9,225 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
Appellant (Pro Se)

Certificate of Service

The undersigned hereby certifies that on this 21st 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 Abigaile Farley at <abigalef@cutlerlawfirm.com,> with a courtesy copy delivered to pro hac vice counsel (in the lower court only, he apparently didn't file for the same on appeal), Jacob Gillick of Gillick Legal APC, at <Jgillick@gillicklegal.com>

Joshua Lapin 8/22/24

Joshua Lapin
Appellant (Pro Se)

APPENDIX

Exhibit A	Order Denying Plaintiff's Motion To Stay, Granting Defendant's Motion For Summary Judgment And Denying Defendant's Motion For Attorneys' Fees.
Exhibit B	Transcript of the Dec. 7th 2023 Hearing (over Defendant's since-granted Motion For Summary Judgment, *inter alia*)
Exhibit C	Defendant Zeetogroup LLC's Brief In Support of Its Motion For Summary Judgment (without exhibits)
Exhibit D	Plaintiff Joshua Lapin's Brief in Opposition to Defendant's Motion For Summary Judgment (including its exhibits, A-H)
Exhibit E	Affidavit of Joshua Lapin (filed therewith his Brief in Opposition to Defendant's Motion For Summary Judgment)

EXHIBIT

A

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

JOSHUA LAPIN, Plaintiff, vs. ZEETOGROUP, LLC, Defendant.	49CIV22-000725 **ORDER DENYING PLAINTIFF'S MOTION TO STAY, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES**

On or about June 20, 2023, the Honorable Sandra Hoglund Hanson entered an Order in the above-referenced matter denying Plaintiff Joshua Lapin's ("Plaintiff") Motion for Partial Summary Judgment, converting Defendant Zeetogroup, LLC's ("Defendant") Motion to Dismiss into a Motion for Summary Judgment, setting a briefing scheduling order for the converted motion, and holding Defendant's Motion for Costs and Attorneys' Fees in Abeyance pending a ruling on the converted motion.

On or about July 7, 2023, Defendant filed a Motion for Summary Judgment on the basis that Plaintiff failed to satisfy the requirement that he was a "resident of this state" as contemplated by SDCL § 32-24-41(14)(c). Plaintiff filed a Motion to Stay Ruling on Defendant's Motion for Summary Judgment and the Entirety of this Case re: 8th Circuit Appeal on or about August 7, 2023. At 9:00 a.m., on December 7, 2023, a hearing on the two foregoing motions was held before the Honorable James A. Power at the Minnehaha County Courthouse in Sioux Falls, South Dakota. Plaintiff appeared personally and was not represented by counsel. Defendant was represented by and through one of its attorneys, Abigale M. Farley of the Cutler Law Firm, LLP.

After considering the written briefs, the arguments of Plaintiff and counsel, all of the materials on file, and otherwise being fully advised, it is hereby

ORDERED, ADJUDGED AND DECREED that this Court is not bound by the Eighth Circuit Court of Appeal's decisions as it pertains to the application and interpretation of South Dakota law;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED Plaintiff's Motion to Stay is DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

1. Plaintiff's claims in this matter require certain types of e-mails to have been "sent to a South Dakota electronic mail address" as provided in SDCL § 32-24-47;

2. In order for Plaintiff to satisfy the "South Dakota electronic mail address" requirement, the alleged e-mails must have been "sent to" "an e-mail address furnished to a resident of this state" as provided under SDCL § 32-24-41(14)(c);

3. The phrase "sent to" as provided by SDCL § 32-24-47 requires Plaintiff to have been a "resident of this state" when the alleged e-mails were claimed to have been sent;

4. Pursuant to SDCL § 2-14-1, the term "resident," as used in SDCL § 32-24-41(14)(c), must first be understood in its ordinary sense because the term is not defined by SDCL Chapter 32-24;

5. According to basic dictionary definitions, the plain and ordinary meaning of the term "resident" requires elements of permanence and physical presence in South Dakota, as opposed to a temporary abiding place;

6. SDCL § 2-14-4 is not applicable because the South Dakota Legislature has provided multiple different definitions for "resident" or "resident" in the chapters of South Dakota Codified Law that specifically define either term;

7. When the South Dakota Legislature has intended to depart from the plain and ordinary meaning of "resident," it has clearly done so by specifically defining the term;

8. The terms "domicile" and "resident" are not synonymous;

9. The plain and ordinary meaning of "resident" does not impose a duration requirement for establishing residency;

10. The plain and ordinary meaning of the term "resident" is not a strict construction or a strict interpretation of SDCL § 32-24-41(14)(c);

11. Applying the plain and ordinary meaning of the term "resident" contextually makes sense because SDCL §§ 32-24-41(14)(a) and 32-24-41(14)(b) reflect a physical connection to South Dakota;

12. The material facts as it pertains to whether Plaintiff was a "resident of this state" are not genuinely disputed by the parties; and

13. Plaintiff was not a "resident of this state" under the plain and ordinary meaning of the term "resident" during the time he has alleged to have received certain e-mails.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment is GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Costs and Attorneys' Fees is DENIED.

The Court incorporates by reference its conclusions stated during the Dec. 7, 2023 hearing.

12/18/2023 12:18:21 PM
BY THE COURT:

James A. Power

Honorable James A. Power
Circuit Court Judge

Attest:
Russell, Lisa
Clerk/Deputy

EXHIBIT

B

COPY

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

****

JOSHUA LAPIN,
Plaintiff,

MOTIONS HEARING

-vs-

ZEETOGROUP, LLC,
Defendant. 49CIV.22-000725

****

BEFORE: The Honorable **James Power**
Circuit Court Judge
Sioux Falls, South Dakota.
December 7, 2023

APPEARANCES: Mr. Joshua Lapin
401 East 8th Street Suite 214 PMB 7452
Sioux Falls, South Dakota

Pro se;

Ms. Abigale Farley
Attorney at Law
140 North Phillips Avenue 4th Floor
Sioux Falls, South Dakota

For the Defendant.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota

THE COURT: So, let's go on the record. We're here today in the matter of Joshua Lapin v Zeeto Group, LLC. It's 49CIV.22-725. I'll let folks note appearances. We'll start with plaintiff.

THE PLAINTIFF: Plaintiff Joshua Lapin appearing pro se.

MS. FARLEY: Abigale Farley, Cutler Law Firm, appears for the defendant.

THE COURT: All right. And I wanted to start by talking about Mr. Lapin's motion to stay and since that was your motion, I'll just briefly let you state why you think the court should pause this case while we're waiting on the 8th Circuit to decide the EverQuote case.

THE PLAINTIFF: I'll make it very brief. Um, so my concern is that that opinion, which is extremely bad for my interests, and I am trying as hard as I can to move this court to respectfully disagree with Your Honor's federal counterpart, with respect to Karen Schreier. Ah, that it's soon to be vacated, have no further force and effect, um, and, ah, that this court will be prejudiced off of that, and that it's soon to not legally exist anymore in their (unintelligible).

THE COURT: Yep. And I understand that's logical. Do you agree that Judge Schreier's opinion and an 8th Circuit opinion would not be binding on me?

THE PLAINTIFF: A 100%.

THE COURT: Okay.

THE PLAINTIFF: It's a matter of state substantive of law, so, yeah.

THE COURT: All right. Um, so I think I got your opinion on that. Let's hear the defendant's reason why they're opposing the stay.

MS. FARLEY: I will similarly be brief. Um, I just don't think that a pending appeal in a different case, which defendant's not a party to, on a different issue, different facts, different dates, sufficient to justify a -- - sufficient to justify a stay, especially considering it's in a different jurisdiction. Um, and, you know, regardless of whether Judge Schreier's opinion is vacated as plaintiff is asserting, she applied really well-settled principles of statutory interpretation that have been cemented by the South Dakota Supreme Court and the legislature for probably a century now.

Those principles won't change. It won't change how this court applies them either, and, ah, I would contend it is prejudicial because I think there's some inherent level of prejudice with any stay. A lot of times it can be de minimis when you have an appeal pending to the South Dakota Supreme Court. It's just not the case here. I don't see any justification for it and so we'd ask that the court

deny the motion.

THE COURT: All right. I'm going to deny the motion to stay. My rationale is that what the 8th Circuit does won't be binding on me. What Judge Schreier did isn't binding on me. I think, um, I might be willing to stay this case if there were an appeal to the South Dakota Supreme Court pending because they do tell me what to do, um, but I don't think it makes sense to slow this case down when we're just waiting on something that would at most be persuasive to me.

And is that -- the light in your face, Abby?

MS. FARLEY: No, I'm okay.

THE COURT: Okay. All right.

MS. FARLEY: I haven't noticed it yet.

THE COURT: All right.

MS. FARLEY: Thank you.

THE COURT: We can adjust those blinds if either one of you have a problem with that. So, then let's move on and tackle the motion for summary judgment today. Um, and I've got questions for you guys. The briefs were really good.

THE PLAINTIFF: Thank you.

THE COURT: So, I actually want to start with a couple of questions related to the facts that will go to Mr. Lapin. So, one thing that it didn't look like was totally

nailed down by the statements of undisputed material facts and your response to them was it looked like the email at issue in your complaint is a Gmail account; is that true?

THE PLAINTIFF: It is.

THE COURT: And is that a free email account?

THE PLAINTIFF: It is.

THE COURT: So, I'm guessing that Google or alphabet never sent bills to you for maintaining or furnishing that email address?

THE PLAINTIFF: Correct. And I've never alleged that. It is a South Dakota email address for that reason, yes.

THE COURT: Right. And so it looked like you're not claiming you qualify under Subpart A or B. You're claiming that you're a resident under Subpart C?

THE PLAINTIFF: Yes.

THE COURT: Right. So, that's where the fight is that, you know, does the fact that you have a driver's license from South Dakota, that you had established residency for tax purposes make you a resident for purposes of this statute, too?

THE PLAINTIFF: Amongst other things, yes.

THE COURT: Yeah. Okay. So, let me then go back to the defendant. I, I think, you know the issue is pretty squarely presented, which is how should the state interpret resident in 37-24-41 Subpart 14, Subpart C. What's the

defendant's rationale for saying even though he's got a South Dakota driver's license, even though he might be able to file income taxes here, which means you don't have to file income tax. He's still not a resident for purposes of that spam law.

MS. FARLEY: Ah, yes, Your Honor. And I think it, it goes back to what principles you have to apply when you have to declare the meaning of the statute that has been expressed by the legislature and the South Dakota Supreme Court, which is that they've left a word undefined, then the intent is that it is interpreted according to its ordinary meaning, ordinary sense, plain meaning, whatever variation of the word, um, and that's the case here.

The legislature did not define resident under that statute. It did define resident under other statutes, like the driver's license statute and things of that nature. It doesn't here.

So, when we go to SDCL.2-14-1, that's the statute that tells us to interpret it according to its ordinary meaning. When you do that, the South Dakota Supreme Court has pretty consistently when they have to do that always refer to dictionary definitions, and between dictionary to dictionary there might be slom-some variances between how they're defining it, but all of them consistently contemplate some form of physical presence.

For example, Black Law Dictionary defines resident first as someone who lives permanently in a particular place, um, or someone who has a home in a particular place. Merriam Webster's defines it as one who resides in a place, and then it defines reside as to dwell permanently or continuously. I won't go down the dwelling rabbit hole, but generally contemplating you know you got a home somewhere. It's where you sleep, where you eat, those kinds of things.

Um, here, that's just not what we have. Um, the emails were sent or alleging sent during June and July of 2021, and, and in plaintiff's complaint he didn't allege that he lived in South Dakota and there's not been any extraneous evidence to support that he did at that time either. He's referred to himself as a full time traveling digital nomad who moves from place to place, generally internationally in 30-day cycles without a permanent residence in or out of the United States.

Um, and when the emails were sent it's undisputed he was not physically present here at any point during that time or until January of this year. Um, didn't have a lease to an apartment. Didn't have a deed to a house. Didn't have a brick-and-mortar job in South Dakota he was going to. He preferred not to receive his mail here, and he had a, I think the term is a virtual address, which I

believe is a modern day P.O. Box of sorts, but it's not a place you could go sleep, um, it's, his I believe was located at 8th and Railroad, which is a shopping complex. So, his only connection to South Dakota at that point was his driver's license, which, again that, that statute does define what a residence is. I believe it's under principal residence.

And I think South Dakota recognized that there's a lot of people who would like to claim legal residency in the state because we have favorable tax laws and other benefits, and there are people who do travel like Mr. Lapin does. There is, you know, Armed Service members who are out of the country on deployment, things like that. That said, they are still citizens and subject to tax requirements and they have to be tied somewhere. So, I think South Dakota broadened it as a way to attract people to do it here, bring in revenue, whatever it may be.

THE COURT: So, let me jump in. So, if we did that, um, why then say, well, you're a resident for one purpose, but not another.

MS. FARLEY: I think it just depends on the issue you're looking at. I mean it happens all throughout the law, um, if you, for example state, in state tuition, um, specific requirements for being a South Dakota resident to qualify for that. Different requirement to get a driver's

license as a legal resident. And I think there's some importance behind the fact that we often distinguish between saying a legal resident and a resident. I don't think it's uncommon. I think most states do it that way, that resident depends on where it's being used, and the legislature has when they wanted to apply a specific definition with a time period or whatever it may be, they've done that. They did not do it here. Which I, it's demonstrative of their intent that it should be construed with the ordinary meaning, and if we look at the ordinary meeting I don't believe plaintiff's satisfied it.

THE COURT: Another question for you, um, so you're arguing, as I understand it, this court should adopt the definition of resident for purpose of the anti-spam law that includes an element of a permanent physical address in South Dakota when the emails are sent or received.

And your opinion is that a strict or liberal definition of resident or a neutral definition, how would you characterize it? Cause that's, I think one of the issues raised by the briefing.

MS. FARLEY: Sure. Well, I guess I haven't looked at it so much as a strict or liberal issue because I, what I'm looking at construction, I'm thinking that the statute is ambiguous. I've not viewed the statute as ambiguous. I don't think it's ever been alleged to be ambiguous. I

don't think there's construction that needs to be done. I mean I think you just turned to and plain and ordinary meaning, um, and regardless of what parameters you put on the plain and ordinary meaning, they all contemplate that, you know, foundational requirement of some physical presence of some sort or another, whether that's, you know, having a house or an apartment. I don't know, but I guess that's the ones I look through it as is that it's not something that is really being construed. We're just applying the plain definition to it.

THE COURT: So, your opinion is that you don't need me to say that this statute needs to have a strict construction in order to say that the ordinary sense includes physical presence and permanent; is that what I'm hearing?

MS. FARLEY: I think, I think that's true, Your Honor. I think if you know you wanted to stick one or the other on it, that the ordinary meeting would probably be the more liberal definition because other definitions of residency often have really specific requirements like being here for 30 days, or 90 days, I can't recall what all the state in tuition requirements are anymore, but I would think this is more broader in the sense that it's physical presence.

THE COURT: Do you agree that this particular statute doesn't have a duration requirement and so as soon as

someone became a resident then if they got an email at any point after becoming a resident they would qualify under Subpart C?

MS. FARLEY: Sure. I do think it's factually specific in the sense that you can just be sitting here receiving the email you know like at a layover at the airport. I think there's some context to consider, but, generally, yes.

THE COURT: Yeah. And the reason I'm raising that is that you know there were some constitutional concerns brought up when, for example, states had tried to say you got to wait a year before you can vote. It looks to me like this statute doesn't have a waiting period. Once you qualify as a resident, then you can start suing for email immediately.

MS. FARLEY: I would agree, um, I think would apply, if you qualify as a resident under the ordinary definition, which I think contemplates you know a meaningful physical presence, so, yes. I don't believe there's a specific you know be here for 30 days and you, you've hit the button, but...

THE COURT: Right. Um, okay. So, one thing that I looked at because, um, I believe courts encounter the same issue in the divorce context with the statute that says a plaintiff has to be a residence of south -- resident of

South Dakota at the time the divorce commences.

Um, first, is it your understanding that if you read *Rush* and *Parsley* that those cases are saying in that context resident meant physically residing here in South Dakota with an intent to remain?

MS. FARLEY: I think that's probably largely consistent. They consider a lot of factors. I think it's, you know, looking at what's going on and applying it. I do think they're applying a general ordinary definition of residence, which again I don't think it's construction. I don't think the court did any construction in those cases either.

THE COURT: I would agree with that. And, and it looked to me like what they did there, um, is they said we think ordinary meaning of resident drives us to the conclusion that it's not just a temporary dwelling place. It's some place you reside on a permanent basis. And then the other thing they added in that context that seemed important to them is that it's not just for the purpose of obtaining a divorce. So, like if you had moved here even if you entered in to a six month lease, and for some reason they felt like there was evidence that the only reason you got that lease is because you were trying to get a quick divorce in South Dakota, I think they would reserve the right to say you're not a resident for purposes of that

statute. But it looked to me like when they go through all those different factors about what the person did, it's all to help them determine whether South Dakota is where you intend to reside not on a temporary basis, but on a permanent one.

And I didn't see anything in them that to me suggested they were doing that because they thought the divorce statutes required a strict interpretation of residence.

MS. FARLEY: I would agree. I think they're just evaluating the term generally because they're not, I didn't see any analysis of ambiguity, or any, the normal things you see with statutory interpretation or construction.

THE COURT: All right. Um, would you agree, and I realize Mr. Lapin's not arguing that he qualifies under Subpart A or B. And he raised some interesting hypotheticals about how someone is not physically present in South Dakota could still qualify under A or B under certain facts. Do you think A or B helps his case or hurts it, if the court looks at the legislative intent reflected in those subparts?

MS. FARLEY: I don't think it's helpful. I mean if you look at B, it's ordinarily access -- accessing a computer located in the state, I mean that's contemplating the physical presence, and I believe that you know the time period you look at for residency in this specific instance,

um, you look at when the cause of action arises. So, I think that's all consistent as far as furnishing and maintaining an email, bills for furnishing and maintaining an email address. Terms of what mailing address means, it gets a little more broad I would say, but I, I don't think it's inconsistent. I think they were still contemplating that someone's got a meaningful connection to South Dakota similar to when they evaluated in Parsley.

THE COURT: Okay. And then, and we talked a little bit about how EverQuote's not binding. Is there anything in EverQuote that you think Judge Schreier got wrong, or what's your position on the value of her analysis in EverQuote?

MS. FARLEY: I don't disagree with judge, Judge Schreier's opinion. Um, I think she methodically applied the rules, which is if we're going to look at the statute, what does the text say, okay, this is, this is the term you know we're, we're dealing with that's disputed. It's not defined. Where do we go next? We go to the ordinary definition, apply that ordinary definition, that doesn't make it absurd. It's applied in other statutes as well. She applied that, and I think her ruling is consistent. Obviously, there might have been other facts and days involved in that case that I'm not too specific on, but her general analysis is correct.

THE COURT: Yeah. The, um, one quibble has come up in front of me in another case, I might have, um, is, I'm not convinced even under the old voter registration statutes were in effect when you registered to vote in South Dakota that you should have been allowed to register to vote in South Dakota based on the type of residency you had.

Now, if I were recall correctly I think the EverQuote opinion may have just assumed your voter registration was valid, and I mean I'm not the one that actually registers people to vote, but, um, I think if that actually got tested, the court might say no the voter registration statutes are pretty specific in requiring physical residence in South Dakota.

So, I'll, I'll talk to you some more about that when I get to you, but be ready for that, that's something I want to talk about.

MS. FARLEY: And if I may, I think I did address that in our reply brief as well for a similar reason that the statute, it does specifically define residence and to stay physically present for 30 days or what it might be. But I would agree with that as well that there's, there's issues with that. I don't think it would be considered valid.

THE COURT: And I, yeah, the other thing that I think is lurking out there that's never been tested is if you look at the jury duty statute, it also has residence, and I

don't think it's defined in that chapter, and I know that people who are quote digital nomads, um, can get called for jury duty, but I think if I were a lawyer, um, especially in a criminal case, I would object to that being resident and you actually being seated on a jury, but I don't want to tell the jury manager how to do her job. And what is true is that the way we to get our pools is based off the driver's licenses. So, if you get a driver's license, which you're allowed to do based on temporary residence, then you are in the pool of people who get called for jury duty, and the jury managers tell people you've got to report, but if I were a lawyer, and I realized someone in the jury pool was here that has never permanently resided in Minnehaha County, I would argue that ain't a jury of my client's peers. I don't want this guy seated because I don't want there to be a problem on appeal with someone who doesn't live in Minnehaha being on the jury. Anyway, that's a huge rabbit trail.

All right. So, let me talk to Mr. Lapin, and I kind of want to walk through some of the same questions with you because I'm guessing you'll have a different perspective on them. Um, first, do you agree that resident isn't defined in this statute?

THE PLAINTIFF: In 37-24-41 specifically, it is not defined.

THE COURT: Yeah.

THE PLAINTIFF: Person is defined by that chapter, which may help, but correct, I agree.

THE COURT: So, do you agree the first step in the analysis is to ask what the ordinary meaning of resident is?

THE PLAINTIFF: Not necessarily. I object strongly on that basis, um, especially when you're talking about residents of this state, which is a class of persons. A class of persons which may have certain rights and benefits under South Dakota law, the state, and U.S. Constitutional restrictions on the same, as opposed to just the word resident. Because, um, in a dictionary, whether it's Black's Law, ah, ah, insert other dictionaries here, cannot define who has the benefits and protections of this state. Only South Dakota, it's legislature, it's people, ah, to the extent not barred by constitutional pressure can do that, and, um, ah, the fixed dwelling requirement, um, of resident alone in the purportedly ordinary sense has no bearing on that unless South Dakota decides and such restriction should apply, which it eventually did this year, when it amended the voter registration, ah, ah, statute in question. And it intended a statutory construction, um, as is generally and through South Dakota Supreme Court. The Lewis water case that, um, that is

evidence that it now has a different meaning, and they very specifically added in a fixed ruling requirement into the voter registration statute long after anytime material to this case, which did not exist before, and they did it very specifically because the South Dakota legislature didn't like people like me voting. I can say that confidently what happens is that they, from their point of view fixed that later on, and, therefore, I was legitimate times prior at a later time and I'll stop in a second, but at a later time, I would like to directly address, respectfully, of course, um, your, ah, concern there about the legitimacy of my voter registration, um, that was not briefed. So, I hope I could brief that if it is to be considered.

THE COURT: No. You don't, you don't need --

THE PLAINTIFF: But I have a lot to say on that.

THE COURT: -- you don't need to. So, I'm with you in terms of the South Dakota legislature amending that statute to make it more clear. I think they were concerned about RVers from other states voting, and they thought they needed to clarify that. I guess the quibble I have that I think you and I are going to have to agree to disagree on, is that I actually think the statutes were clear before they changed them, but what they were right about is that I think people who were actually giving out voter registration cards were interpreting them to allow people

like you to get registered to vote here, and so they wanted to make it clear to those people to stop doing that, and so they amended the language to make it super clear, but I think there's a pretty good argument it was already clear for whatever reason folks and local offices just weren't following the language. But I also think that's a rabbit trail that we don't need to fight over.

So, let me ask you another question then. So, if, if the first step is not to go to the plain and ordinary meaning of resident off things like dictionaries. What do you think the first step should be?

THE PLAINTIFF: Sorry, I, I love that question. So, 2-14-1 as Ms. Farley mentions, um, I believe it's 2-14-1, it is words used in the ordinary sense.

THE COURT: Yes.

THE PLAINTIFF: Self-explanatory, but that's not the only thing the chapter says, and I deeply regret that somehow didn't make it in to the brief. Sacrifices were made, this should not have been sacrificed. 2-14-4, application of statutory definitions, whenever the meaning of a word or phrase is defined in any statute such definition is applicable to the same word or phrase whenever it occurs except for a contrary intention plainly appears. And not only does a contrary intention not plainly appear, but Subsection A of 37-24-14 very clearly,

very specifically has broad, as Ms. Farley can see it is remarkably so extraterritorial application to the email addresses that the Internet service provider thereof merely sends a, ah, a bill once a month, once a year in to a mailing address in this state, and the mailing address could be P.O. Box much more simplistic than a personal mailbox of PMB that I and the other 30,000 some odd travelling South Dakotans had.

So, that would be a good place to start and then, of course, there's the constitutional plethora Don B. Blumenstein [spelled phonetically] (unintelligible) which (unintelligible) Williams which equated state citizenship with simple residence, so on and so forth to the extent not clarified, I otherwise defer to the brief for all the details on that.

THE COURT: I understand your point. All right. Next question for you is I gathered from your brief that you think looking at the context of Subpart A and B helps you.

THE PLAINTIFF: Especially A, yes.

THE COURT: And so I'll let you talk about that. Why, why do you think that helps?

THE PLAINTIFF: It goes back to the tenant of statutory construction that, ah, it's going to take me a second here to find it. Ah, okay. Moss v. Guttormson, for the record that's G-U-T-T-O-R-M-S-O-N, South Dakota Supreme

Court 1996. The purpose of the rules of strat -- statutory construction is to determine the true intention of the law. That intention must be ascertained primarily from the language expressed as a statute. Ah, State v. Kaiser [spelled phonetically], ah, elaborating on that. Ah, the intent must be, ah, must be determined from emphasis on the statute as a whole as well as an (unintelligible) relating to the same subject. This is a remedial statute. No one's disputed that, and remedial statutes are generally liberally construed to advance the remedy and deter the behavior that is offensive that warranted the same.

So, ah, in contrast to a divorce statute, Iowa and South Dakota Supreme Courts both agreeing that, ah, South Dakota, um, that divorce statute should be strictly construed.

THE COURT: Why do you think that?

THE PLAINTIFF: Ah, so I defer to the brief that I'm going to get you a straight answer on that. It's gonna, it may take me a second to find it. Um, it is a rabbit hole, and I did my best to explain it coherently, but you could straight follow a trail from, I don't want to sound like a conspiracy theorist, but you could draw a straight line. So, let's simplify first, ah, *Rush v. Rush* is more recent and it is essentially verbatim exactly what happened in *Parsley v. Parsley* for the same reason. We can essentially

condense the two into one. This is *Parsley v. Parsley's* interpretation in a divorce statute of the phrase *resident of the state*. The only time that, at least the case text is showing me, the South Dakota Supreme Court has ever considered that phrase exactly. So, it makes sense why the judge, Judge Schreier went to it. There are some problems though. Ah, why, um --

THE COURT: So --

THE PLAINTIFF: -- yeah.

THE COURT: Cause I, when I read *Parsley* and *Rush* I don't see the word strict.

THE PLAINTIFF: Um-hum.

THE COURT: Are you telling me it's in those opinions? Did I miss it?

THE PLAINTIFF: I'll, I'll explain because this is very important, and, ah, I'm also going to throw out there to the extent any of this needs clarify -- clarification, I hope I'll be granted leave for a very brief --

THE COURT: No, this is it. So, you need, you need to get it in.

THE PLAINTIFF: Well, I, I will, but I was going to say just the notice of subsequent authority if the answer is no, the answer is no. So, *Parsley v. Parsley* was based on a Iowa Supreme Court case. You could draw this straight back to 1855 actually.

THE COURT: Yep. So, you're looking at the Iowa opinion?

THE PLAINTIFF: Only because the South Dakota Supreme Court did.

THE COURT: Yes.

THE PLAINTIFF: Yes. And then through Iowa we eventually see that, um, it's a, state had an interest in stopping, ah, ah, abusive, um, you know, ah, especially like certain partners having the idea that a state like this is going to be favored especially for like, ah, the male diversity versus like California.

THE COURT: Yep. Yep. So, try and do some time management.

THE PLAINTIFF: Sorry.

THE COURT: So, are you telling me the Iowa opinion uses the word strict?

THE PLAINTIFF: A string of them, yes. It goes straight back from the *Parsley v. Parsley* to Iowa. To previous Iowa to previous Iowa. You draw a straight line. I tried my best to clear it up, yes.

THE COURT: Okay. What, what, is it Harson [spelled phonetically]? Which opinion are you saying the word strict in?

THE PLAINTIFF: Um-hum.

THE COURT: Give me the cite.

THE PLAINTIFF: So, in, so in *Root v. Thuni* [spelled phonetically], we expressly see the Iowa Supreme Court differentiate the residency requirements from that case in question. I need to find the caption, um, from a case regarding a protective order. Woman was trying to avoid her abusive ex and they said, well, well, well, for this chapter, ah, residency should be liberally construed. We don't believe that the one for divorce should apply, and that caption, I'm gonna go with (unintelligible). Parsley relies on, and there's a string, if I could condense this I would. *Parsley* relies on and there's a string, if I could condense this, I would. *Parsley* relies on Iowa Supreme Court case *Snyder v. Snyder*.

THE COURT: Yep.

THE PLAINTIFF: *Snyder* relies on a finding from yet another Iowa Supreme Court case *Smith v. Smith*, which found that quote the requirements, ah-ha, the requirements of the statute relating to divorce should be strictly construed. *Snyder* in turn refers to the findings of *Smith v. Smith*. Yes.

THE COURT: Okay.

THE PLAINTIFF: The answer is *Snyder v. Snyder*. The answer is *Smith v. Smith*.

THE COURT: Got it.

THE PLAINTIFF: I'm sure we'll get to this later, but,

ah, there are three other times where the South Dakota Supreme Court did construe residency in matters a little more similar not related to family matter and they look much better for me. I just wanted to throw that in there.

THE COURT: What are those contexts?

THE PLAINTIFF: So, while the residency wasn't directly at issue, as soon Ms. Farley pointed out in the last hearing with Judge Hanson, *Payne* [spelled phonetically] *v. State Farm Fire and Casualty Company*, South Dakota Supreme Court 2022. John and Robin were married on April 30th, 2011. John and Robin Payne. The Paynes moved from Virginia to Florida in a recreational vehicle intending to establish a domicile in Florida while traveling in the RV around the continental United States. The Paynes set up a private mailbox in Florida at which they received all their mail. I received some of my mail there. Some I leached off my company's address. Um, the mailbox service then forwarded mail to them during their travels as directed. Same here. I could call them up at any time, they would send it.

THE COURT: Do you agree the parties weren't fighting in that case whether a person was a Florida resident, right?

THE PLAINTIFF: I agree it was (unintelligible), yes.

THE COURT: Okay. So, I, I got that. You don't need

to talk about that case more.

THE PLAINTIFF: Okay.

THE COURT: I picked that up from your brief.

THE PLAINTIFF: Um-hum.

THE COURT: So, I get why you think it's a remedial statute so you think it should be interred -- interpreted liberally. Um, do you agree that in South Dakota we treat domicile and residence as different concepts?

THE PLAINTIFF: Yes or no. Ah, the answer is a little bit the devil's in the details like many things. Um, the South Dakota Supreme Court has found that domicile and residency are not exactly the same. They are closely related concepts. I'm going to defer very strongly here and this is very, ah, even though this was in the record for a long time, I actually didn't discover it till this morning, and I was like, oh, my gosh, but it is timely in the brief. I'm going to go to an exhibit. Let me find the exhibit number. So, well this is not necessarily law or common law, it's very solid public policy. Exhibit E, as in elephant, for plaintiff's opposition. Residency laws, this is from the South Dakota Legislative Research Council an issue memorandum from the year 2020. Amongst many other things and the entire thing is priceless, but there's one paragraph that I had overlooked this entire time, ah, which really does equate residence and domicile for statute

purposes unless otherwise expressed. And I want to read that verbatim because it's something. Somewhere in that Exhibit E, that residency memorandum from the Legislative Research Council it states in statute states frequently defined residency as being domiciled in the state's jurisdiction. So, the terms often get confused for one another. Regardless, domicile is typically the standard that will be applied when residency is requirement.

THE COURT: And what's that from?

THE PLAINTIFF: Um, the issue memorandum, 2020, Exhibit E, put out by the LRC, and that's not an exhaustive argument, I promise, but that's what I cited to.

THE COURT: Yep.

THE PLAINTIFF: And, ah, (Unintelligible) v. Williams, ah, we equated state citizenship with simple residents. And even though I do believe domicile's sufficient for the purposes of the statute, um, it still remains disputed. I continue to believe under any standard I was a resident of this state notwithstanding even if domicile's not the standard.

THE COURT: Got it. All right. Anything else you need critically important you wanted to say to me today?

THE PLAINTIFF: What is my time frame?

THE COURT: Short. Because I gotta, I gotta give you guys a decision, and I've got another hearing coming up.

So, boil it down for me because I, I mean I've read your written materials. So, what is it you really want to highlight for me as to why you think you should win.

THE PLAINTIFF: And there's no chance we can start with Ms. Farley first?

THE COURT: No, I've already listened to her. So, I, you know you've already made a lot of good points. Is there anything else we haven't talked about that you were like, man, I really wanted Judge Power to hear this because I think it's super important. And I've read your briefs, so…

THE PLAINTIFF: Right.

THE COURT: You know I'm just asking you to pick out what you felt like was your best or most important thing we haven't talked about yet, and if there's not anything that's okay.

THE PLAINTIFF: Um, I'll make it a very short conclusion statement.

THE COURT: Sure.

THE PLAINTIFF: Thank you for the court's time.

THE COURT: Yep.

THE PLAINTIFF: Um, I was, and a lot of this is in the brief like you mentioned. Um, I'm a resident undisputably for so many purposes throughout the statute. It's questionable at best, ah, like I wouldn't during that time

have qualified under the specific requirements for in-state tuition for example. U.S. Supreme Court, do not have the case in front of me, has been clear that in-state tuition is sort of a different case, and that it is in fact related to a legitimate compelling governmental interest and contrast in those purposes. So, a longer durational residency requirement is, ah, is proper. Ah, if I have more time I'll use it, if not I'll end with that.

THE COURT: Yeah. Let's, let's wind it up. I think you guys have done a great job arguing this issue, which is an interesting issue. Um, I think I've got a handle on the different arguments. I actually had to look at this issue in the context of divorce in another case, which I probably don't have access to because they don't publish circuit court opinions, but I'll give you a copy of it. And I'm not saying it's binding here. So, in previous case I had to deal with someone who had done the same thing you had done. They had registered to vote. They had gotten a South Dakota driver's license. They were living an RV lifestyle where they weren't living in South Dakota, and then they decided they wanted to get divorced, and the issue was whether the wife, who was the divorce plaintiff was a resident. And I ultimately concluded she wasn't, um, despite having the South Dakota driver's license and the registration to vote. I felt like resident should be

defined differently in the divorce context.

And I understand the point Mr. Lapin makes about how if you go back through the divorce cases all the way to the old Iowa cases that underlie that paragraph in *Parsley v. Parsley*, you get to the point where courts are very unfriendly to divorce in general, and so it doesn't surprise me that you can find statements about how divorce statutes should be construed strictly.

I think when you get all the way to *Parsley v. Parsley* and *Rush v. Rush*, I don't see the South Dakota Supreme Court saying that we're interpreting resident in our divorce statute strictly. Looks to me like they're just trying to interpret that term, and I think they're basing it on a definition that is consistent with the ordinary dictionary definition. So. I certainly don't think it's controlling, but I think the opinion I'm ultimately gonna reach here, which is that I don't think at that time you were a resident of South Dakota for purposes of the anti-spam law is consistent with what I did when I was dealing with the divorce plaintiff, but I think it's really important to be careful because I do believe resident shows up in our code in lots of places, and it's not always the same definition. And so you got to think carefully about it.

But I guess to back up a little bit, um, I think the

material facts related to Mr. Lapin's residency are not genuinely disputed. I think it's clear everyone agrees he wasn't physically residing here, but he had gone through the steps to get a South Dakota mailbox, to have mail forwarding, to get a South Dakota driver's license. I'm not contending any of that was improper. He'd also, I'm not questioning his South Dakota residency for purposes of income taxes. The, the one thing I do question is whether he should have been given a South Dakota voters registration card, but I also believe based on my experience with other RVers that that was routinely being done. So, I don't think you did anything wrong in getting that card. I don't mean to imply that.

I think the key time frame is when the emails at issue were sent because the South Dakota statute prohibits sending certain types of email to a South Dakota electronic mail address. So, it looks to me like if we looked at what kind of resident you are today, you probably are a South Dakota resident today even under the definition I'm going to adopt, but I don't think that's the critical time period. I mean we need to look at when the emails in the complaint were sent. It's undisputed that happened between June 15th and July 25th of 2021. And it's undisputed during that time frame you were what you described as a digital nomad without a permanent residence. You weren't

physically in South Dakota during that time frame, didn't lease or own property in that time frame. Didn't have a job in South Dakota in that time frame.

But that still raises interesting questions based on the fact as I said earlier that you had a driver's license. A mailbox with mail forwarding and income tax status here.

So, I think, um, we start with the statute that says, um, if it's not defined then you look at the ordinary meaning. And so first we look for a statutory definition in the statute we're actually considering. I think everyone agrees there's not one in 37-24.

So, then we need to look at the ordinary meaning, and I'll come back to Mr. Lapin's argument at the end based on 21-14-4. So, I do agree with the defense that when you look at dictionaries like Black's Law Dictionary or other basic American English dictionaries, that residents always has an element of physicality to it that you're physically dwelling in a particular place, and that it's not just a temporary abode like a hotel. There's some element of permanence. And so when you use resident in the ordinary meaning you're asking where someone physically resides on a permanent basis.

Then I think it's important to look at the context of the particular statute and say, well, does that fit the context of that statute? I think it makes sense that in

Subpart E the legislature was saying we wanted the email address to be furnished to a resident of this state in the sense that it was someone who physically resided in South Dakota on a permanent basis. And part of the reason I think that is because of what they did in Subparts A and B, and one of the problems with writing an anti-spam law is, well, how do you make sure this remedy is really being provided to people in South Dakota when email is sort of a digital thing.

I think if you look at each subpart it does reflect a legislative intent to find some sort of physical connection to South Dakota. So, for example, in A it's based on the provider of the email address sending bills for the email address to a mailing address in this state. And I recognize as Mr. Lapin pointed out, well, a P.O. Box is a mailing address in this state, and so you could have someone who has a P.O. Box and gets bills at that P.O. Box that then get forwarded then somewhere else. But I think the ordinary, I think that's an exception, and that the run-of-the-mill of mailing address in this state is going to be someone who has some sort of apartment or residence that they own, and they get bills at that residence, and that's the physical connection.

I also note Subpart A doesn't matter because we're dealing with a free email account so there were no bills in

this case, but I think what they were looking for by saying, hey, it has to be a mailing address in this state is a physical connection to South Dakota even though there are some situations where you could qualify under A without a physical connection.

Then B you have an email address ordinarily access from a computer located in this state. I mean the legislature based on that language was imagining a computer sitting in someone's apartment or house in South Dakota on an ordinary basis, but I think they were recognizing that we still want to protect the South Dakota resident if they and their laptop go on vacation to Florida, get a spam mail while they're on vacation. I think they would want that South Dakota resident to still be able to sue. But, to me, both those indicate they're trying to find ways to attach email addresses to a real physical connection with South Dakota.

So, that leads me to Subpart C and why I think the ordinary meaning of resident fits is that the other two subparts to me indicate they're searching for physical connections with South Dakota. So, I agree with the defense on that point.

The other thing that I think is important is that it seems clear to me that in the driver's license contacts the South Dakota legislature consciously chose to depart from

the ordinary meaning of residence, and when they did that they flagged that by saying in 32-12-1 Subpart 4, the principal residence is the location where a person currently resides even if at a temporary address. And so I think that leads me to conclude when the South Dakota legislature intends to depart from the ordinary meaning of the word they signal it, and they didn't do that in the anti-spam law. So, I think that weighs in favor of the defense interpretation.

I agree with the defense that South Dakota law distinguishes domicile and residence. And why that's important is that I think it means, um, when you look at decisions from other states that don't really distinguish between that to the same extent we do, those opinions become unhelpful.

I also agree with the defense that I don't think it's necessary to resort to a strict interpretation of residence to reach the conclusion that some sort of permanency in physical residency is required. I think that's an ordinary definition not a strict one, and I don't think this statute should be interpreted strictly, and don't intend to interpret it strictly.

So, EverQuote I agree with Mr. Lapin and it's not binding. It was the case where she was doing the same thing, Judge Schreier was doing the same thing I'm trying

to do which is really guess how the South Dakota Supreme Court would want me to interpret this statute. So. I think there's some value in that I think her approach was a logical one, and I end up in the same place, but it's at best persuasive authority, it's certainly not binding.

I think it's also important that there's no duration to this. So, I think as soon as Mr. Lapin becomes a physical residence, physical resident of the state with an intent for South Dakota to be where he permanently resides, and so as soon as he gets an apartment lease here or something like that, which I think he's already done. I think any email after that point he can sue over.

So, I think that distinguishes the constitutional cases that he mentioned where states have tried to say, well, you need to be a resident for a year before you can vote. I don't think the South Dakota legislature imposed these sort of duration requirement.

But the problem for Mr. Lapin is that at the point the emails at issue in this case were sent, he had not done that. In my opinion, he had not become a resident of this state as I'm interpreting that phrase based on the ordinary meaning.

So, I recognize he makes a good point with his appeal to 2-14-4, and how it says, um, you know when a word has been defined somewhere in the South Dakota code we try and

use a consistent definition of that word. The problem here is that resident is used in so many different contexts, and it's been defined differently in different contexts that that principle doesn't work. So, you know, for example, should I use how it's been defined in the voter registration statutes, or in the driver's license statutes, or for in-state tuition, or how courts have looked at it in divorce. And that statute doesn't help you decide which one of those to use. And so I think what you have to do rather than relying on 2-14-4 is walk through the analysis did the legislature take the time to give a specific definition in this statute. What does context suggest it should mean in this particular statute? What other statutes does this statute seem most analogous to? And so there's too many different definitions of residents in our code for that principle to be controlling.

So, I think there's lots of interesting issues. I ultimately agree with the defense on use of the ordinary meaning, and that the ordinary meaning includes an element of permanency and physicality, um, that wasn't the case under the undisputed facts of this case.

I believe there had been a request for attorney fees from the defense. I'm denying that. I think this was an issue of first impression in South Dakota law and good arguments were made by both sides. So, the defense would

not be entitled to attorney fees in my opinion, but I think it is entitled to have its motion for summary judgment granted.

So, I'll ask the defense to submit an order through E-courts. You can incorporate my conclusions pursuant to Rule 52. You don't have to try to repeat them in the order. Okay.

MS. FARLEY: I can do that.

THE COURT: Um, so, understand you don't like what I'm doing, Mr. Lapin, and I don't expect you to agree with it either, but do you have any questions about what I'm deciding, not why, but just what did I do and what it means going forward.

THE PLAINTIFF: Um, thank you for explaining it so thoroughly. The only thing I ask, ah, and you basically just said it, is that the findings of facts and conclusions of law, um, I understand they're not being written by you, but, ah, I hope that they are robust. I hope that they are thorough, and last thing I'm going to say I hope they're very laid out, very elaborate, just as it was explained here. And Judge Schreier, and your, yours truly or yourself, were both trying to predict how the South Dakota Supreme Court would handle this. I think it's time we talk to them and I say that with complete respect.

THE COURT: Oh, yeah.

THE PLAINTIFF: So, I hope that it is sufficient so that that could be done and decisions can be made.

THE COURT: So, let me address that since you're representing yourself. So, I would describe what I said as conclusions because it's summary judgment, so I don't find facts. I just make a decision based on --

THE PLAINTIFF: -- hum.

THE COURT: -- the undisputed facts and I interpret the facts most favorably to you at this point. So, there are no findings of fact. So, I just made conclusions based on undisputed facts. She's going to enter an order. The order's gonna incorporate what I just said from the bench. So, if you choose to exercise your right to appeal this, you need to order a transcript, and this transcript is going to be the conclusions that you'll argue about in front of the Supreme Court.

THE PLAINTIFF: Okay.

THE COURT: So, if you want to go down that route, it does not offend me in the slightest. I totally am fine with parties exercising their rights to appeal. So, and that's what they're for.

THE PLAINTIFF: You're still great.

THE COURT: Thank you for being polite and respectful, I appreciate that. Okay. So, you understand what I'm asking you to do, too?

MS. FARLEY: I do, Your Honor.

THE COURT: All right. Appreciate very good arguments and the very interesting issue. Wish you both the best. Have a good day. We can be adjourned.

(Proceedings adjourned at 10:09 a.m.)

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF MINNEHAHA)

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 40, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 3rd day of May, 2024.

/s/ Roxane R. Osborn
Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2024

EXHIBIT

C

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

JOSHUA LAPIN, Plaintiff, vs. ZEETOGROUP, LLC, Defendant.	49CIV22-000725 **BRIEF IN SUPPORT OF DEFENDANT ZEETOGROUP, LLC's MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Zeetogroup, LLC ("***Zeeto***"), by and through counsel, and hereby submits its Brief in Support of Zeeto's Motion for Summary Judgment.

INTRODUCTION

There is no genuine issue of material fact that Plaintiff Joshua Lapin ("***Plaintiff***") was not a "resident" as contemplated by SDCL Chapter 37-24. The particular statute under which Plaintiff brings his 46-count Complaint, SDCL § 37-24-47, requires as a precondition that Plaintiff be a South Dakota resident. However, SDCL Chapter 37-24 does not define "resident" and therefore requires this Court to interpret the term in accordance with its plain and ordinary meaning. Importantly, the Honorable Karen E. Schreier for the United States District Court for the District of South Dakota, Southern Division, recently concluded Plaintiff was not a "resident" under SDCL § 37-24-47 because the plain meaning of the term requires meaningful physical presence. However, Plaintiff concedes he was not a resident of South Dakota during the relevant time period—June and July of 2021—in pleadings, discovery responses, and social media by dubbing himself a "digital nomad" without a dwelling (permanent or temporary) or job in South Dakota. Accordingly, Zeeto's Motion for Summary Judgment should be granted.

FACTUAL BACKGROUND

Plaintiff, *pro se*, filed a 133-page, 46-count Complaint on or about March 30, 2022, against Zeeto and "John Doe Sender." [1] *See* Complaint at p. 1, filed March 30, 2022. The crux of Plaintiff's Complaint is that the e-mail address "ketosoup97@gmail.com" allegedly received a number of advertisements between June 14, 2021, through July 25, 2021, in violation of SDCL § 37-24-47. *See id.* at pp. 3-50. Plaintiff asserts that the e-mail address "ketosoup97@gmail.com" satisfies the requirement of being a "South Dakota electronic mail address" because it was "furnished to a resident of [South Dakota]" pursuant to SDCL § 37-24-41(14)(c). *Id.* at p. 124.

However, Plaintiff was not born in South Dakota, did not attend college in South Dakota, and was not employed in South Dakota. Zeeto's Statement of Undisputed Material Facts ("SUMF") at ¶¶ 4-6, filed July 7, 2023. Rather, his claim of residency is principally based on the allegation that he "maintains a drivers [sic] license, voter registration, and Personal Mail Box in Sioux Falls, South Dakota, and all three documents list the PMB as his legal address." *Id.* However, Plaintiff has repeatedly described himself in pleadings, discovery responses, and online platforms as a "full-time traveling 'digital nomad,' who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence in or out of the United States." *Id.* at ¶¶ 3, 11, 13. Consistent with his self-ascribed status, Plaintiff was not physically present in South Dakota between March 24, 2021, through January 9, 2023, and did not have a lease to an apartment or a deed to a house. *Id.* at ¶ 11. Plaintiff also chooses to register his various entities outside of South Dakota and prefers to receive his mail at an address in the State of Wyoming. *Id.* at ¶¶ 7-8.

[1] Plaintiff dismissed John Doe Sender on or about April 25, 2023. *See* Order Dismissing Defendant John Doe Sender from this Action Without Prejudice, dated April 25, 2023.

Plaintiff filed a Motion for Partial Summary Judgment and Zeeto filed a competing Motion to Dismiss asking that the Court determine whether Plaintiff, as a matter of law, was a South Dakota "resident" as contemplated by SDCL § 37-24-41(14)(c).[2] *See* Plaintiff Joshua Lapin's Motion for Partial Summary Judgment Pursuant to SDCL 15-6-56(A), filed May 1, 2023. Zeeto also filed a Motion for Costs and Attorneys' Fees on the basis that Plaintiff's lawsuit was frivolous and/or brought for a malicious purpose. The Court denied Plaintiff's Motion for Partial Summary Judgment, converted Zeeto's Motion to Dismiss into one for Summary Judgment and requested it be briefed in accordance with SDCL § 15-6-56(c), and held Zeeto's Motion for Costs and Attorneys' Fees in abeyance pending the Court decision on the converted Motion for Summary Judgment. *See* Order at ¶¶ 1, 3-6. Zeeto's instant Motion and supporting materials follow in accordance with the Court's Order.

ANALYSIS

A. AS A MATTER OF LAW, PLAINTIFF WAS NOT A SOUTH DAKOTA "RESIDENT" AS CONTEMPLATED BY SDCL § 37-24-41(14)(C).

This Court should grant Zeeto's Motion for Summary Judgment because Plaintiff was not a "resident" as provided by SDCL § 37-24-41(14)(c). Under South Dakota law, summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). All reasonable inferences drawn from the facts are viewed in the light most favorable to the non-moving party. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (quoting *Roden v. Gen. Cas. Co. of Wis.*, 2003 S.D. 130, ¶ 5, 671 N.W.2d 622, 624). "The nonmoving party,

[2] Plaintiff's motion for summary judgment that "advertisers" under SDCL § 37-24-47 are subject to strict, vicarious liability, three informal requests to strike and for leave to amend were also denied. *See* Order at ¶¶ 1-3.

however, must present specific facts showing that a genuine, material issue for trial exists." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). "Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762.

Plaintiff's claims are brought under SDCL § 37-24-47, which provides as follows:

> No person may advertise in a commercial e-mail advertisement . . . sent to a South Dakota 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;
> (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.

SDCL § 37-24-41(14) defines "South Dakota electronic mail address" as including:

> (a) 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;
> (b) An e-mail address ordinarily accessed from a computer located in this state; or
> (c) An e-mail address furnished to a resident of this state.

Plaintiff has alleged he, or more specifically his e-mail address ketosoup97@gmail.com, satisfies SDCL § 37-24-47 because he is a "resident" of South Dakota under SDCL § 37-24-41(14). Complaint at p. 124. Accordingly, Plaintiff's failure to satisfy the plain and ordinary meaning of "resident" as set forth below entitles Zeeto to summary judgment.

A. The Plain and Ordinary Meaning of Resident Requires Physical Presence.

Analyzing SDCL § 37-24-41(14)(c) is simple because the South Dakota Supreme Court has set forth finite rules to follow for the Court to interpret a statute. "Resolving an issue of

statutory interpretation necessarily begins with an analysis of the statute's text." *Matter of Appeal by Implicated Individual*, 2021 S.D. 61, ¶ 16, 966 N.W.2d 578, 583 (citing *Long v. State*, 2017 S.D. 78, ¶ 12, 904 N.W.2d 358, 363). "This [C]ourt assumes that statutes mean what they say and that legislators have said what they meant. When the language of a statute is clear, certain and unambiguous, there is no occasion for construction, and the [C]ourt's only function is to declare the meaning of the statute as clearly expressed in the statute." *Delano v. Petteys*, 520 N.W.2d 606, 608 (S.D. 1994) (quoting *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 886 (S.D. 1984)). When declaring the meaning of the statute, the Court "must confine itself to the language used" and unless otherwise defined in statute, "[w]ords and phrases in a statute must be given their plain meaning and effect." *Rowley v. S.D. Bd. of Pardons & Paroles*, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363 (citation omitted); *see also* SDCL § 2-14-1 (directing that words used in a statute "are to be understood in their ordinary sense" unless otherwise defined).

Here, the plain and ordinary definition of "resident" must be applied because SDCL Chapter 37-24 does not define the term. Importantly, the Honorable Karen E. Schreier issued an order on the same issue in Plaintiff's lawsuit styled as *Lapin v. Everquote, Inc. et al.*, 4:22-CV-04058-KES and filed in United States District Court in the Southern Division of the District of South Dakota.[3] Aff. of Counsel, Ex. 6 (Order Dismissing Lapin's Claims Against Defendant Everquote and Denying Lapin's Motion to Reconsider at pp. 19-27, dated Feb. 17, 2023). Judge Schreier adhered to the principles set forth under South Dakota law when she too determined that the plain and ordinary definition of "resident" must be applied to declare the meaning of the statute. Much like the South Dakota Supreme Court, Judge Schreier reviewed common

[3] Zeeto anticipates Plaintiff will urge that this Court should not follow Judge Schreier's Order based on a newly asserted argument that the district court lacked subject matter decision. This argument should not be given any weight or consideration as it is irrelevant to the merits of Judge Schreier's analysis.

dictionary definitions to determine that the ordinary meaning of "resident" is the location "where one lives":

> Black's Law Dictionary defines "resident" in a few ways. First, it defines a resident as "[s]omeone who lives permanently in a particular place[.]" *Resident*, BLACK'S LAW DICTIONARY (11th ed. 2019). It also defines it as "[s]omeone who has a home in a particular place[,]" and "[s]omeone who is staying in a particular hotel, apartment building, etc." *Id.* Similarly, Merriam-Webster's Collegiate Dictionary defines "resident" as "one who resides in a place." *Resident*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999). In turn, it defines "reside" as "to dwell permanently or continuously." *Reside*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999).

Id. at 23. A requirement of physical presence is consistent with the South Dakota Supreme Court's holdings in two domestic cases involving a statute where "residency" was not defined in which, according to Judge Schreier, the Court "made clear that it views residence as being the location where someone lives." *Id.* at 24. ("In both *Parsley* and *Rush*, the court found that the relevant individuals were residents for purposes of SDCL § 25-4-30, and in both cases the individuals had significant physical presence in the state.") (citing *Parsley v. Parsley*, 2007 S.D. 58, ¶ 18, 734 N.W.2d 813, 818 (noting that the plaintiff had lived in a "permanent residence" in South Dakota for more than three years when the action was filed); *Rush v. Rush*, 2015 S.D. 56, ¶ 14, 866 N.W.2d 556, 561 (noting that the plaintiff had physically moved to South Dakota and resided there "for over 45 days" before commencing the action and was gainfully employed)). More specifically, the *Parsley* Court expressly acknowledged that "residence must be an actual residence as distinguished from a temporary abiding place[.]" 2007 S.D. 58, ¶ 17, 734 N.W.2d at 818; *see also Rush*, 2015 S.D. 56, ¶ 12, 866 N.W.2d at 561 (affirming the principle that residence requires more than a "temporary abiding place. *See also In Re G.R.F.*, 1997 S.D. 112, ¶ 16, 569 N.W.2d 29, 33 n. 4 (explaining that "residence" "signifies living in a particular locality") (quoting *Black's Law Dictionary 485* (6th ed.)). Judge Schreier dismissed Plaintiff's

claims on the basis that he did not "have any meaningful physical presence in South Dakota, and thus he is not a South Dakota resident." Aff. of Counsel, Ex. 6 at 25.

B. Plaintiff Must Have Been a "Resident" During June and July of 2021.

All 46-counts of Plaintiff's Complaint pertain to the alleged receipts of e-mails during the months of June and July of 2021. As these e-mails are the events giving rise to the Complaint, June and July of 2021 is when Plaintiff must have been a "resident" of South Dakota. While Plaintiff did arrive in South Dakota in January of 2023, this was only after a similar motion to dismiss was filed against him in *Lapin v. Everquote, Inc. et al.* To that end, Judge Schreier was unpersuaded by Plaintiff's newfound presence in South Dakota due to its timing and because he fails to show his residency during the relevant time period. Aff. of Counsel, Ex. 7 at pp. 5-6 ("At the time [] Lapin's complained of e-mails were sent, he was not a resident of South Dakota. His move to Sioux Falls in January 2023 does nothing to alter that"). This is also true of Plaintiff's references to obtaining a driver's license in South Dakota. To be sure, Plaintiff himself stated that March 5, 2021, is a date "earlier than any time material to his dispute" in his discovery responses. Aff. of Counsel, Ex. 1 (Answer to Interrogatory No. 6).

Judge Schreier explained that SDCL § 32-24-47 determines the relevant time period to consider which pertinently provides that "[n]o person may advertise in a commercial e-mail advertisement . . . sent to a South Dakota electronic mail address[.]" Aff. of Counsel, Ex. 7 at p. 5. Judge Schreier explained that "'sent to' means that the relevant time in which to determine whether the recipient is a resident of South Dakota is at the time the e-mail was sent." *Id.* "And that makes sense: adopting Lapin's argument would allow any current resident of South Dakota to theoretically resurrect emails it received several years ago back when such individual resided in a different state, all because the individual currently lives in South Dakota." *Id.* (also writing

that this could "pose a serious Due Process notice issue" by "impos[ing] liability on a sender of an email to a recipient who was not a resident of South Dakota at the time the email was sent but later moved to South Dakota) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994)). As such, Plaintiff must show that he was a "resident," as used herein, in June and July of 2021.

C. Plaintiff Fails to Satisfy the Plain and Ordinary Meaning of Resident.

Plaintiff concedes in the Complaint that he did not consider South Dakota "home," if even a "temporary abiding place." Plaintiff defines himself in the Complaint as a "full-time traveling 'digital nomad', ***who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence*** in or out of the United States[.]" Complaint at p. 2 (emphasis added); *see also* Aff. of Counsel, Ex. 6 at p. 25 (noting, "Lapin is a 'full-time traveling "digital nomad[,]" who moves from place to place, *generally internationally*, in 30 day cycles, without a permanent residence in or out of the United States[.]'" (emphasis in original)); *compare Parsley*, 2007 S.D. 58, ¶ 18, 734 N.W.2d at 818 (specifically acknowledging that the plaintiff had a "permanent residence" in South Dakota); *see also In Re G.R.F.*, 1997 S.D. 112, ¶ 16, 569 N.W.2d at 33 n. 4 (domicile means "living in that locality with intent to make it a fixed and permanent home.") (quoting Black's Law Dictionary 485 (6th ed.)). In fact, there is not a single allegation in Plaintiff's Complaint alleging that he *lives* in South Dakota as required by SDCL § 37-24-41(14)(c). *See generally* Complaint.

Furthermore, the header of Plaintiff's Complaint appears as follows:

Joshua Lapin, Pro Se Plaintiff

Preferred Mailing Address:
30 N Gould ST STE 3229
Sheridan WY 82801

Legal Residential Address (Not ideal for mail)
401 E 8th ST STE 214 PMB 7452
Sioux Falls SD 57103

Email: thehebrewhammerjosh@gmail.com

Facsimile: (307) 655-1269

3/30/2022

22-725

Complaint at p. 1. Not only does Plaintiff "prefer" to not receive his mail in South Dakota, his "residential address" is not residential at all. *See id.*; *compare Rush*, 2015 S.D. 56, ¶ 14, 866 N.W.2d at 561 (noting that the Plaintiff was receiving his mail in South Dakota and had a South Dakota telephone number). Rather, it is only the location of a mailbox in a strip mall, otherwise known to locals as the "8th & Railroad" complex. To that end, this mailbox is the foundational reason for Plaintiff's facially erroneous allegation that he is a "resident" of South Dakota for purposes of SDCL § 37-24-41(14). Complaint at p. 2 (writing that Plaintiff "maintains a drivers license, voter registration, and Personal Mail Box (PMB) in Sioux Falls, South Dakota, and all three documents list the PMB as his legal address."). Claiming that this mailbox makes Plaintiff a "resident" is akin to claiming that a P.O. Box makes the post office a home.

Moreover, Judge Schreier swiftly rejected Plaintiff's contentions that his possession of a South Dakota driver's license and voter registration somehow overrides the ordinary meaning of "resident":

> South Dakota law *may* treat Lapin as a South Dakota resident for purposes of allowing Lapin to obtain a South Dakota's Driver's License and to vote. But the statute at issue in this case, § 37-24-41(c), provides no evidence that the South Dakota Legislature wished to import the same loose definition of resident. In fact, the South Dakota Legislature has done the opposite, given its instruction to interpret words "in their ordinary sense" unless it has otherwise defined such words. SDCL § 2-14-1. And because neither SDCL § 37-24-41(14)(c) nor any surrounding provisions define the term resident, and the ordinary sense of the word resident does not include a self-admitted travelling digital nomad who has not physically lived in South Dakota for any significant time, the court rejects Lapin's argument that he is a resident for purposes of his claims.

Aff. of Counsel, Ex. 6 at 26 (emphasis in original). To that end, Plaintiff has bragged online that he only had to spend a "mere" thirty days in South Dakota to claim the benefits of the State's favorable tax law. Aff. of Counsel, Ex. 2 (Reddit Post from March of 2023); *compare Rush*, 2015 S.D. 56, ¶ 14, 866 N.W.2d at 561 (explaining that the plaintiff is not a "resident" by

claiming residency for the purpose of initiating a divorce). Plaintiff sought South Dakota out to take advantage of its laws—anti-spam, income tax, or otherwise—while he contributed nothing in return to the State. This is wholly at odds with the rationale adopted by *Parsley* and *Rush* which condemn the idea of claiming residency in a jurisdiction for purposes of filing suit.

Plaintiff's lack of residency in South Dakota is compounded by his own discovery responses, in which he admits to not being physically present in South Dakota during the relevant time period, not being employed in South Dakota, and having no dwelling to call home in South Dakota. Once again, Plaintiff re-affirms the notion that he is a "digital nomad" without a "***permanent house or apartment***, who travels from 'from place to place' often country-to-country, and explores the world while making a living over the internet (as opposed to going to work in- person in an office, which would [sic] one of the ***ability to travel the world constantly***)." Aff. of Counsel, Ex. 1 (Answer to Interrogatory No. 4) (emphasis added); Ex. 2 (writing, "[f]or approximately the last two years, I was traveling full-time as a 'digital nomad,' spending 30-60 days in each country, living in an AirBnb, and then moving onto the next country, and the next, and the next. Meanwhile, South Dakota allows anyone to become a resident of the state after spending a mere 24 hours in the state"). At no point does Plaintiff make any indication that his status as a digital nomad was at all temporary, as he has more recently. Indeed, according to Plaintiff, he was not physically present in South Dakota from March 24, 2021, through January 9, 2023. Aff. of Counsel, Ex. 1 (Answer to Interrogatory No. 6).

CONCLUSION

The undisputed facts show that during the relevant time period, Plaintiff was not physically present in South Dakota, was not employed in South Dakota, did not have a dwelling in South Dakota, and he preferred to receive his mail in another state entirely. Therefore, Zeeto

respectfully requests that this Court grant its Motion for Summary Judgment and find that Plaintiff was not a South Dakota resident for purposes of SDCL § 37-24-41(14). Zeeto additionally requests this Court also grant its Motion for Costs and Attorneys' Fees that is currently held in abeyance.

Dated this 7th day of July, 2023.

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CERTIFICATE OF SERVICE

I, Abigale M. Farley, do hereby certify that on this 7th day of July, 2023, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system. A true and correct copy of the same was mailed via First Class Mail, postage prepaid to the following:

Joshua Lapin
401 E 8th Street STE 214 PMB 7452
Sioux Falls, SD 57103

Additionally, a courtesy copy was sent via electronic mail to the following:

Joshua Lapin
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/s/ Abigale M. Farley
Attorney for Defendant Zeetogroup, LLC

EXHIBIT

D

Joshua Lapin, Pro Se Plaintiff

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STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

Joshua Lapin Plaintiff, vs. Zeetogroup LLC Defendant	Case No.: 49CIV22-000725 **PLAINTIFF JOSHUA LAPIN'S BRIEF IN SUPPORT OF HIS OPPOSITION TO DEFENDANT ZEETOGROUP LLC'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Joshua Lapin, pro se, and hereby submits his Supporting Brief in Opposition to Defendant Zeeto's Motion for Summary Judgment.

Introduction

There is a genuine, triable issue of fact as to whether plaintiff Joshua Lapin was a "resident of this state" as contemplated by SDCL § 37-24-41(14)(C) *et seq* ("SD Anti-Spam Law") at the times he received the spam email at issue in this matter. The lone case finding otherwise *Lapin v. EverQuote Inc.*, 4:22-CV-04058-KES (D.S.D. Feb. 17, 2023) ("EverQuote") is currently on appeal, will likely be vacated due to lack of article III standing, is not binding onto this court, and runs contrary to the South Dakota and US Supreme Courts construction of residency for the purposes of the South

Dakota / US Constitutions. It further overlooked vital elements of statutory construction[1] to which the South Dakota Supreme Court adheres, as well as on-point cases in both the South Dakota Supreme Court and the 8th Circuit, which prove the incorrect interpretation of Resident was reached.

Factual Background

Plaintiff Joshua Lapin swore to the Department of Public Safety's "Residency Affidavit" (*Ext. C*) and fulfilled its requirements to enable him to get a drivers license, register to vote, and pay no state-level income tax while traveling the world. He's in good company, with tens of thousands of others doing the same; a chart of voters registered at PMB addresses within this state is submitted herewith as (*Ext. F*), and a related Keloland article submitted as *Ext. G*. Like the others, he swore in this affidavit that he maintained no residence in any other state, that South Dakota is his "state of residence," and that he intends to return to South Dakota after his travels. Plaintiff complied, returning to South Dakota on January 9th 2023, signing a lease the following week, and therefore returned to his state of residence after approximately one year and nine months of travel through other states and foreign countries on a series of temporary one month trips. At any time during his travels, he could have been summoned to Jury Duty in Minnehaha County, as forewarned on the Residency Affidavit itself; the same has happened to his similarly-situated peers.

Analysis

A. SDCL § 37-24-41(14)(C) Does Not Define "Resident of This State" (Legal Standard)

The statute provided the instant powerful right of action to "resident[s] of this state," but it makes no attempt to define the requirements for South Dakota residency; this is an issue to be determined by the language of the statute as a whole, other South Dakota Statutes, South Dakotan public policy, and the common law of this state[2]. Indeed, "[t]he purpose of the rules of statutory construction is to discover the true intention of law, and that intention must be ascertained primarily from the language expressed in the statute." *State v. Kaiser*, 526 N.W.2d 722 (S.D. 1995). Beyond the language of the statute at issue, the South Dakota Supreme Court has less regard for statutes relating to the same subject (e.g. Email Spam), and more regard for statutes relating to the same class of persons (e.g. Residents of This State). *Olson v. Butte Cnty. Comm'n*, 925 N.W.2d 463 (S.D. 2019),

[1]Intending no disrespect to the Honorable Karen Schreier
[2]Minding constitutional restrictions on the same.

"We construe statutes 'in pari materia' when 'they relate to the same person or thing, to the same class of person or things, or have the same purpose or object, quoting from *Lewis & Clark Rural Water Sys., Inc.* v. Seeba , 2006 S.D. 7, ¶ 15, 709 N.W.2d 824, 831. For our purposes,"Resident[s] of this state" is the class of person or object sought to be construed. *Goetz v. State, 636 N.W.2d 675 (S.D. 2001)* "Characterization of the object or purpose is more important than characterization of the subject matter in determining whether different statutes are closely related enough to justify interpreting one in light of another." Further, "When construing statutes that are apparently in conflict, the court should read them together and harmonize them if possible to give effect to all words in the statute. *Faircloth*, 2000 SD 158 at ¶ 7, 620 N.W.2d at 201.

Finally, "When faced with a choice between two possible constructions of a statute, the court should apply the interpretation which advances the legislature's goals." *State v. Schempp*, 498 N.W.2d 618 (S.D. 1993), quoting from *Friese v. Gulbrandson*, 69 S.D. 179, 8 N.W.2d 438 (1943).

B. Language of The Statute Reveals Intention to Apply To Spams Received Outside SD, and to e-mail addresses with Highly Attenuated Connections To South Dakota

SDCL § 37-24-41(14) defines "South Dakota electronic mail address" as including:

(a) 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;

(b) An e-mail address ordinarily accessed from a computer located in this state; or

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

The phrase needing construction is "Resident of This State" from § 37-24-41(14)(C): To this effect, "[t]he purpose of the rules of statutory construction is to discover the true intention of law, and that intention must be ascertained primarily from the language expressed in the statute." *State v. Kaiser*, 526 N.W.2d 722 (S.D. 1995)." The South Dakota Supreme Court looks to other provisions within the same statute to assist, "[T]he intent must be determined from the statute as a whole, as well as enactments relating to the same subject." *Moss v. Guttormson*, 551 N.W.2d 14 (S.D. 1996). Likewise, "When called upon to construe statutes, this court may look to the legislative history, title, and the total content of the legislation to ascertain the meaning." *LaBORE v. MUTH*, 473 N.W.2d 485 (S.D. 1991). Accordingly, it is appropriate to turn to subsections (A) and (B), in order

to help determine the intention of the pertinent subsection (C).

Beginning with (A) *"An e-mail address furnished by an electronic mail service provider that sends bill for furnishing and maintaining that e-mail address to a mailing address in this state;"* we immediately see a clear and unambiguous intention for the statute to apply to spam received outside the state of South Dakota, as well as a separate intention to apply the statute to an email address which is far more tenuously associated with South Dakota than the instant plaintiff. (A) qualifies an email address that receives spams that are sent from outside South Dakota and received outside of South Dakota, by a non-South Dakotan, merely because the provider of that email address sends monthly or even annual bills to a mailing address within South Dakota for maintaining that email address.

Moving to subsection (B), *"An e-mail address ordinarily accessed from a computer located in this state,"* we are similarly reminded of the far-reaching application of the statute to emails not received in South Dakota, and to email addresses with a tenuous connection to South Dakota. Indeed, an email address that is ordinarily accessed from a computer located in South Dakota is granted the right to sue over spam received by even a non-South Dakotan, outside of South Dakota, at a time in which the email address is not being accessed in South Dakota...so long as such email address is "ordinarily" accessed from a computer located in the State.

Therefore, subsection A and B reveals how "wide a net" the South Dakota legislature cast when it copied the Californian Anti-Spam law verbatim into its book as declared it to be the South Dakota anti-spam law. It is clear the statute can apply to spam received outside of the state with a merely tenuous connection to the state so long as an email address is "ordinarily" accessed from within the state, and/or so long as the provider of that email address sends bills to a mailing address into the state for furnishing that email address. These far-reaching, liberal provisions are relevant parts of the "statute as a whole," in determining legislative intent of subsection C, *"an e-mail address furnished to a resident of this state."* The context justifies departure from a strict definition of resident which would not allow for extended travel outside of South Dakota prior to returning. *State v. Kaiser,* 526 N.W.2d 722 (S.D. 1995) "The language of a statute is presumed to convey

ordinary meaning, unless the context or the legislature's apparent intention justifies departure. *French*, 509 N.W.2d at 695."

C. Language of Ch. 37-24 Supports Liberal Construction of "Resident of This State"

The South Dakota Supreme Court habitually resorts to the greater chapter in which the statute is found for the purposes of statutory construction and determining legislative intent. See *Save Our Neighborhood-Sioux Falls v. City of Sioux Falls*, 849 N.W.2d 265 (S.D. 2014) at *268 (resorting to Chapter 9-4 to discern "such" for the purposes of SDCL 9-4-5), See also *Olson v. Butte Cnty. Comm'n*, 925 N.W.2d 463 (S.D. 2019) at *466 (reviewing SDCL chapter 31-3 to attempt to construe "effective date" for the purposes of SDCL 31-3-34), See also *Schupp v. S. Dakota Dep't of Labor & Regulation*, 2023 S.D. 4 (S.D. 2023) at *3 (citing to the definition of "captive insurance company" from SDCL chapter 58-46 for the purposes of SDCL 58-46-31), see also *Farmland Ins. Companies v. Heitmann*, 498 N.W.2d 620 (S.D. 1993) (recognizing legislative intent from chapter 58, that contractual provisions not inconsistent with may be included in policies, in order to find SDCL 58-11-9.5 applies to UIM policies sold in South Dakota).

And yes, the South Dakota Supreme Court has done the same with Chapter. 37-24 to construe standing under SDCL 37-24-31. *Moss v. Guttormson*, 551 N.W.2d 14 (S.D. 1996) at *17, "While SDCL Chapter 37-24 obviously assists consumers seeking relief as victims of deceptive trade practices, the broad statutory language includes more than only consumers. The statute provides, " [a]ny person who claims to have been adversely affected by any act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." SDCL 37-24-31 (emphasis added). "Person" includes natural persons, partnerships, corporations (domestic or foreign), trusts, incorporated or unincorporated associations, and "any other legal entity." SDCL 37-24-1(8). Hence, an employee is a "person" within the purview of SDCL 37-24-31 who may be adversely affected by practices declared unlawful under SDCL 37-24-6." While it is true that "person" is defined in SDCL 37-24 and resident is not, we notice the "broad statutory language" of this chapter, which that South Dakota Supreme Court recognized (*Id*), *in pari materia* and in the light of the equally broad examples of a "South Dakota Electronic Mail Address" in SDCL 37-24-41(14) (A) and (B),

as explained in the last subsection in this brief, calling for application of the spam law to emails not received in South Dakota, and to email addresses with very attenuated connections to South Dakota, such as ordinarily being accessed from a computer located in the State and email addresses whose provider sends bills for maintaining that email address to a mailing address within the state. "When faced with a choice between two possible constructions of a statute, the court should apply the interpretation which advances the legislature's goals." *State v. Schempp*, 498 N.W.2d 618 (S.D. 1993). From all of the above we see that a strict definition of resident does not fit into the statute itself nor in the chapter it's located in, and we can predict that the South Dakota Supreme Court would find a liberal construction of resident to be appropriate, and would best-advance the legislature's goals. *See also* subsection (j) of this brief: SD Supreme Court construing residency.

D. South Dakota Legislature Recently Admitted [Those Situated To] Plaintiff was a South Dakota Resident. The Recently Amended and Tightened "Residency For Purposes of Voting Law," at SDCL § 12-1-4 is evidence of it's Inclusion of Plaintiff Prior to The Amendment.

Lewis Clark Rural Water System v. Seeba, 709 N.W.2d 824 (S.D. 2006) "It is . . . an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different construction."

SDCL 12-1-4 "Criteria For Determining Voting Residence" was Amended by S.L. 2023, ch. 42,s. 1; eff. 7/1/2023, whose changes are shown below:

Senate Bill 139

HOUSE ENGROSSED

Introduced by: Senator Drilling

An Act to revise residency requirements for the purposes of voter registration.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 12-1-4 be AMENDED:

12-1-4. For the purposes of this title, the term, residence, means the place in which a person ~~has fixed his or her habitation~~ is domiciled as shown by an actual fixed permanent dwelling, establishment, or any other abode and to which the person ~~, whenever absent, intends to return~~ returns after a period of absence.

A person who ~~has left home and gone~~ leaves the residence and goes into another county of this state or another state or territory ~~or county of this state~~ for a temporary purpose ~~only~~ has not changed ~~his or her~~ residence.

A person is considered to have gained ~~a~~ residence in any county or municipality of this state in which the person actually lives, if the person has no present intention of leaving.

A person retains residence in this state until another residence has been gained. If a person moves from this state to another state, or ~~to any of the other territories~~ territory with the intention of making it ~~his or her~~ the person's permanent home, the person ~~thereby~~ loses residence in this state.

The changes reveal that voting residence has been changed from the ambiguous and broad term of

"fixed his or her habitation" to "domiciled as shown by an actual fixed permanent dwelling, establishment, and any other abode to which the person returns after a period of absence." Theretofore, people such as plaintiff could fix their habitation in [Sioux Falls] by having a PMB Mailbox Address in the city, and fulfilling the terms of the residency affidavit, including the sworn representation that the person lacks legal residency in any other U.S. State. We know that this change was designed to stop people such as plaintiff (during the timeframe he was traveling as a "digital nomad") from voting thereinafter its enactment date, because transcripts of the State Senate discussing S.B. 139 (2023) made the same very clear. Plaintiff paid a transcriber on freelancing platform fiverr to transcribe recordings of the state senate hearings (Ext D w/ highlights). Therein, the legislature repeatedly admits (as highlighted) that the "24 hour residents" are residents of this state. Finally, both the prior and new versions of SDCL § 12-1-4 prescribe that residence in this state is retained until another has been gained and/or until a person moves to another state with the intention of making it [their] permanent home. See also S.D.Const. art. VII, § 2, providing in pertinent part:

"Each elector who qualified to vote within a precinct shall be entitled to vote in that precinct until he establishes another voting residence. An elector shall never lose his residency for voting solely by reason of his absence from the state." But plaintiff followed his sworn representations in the Department of Public Safety's "Residency Affidavit" and did not maintain residence anywhere else, acquire any new ones while traveling, and returned home to South Dakota at the conclusion of his travels. The change in 12-1-4, calculated with the intention of excluding "mailbox voters" from voting, proves that the version of the law that was in effect at times material to this dispute considered plaintiff a resident because, once again, *Lewis Clark Rural Water System v. Seeba*, 709 N.W.2d 824 (S.D. 2006) "It is . . . an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different construction."

E. The Reasoning of Neighboring State Supreme Courts On State Residency

NORTH DAKOTA – A mere three years ago, the North Dakota Supreme Court explained who is a resident of North Dakota. Chairman of the North Dakota Republican Party utilized the

original jurisdiction of the [ND] Supreme Court, petitioning for a writ of mandamus directing the [ND] Secretary of State to remove Travisia Martin, candidate for the office of insurance commissioner, from the 2020 general election ballot. *Berg v. Jaeger*, 948 N.W.2d 4 (N.D. 2020). The ND Supreme Court reviewed the elective office qualifications of the North Dakota State Constitution *Id*, at *7:

"Eligibility to hold elective office in the executive branch is governed by N.D. Const. art. V, § 4, which states that '[t]o be eligible to hold an elective office established by this article, a person must be a qualified elector of this state, must be at least twenty-five years of age on the day of the election, and must have been a resident of this state for the five years preceding election to office.' A resident of this state, as used in the Constitution, means having had a legal residence 'entitling one to vote or to hold office in the state of North Dakota.' *State ex rel. Sathre v. Moodie* , 65 N.D. 340, 258 N.W. 558, 562 (1935)."

The court turned to the statutes and caselaw of ND to determine residency in *Id*, at *8:

"Several factors relevant to determining one's legal residence are set forth in N.D.C.C. § 54-01-26 : Every person has in law a residence. In determining the place of residence, the following rules must be observed:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

2. There can be only one residence.

3. A residence cannot be lost until another is gained.

...

7. The residence can be changed only by the union of act and intent.

[¶12] "A legal residence is the place where an individual has established his home, where he is habitually present, and which he intends to return to when he is away for business or pleasure." *Dietz v. City of Medora* , 333 N.W.2d 702, 705 (N.D. 1983). "Every person has only one legal residence, as distinguished from the possibility of several actual physical residences." *Id*. All of the facts and circumstances in an individual's life may be used when considering the factual issue of whether or not there has been a change of legal residence. Id. Legal residence, determined under the rules in N.D.C.C. § 54-01-26, is a question of fact to be determined by the factfinder. *Dietz* , at 705"

The court found she had not abandoned her legal residence in Nevada in becoming a North Dakota resident within the five years preceeding the 2020 election:

Id, at *9 "Martin intended to cast a legal vote in Nevada, and she was a registered voter in Nevada with a valid Nevada address at the time she cast her vote [in 2016]."

Id, at *10 "Other than physically living in North Dakota, most of Martin's other actions suggested an intention to retain her legal residence in Nevada, including maintaining her home, driver's license, passport, and vehicle registration all in Nevada. She continued to receive medical care in Nevada, traveled there often, and kept her personal vehicle there. "[N]otwithstanding one may testify that his intention was to make his home in a certain place, if his acts are of a character to negative his declaration or inconsistent with it, it is clear that the court cannot be governed by his testimony as to intention." *Moodie* , 258 N.W. 558 at 563."

In accordance with the above, the North Dakota Supreme Court enjoined the Secretary of State from placing Martin on the ballot. *Id,* at *14, "[w]e issue a writ of injunction restraining Secretary of State Jaeger from placing the name of Travisia Jonette Minor, A/K/A Travisia Martin, on the November 3, 2020, general election ballot."

The North Dakota State Constitution's Requirements for office as described above, codified at N.D. Const. art. V, § 4, are functionally identical, for our purposes, to South Dakota's Constitutional Provisions governing the same. S.D. Const. Art. III, § 3, which reads, in pertinent part:

No person is eligible for the office of senator who is not a qualified elector in the district from which such person is chosen, a citizen of the United States, and who has not attained the age of twenty-one years, and who has not been a resident of the state for two years next preceding election.

North Dakota requires five years residency for office, South Dakota requires two. North Dakota requires 25 years of age; South Dakota requires 21 years of age. But regardless, both states require one to be a resident of this state. Notwithstanding Martin's multi-year physical presence in North Dakota, the North Dakota Supreme Court found her to still be a legal resident of Nevada, due to her voting in Nevada in 2016, her valid address in Nevada, drivers license, passport, and vehicle registration all in Nevada. This is important because the North Dakota Supreme Court equated

the phrase "resident of this state" from its constitutional provision at art. V, § 4 to "legal residence." The *instant* plaintiff's drivers license and voter registration, are both South Dakotan. In fact, he was *required* to surrender his previous voter registration in Colorado when he filed the "Residency Affidavit" at the Rapid City DMV on March 5 2021, along with the sworn representations that South Dakota was his state of residence, that he didn't maintain residence in any other state, and that after his travels he would return to South Dakota (which he did). Plaintiff couldn't have possibly been a resident of any other U.S. State because this process ensured he did not have residency, or any of the voting/driving rights associated therewith, anywhere except for South Dakota, and "Every person has only one legal residence" *Id.*

Next, the North Dakota Supreme Court turned to its residency law N.D.C.C. § 54-01-26, which contained several important points, summarized as follows: 1) Every person has in law a residence. (notice its singularity), 2) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose. 3) There can be only one residence. 4. A residence cannot be lost until another is gained. These points are functionally identical to SDCL § 12-1-4 as it existed prior to its amendment7/1/23 amendment. Prior to amendment, including all times material to this suit, the South Dakotan statute was *functionally* identical to that of the North Dakotan one N.D.C.C. § 54-01-26. Also notable is that the text of N.D.C.C. § 54-01-26 and pre-amended SDCL § 12-1-4 are mirrored by the questions of the Department of Public Safety's Residency Affidavit, which ensure the person will return to South Dakota after their travels, that South Dakota is their state of residence, and that they do not maintain residency in any other U.S. State. The North Dakota Supreme Court's reasoning is irreconcilable with the use of the plain meaning rule as construed in the *Everquote* case which defendants rely near-exclusively; Martin would have been seen as a North Dakota resident eligible to hold office due to her extended physical presence in North Dakota, and her Nevada drivers license and voter registration would have been tossed aside similarly to the instant plaintiff's South Dakotan documents, *Lapin v. EverQuote Inc.*, 4:22-CV-04058-KES (D.S.D. Feb. 17, 2023) at *27, "South Dakota law may treat Lapin as a South Dakota resident for purposes of allowing Lapin to obtain a South Dakota's Driver's License and to vote. But the statute at issue in this case, § 37-24-

41(c), provides no evidence that the South Dakota Legislature wished to import the same loose definition of resident."

While Defendant may argue plaintiff did not have a house or apartment in South Dakota while he traveled, it is equally true that each person has one, and only one, legal residence at a time, as we have seen herein from the North Dakota Supreme Court. This includes the homeless. And the North Dakota Supreme Court uses this legal residence to determine if one was, for the applicable timeframe, a "resident of this state" [North Dakota] for the purposes of N.D. Const. art. V, § 4, whose relevant language is also found in S.D. Const. Art. III, § 3. This court should adopt the reasoning of the North Dakota Supreme Court.

IOWA – 32 years ago, the Iowa Supreme Court had to construe the undefined term "resident" in Iowa Code § 515B.2(3)(a) (1985), the "Iowa Insurance Guaranty Association." Before the court was the issue of whether Kroblin Refrigerated Xpress, Inc "Kroblin" was a "resident" for the purposes of standing under the act. *Kroblin Refrigerated Xpress, Inc. v. Iowa Insurance Guaranty Ass'n*, 461 N.W.2d 175 (Iowa 1990). "When the term "resident" is undefined in the statute, it becomes an ambiguous term requiring statutory construction to determine its legal meaning. Therefore, we may invoke rules of statutory construction to aid us in determining the meaning of the term 'resident.' " *Id*, at *178. "General principles of construction require consideration of the spirit and words of a statute, and that the manifest intent of the legislature prevail over the literal import of the words used. *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 283 (Iowa 1983). Thus, we seek a reasonable interpretation of the term "resident" that will satisfy the objectives of the statute." *Id*, at *178. "In summary, we conclude that a corporation's residence is its principal place of business under chapter 515B" *Id*, 182 Notably, the Iowa Supreme Court considered the spirit and words of the statute to understand the manifest intent of the statute, prioritizing it above the "literal import of the words used." This relates to the broad statutory language of chapter SDCL § 37-24, as explained in subsection C herein, as well as the far-reaching definitions of "South Dakota Electronic Mail Address," revealing intention of applying to email addresses that receive spams out-of-state with highly tenuous (at best) connections to South Dakota, such as a mailing address within the state to receive bills for maintaining that email address and/or being *ordinarily* accessed from a

computer located in [South Dakota], as explained in subsection B herein. The manifest intent of the statute is to apply broadly to email addresses with ties to the state, and this warrants a liberal interpretation of resident to advance the legislatures goals. "When faced with a choice between two possible constructions of a statute, the court should apply the interpretation which advances the legislature's goals." *State v. Schempp*, 498 N.W.2d 618 (S.D. 1993)." Further, plaintiff is analogous to *Kroblin* because his "principal place of business" was South Dakota, metaphorically, at all times.

MINNESOTA - *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391 (Minn. 2001) "To clarify, we stated that, under Minn. Stat. § 290.014, subd. 1, all net income of a 'resident individual' is taxable under Minn. Stat. ch. 290. Brun, 549 N.W.2d at 92-93. We further stated that the legislature has defined 'resident' as 'any individual domiciled in Minnesota.' *Id.* at 93; see Minn. Stat. § 290.01, subd. 7 (2000)."

See also *Dreyling v. Commissioner of Revenue*, 753 N.W.2d 698 (Minn. 2008) "The term 'resident' includes 'any individual domiciled in Minnesota.' Id. 'Domicile' means bodily presence in a place coupled with an intent to make that place one's home.' *Dreyling* I, 711 N.W.2d at 494; see also Minn. R. 8001.0300, subp. 2. 'The domicile of a spouse shall be the same as the other spouse unless there is affirmative evidence to the contrary or unless the husband and wife are legally separated or the marriage has been dissolved." Minn. R. 8001.0300, subp. 2. 'An individual can have only one domicile at any particular time.' *Id.* 'A domicile once shown to exist is presumed to continue until the contrary is shown.' "

These two Minnesotan Supreme Court tax cases are significant because they equate residency with domicile, similarly to the North Dakota Supreme Court equates 'resident of this state' with one's legal residency, rather than their physical presence. *See also* final case in subsection L of this brief: 8th Circuit finding the same.

NEBRASKA – *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722 (Neb. 1997) "In contrast, in *Stoner v. State Farm Mut. Auto. Ins. Co.*, 780 F.2d 1414 (8th Cir. 1986), the court, in applying South Dakota law, concluded that the phrase 'lives with you' was unambiguous. The court found that unlike legal residence or domicile, which have specific legal meanings apart from their ordinary usage, the phrase "lives with you" was susceptible of only one interpretation, that is, actually living

in fact. Thus, the court determined that the insured's 21-year-old daughter who was enlisted in the Navy and stationed away from her father's residence did not 'live with' her father but remained a legal resident of her parents home (not on the base). Directly contradicting *Everquote* court's application of the application of the 'ordinary meaning' of 'resident of this state,' notwithstanding it was bound to *Stoner*.

Willie v. Willie, 167 Neb. 449 (Neb. 1958) "One's legal residence is where he has his established home [note the singularity] , and to which, when absent, he intends to return. To effect a change there must not only be a change of residence, but an intention to permanently abandon the former residence. See also *Acklie v. Neb. Dep't of Revenue*, 313 Neb. 28 (Neb. 2022) The court emphasized the alternative language of § 77-2714.01(7) defining a resident individual: "an individual who is domiciled in Nebraska or who maintains a permanent place of abode in this state and spends in the aggregate more than six months of the taxable year in this state."

State ex Rel. Frasier v. Whaley, 194 Neb. 703 (Neb. 1975) The underlying issue is whether Tammy Maddux is a resident of the Chase County high school district. Residence, for the purposes of section 79-445, R. S. Supp., 1972, has long been interpreted by this court to mean domicile or legal residence, i.e., one's established home and the place to which one intends to return when absent therefrom. *State ex rel. Vale v. School District of City of Superior*, 55 Neb. 317, 75 N.W. 855; *State ex rel. Rittenhouse v. Newman*, 189 Neb. 657, 204 N.W.2d 372.

MONTANA -*Monroe v. State*, 265 Mont. 1 (Mont. 1994) Section 87-2-102, MCA (1989),provides:
Resident defined.
In determining a resident for the purpose of issuing resident fishing, hunting, and trapping licenses, the following provisions shall apply:
. . . . . .
(2) Any person who has been a resident of the state of Montana, as defined in 1-1-215, for a period of 6 months immediately prior to making application for said license shall be eligible to receive a resident hunting, fishing, or trapping license.
Section 1-1-215, MCA, provides:
Residence — rules for determining. Every person has, in law, a residence. In determining the place

of residence the following rules are to be observed:

(1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose.

(2) There can only be one residence.

(3) A residence cannot be lost until another is gained.

. . . . . .

(6) The residence can be changed only by the union of act and intent.

The Montana Supreme Court reiterates the North Dakotan Supreme Court's recitation that "every person, has in law, a residence," which implicitly concedes that a full-time traveler still has a residence for legal purposes even though they're traveling without a home, apartment, or other traditional fixed dwelling. It cites to Montana's Residency law MCA § 1-1-215, which is nearly identical to North Dakota's comparable N.D.C.C. § 54-01-26, which in turn in nearly identical to the pre-amended South Dakotan SDCL § 12-1-4, version in effect prior to 7/1/23, effective at all times material hereto. South Dakota more specifically recognizes the North Dakotan and Montanan concepts that each person has one legal residence at a time in SDCL § 13-53-23.1, which reads:

For the purpose of §§ 13-53-23 to 13-53-41, inclusive, residence, means the place where a person has a permanent home, at which the person remains when not called elsewhere for labor, studies, or other special or temporary purposes, and to which the person returns at times of repose. It is the place a person has voluntarily fixed as the person's permanent habitation with an intent to remain in such place for an indefinite period. A person, at any one time, has but one residence and a residence in not lost until another is gained.

F. This Court Admits Pltf is a Minnehaha County Resident (Hauls Him To Jury Duty)

When full-time traveling South Dakotans, including the instant plaintiff and the tens of thousands of others similarly situated, sign the aforementioned "Residency Affidavit," (*Ext. C*) it contains the following language:

"PLEASE NOTE: South Dakota Driver Licensing records are used as a supplemental list for jury duty selection. Obtaining a South Dakota driver license or non-driver ID card will result in you being required to report for jury duty in South Dakota." It isn't lying. South Dakota codifies its

"Qualifications of Jurors" at SDCL § 16-13-10 which reads as follows:

"Any citizen of this state, who is a resident of the county or jury district where the jury is selected, eighteen years of age or older prior to January first of the year of jury service, of sound mind and who is able to read, write, and understand the English language, is eligible to serve as a juror..."

In accordance with the above, this Minnehaha County Circuit Court routinely summons other full-time travelers with the same legal residential address as plaintiff for jury duty. Please see attached *Ext A+B*, which is a true and correct [less redactions] Juror Instructions sent to someone else at plaintiff's address 401 E 8th St STE 214 PMB XXXX, Sioux Falls SD 57103 (at a different, unique four-digit pmb unique to the juror) Understandably, it clearly it does not matter to the 2nd judicial circuit that these folks are full-time travelers and are usually far away from South Dakota: one of the responsibilities of being a citizen of South Dakota and a resident of [that particular county] SDCL § 16-13-10 is the obligation to serve on a jury of their peers. Nor can this court admit such travelers are residents of [Minnehaha] County per the juror qualification statute when its short on jurors, but subsequently reject such travelers residency for the purposes of functionally identically worded statutes which provide benefits and protections to that same resident, without denying such person the equal protection of the laws of this state. See also

G. Drivers License Revocation Statute Proves Plaintiff's A "Resident of This State"

SDCL § 32-12-56 is titled "Suspension or revocation for out-of-state conviction—Grounds." and reads as follows: "The Department of Public Safety may suspend or revoke the driving privilege or driver license of any resident of this state or the privilege of a nonresident to drive a motor vehicle in this state upon receiving notice of the conviction of such person in another state of an offense which, if committed in this state, would be grounds for the suspension or revocation of the driving privilege or driver license." Suffice to say, the Department of Public Safety is unable to revoke the drivers license of a non-resident of this state (issued by another state), and accordingly, this section limits the Department's Authority to banning such person from driving a vehicle within this state. However, the same section does empower the Department with the ability to "suspend or revoke the driving privilege or driver license of any resident of this state."

There's positively no doubt that the drivers licenses issued to plaintiff Joshua Lapin, and the many thousands similarly situated, are governed by this provision, and that the many full-time RV-ers who obtained a drivers license through the same "residency affidavit" and Your Best Address PMB-mailbox combination are also liable to have their South Dakota drivers licenses revoked due to serious accidents occurring in other states. "Intent must be determined from the statute as a whole, as well as enactments relating to the same subject. Where statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them `harmonious and workable." *City of Sioux Falls v. Ewoldt*, 568 N.W.2d 764 (S.D. 1997). Relevantly, the same chapter defines "principal residence" at SDCL § 32-12-1 as "the location where a person currently resides even if at a temporary address."

H. Durational Residency Requirement / Equal Protection Constitutionality Challenge

Any durational residency requirement in excess of the 30 days plaintiff spent from February-March 2021 in the AirBnb (during which time he signed the Residency Affidavit, PMB Mailbox Address, Drivers License, and Voter Registration), as a prerequisite to obtain the benefits and protections of this state enjoyed by more established, "old-timer" residents of the state, prior to his one year nad nine months travel before he returned home to South Dakota as sworn, would amount to this court judicially taking upon itself to write in an un-legislated durational residency requirement and burden on his right to travel; the constitutionality thereof being a matter of well-settled law in the U.S. Supreme Court. Fewer places are better to turn than *Dunn v. Blumstein*, 405 U.S. 330 (1972), "a college professor attempted to register to vote after moving to Tennessee for a new job. He was denied the right to register because Tennessee imposed a one-year DRR before being allowed to vote. The Court agreed it was important for Tennessee to ensure election integrity and complete administrative requirements before an election, but that could be achieved in thirty days; a year was not necessary." [underline added] South Dakota agrees. The aforementioned quoted description of Dunn was copied and pasted from the South Dakota Legislative Research Council's "Residency Laws" ISSUE MEMORANDUM 2020-XX, ("Residency Memorandum") which is available here https://mylrc.sdlegislature.gov/api/Documents/Attachment/207175.pdf?Year=2020, and attached as

Exhibit E. Relevant findings from *Dunn* include: "(b) Absent a compelling state interest, Tennessee may not burden the right to travel by penalizing those bona fide residents who have recently traveled from one jurisdiction to another. (c) A period of 30 days appears to be ample to complete whatever administrative tasks are needed to prevent fraud and insure the purity of the ballot box [as opposed to one year]. (d) Since there are adequate means of ascertaining bona fide residence on an individualized basis, the State may not conclusively presume nonresidence from failure to satisfy the waiting-period requirements of durational residence laws. (e) Tennessee has not established a sufficient relationship between its interest in an informed electorate and the fixed durational residence requirements." *Id. Shapiro v. Thompson*, 394 U.S. 618 (1969) is another U.S. Supreme Court case, for which plaintiff turns yet again to the LRC's "Residency Laws" (*Ext. E*) for its analysis of the same: "California imposed a one-year DRR before a person could receive welfare benefits. California argued the requirement was necessary to prevent people from temporarily moving to California for purposes of qualifying for welfare benefits. The Supreme Court disagreed and found DRRs were constitutional if they advanced a compelling state interest. Preventing people from receiving the assistance they would otherwise be eligible for was not a valid reason." Relevant findings from Shapiro include, "The statutory prohibition of benefits to residents of less than a year creates a classification which denies equal protection of the laws because the interests allegedly served by the classification either may not constitutionally be promoted by government or are not compelling governmental interests. P. 627," AND "Since the Constitution guarantees the right of interstate movement, the purpose of deterring the migration of indigents into a State is impermissible and cannot serve to justify the classification created by the one-year waiting period. Pp. 629-631.", AND "The classification may not be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes because the Equal Protection Clause prohibits the States from apportioning benefits or services on the basis of the past tax contributions of its citizens," and "In moving from jurisdiction to jurisdiction appellees were exercising a constitutional right, and any classification which penalizes the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." AND "Appellants do not use and have no need to use

the one-year requirement for the administrative and governmental purposes suggested, and under the standard of a compelling state interest, that requirement clearly violates the Equal Protection Clause." See also *Zobel v. Williams*, 457 U.S. 55 (1982): "But it is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence." This prohibition on states appointing benefits based on "past tax contributions" runs directly afoul of Ms. Farley's statement that plaintiff "contributed nothing to the state" *Brief ISO Motion For Summary Judgment, pg 10, line* 2. We know that plaintiff and the 20,000+ similarly situated are citizens of South Dakota, collectively, from the following:

A) The text of the residency affidavit, "Obtaining a South Dakota Driver License or non-driver ID card will result in you being required to report for jurty duty in South Dakota if selected,"

B)the Juror qualification Statute at SDCL 16-13-10, "Any citizen of this state, who is a resident of the county or jury district where the jury is selected...is eligible to serve as a juror..."

C) Exhibit A+B (proving this court does summon jurors from the same PMB address as plaintiff), collectively prove than plaitiff and the other 20K are South Dakota Citizens. Therefore, refusing residence to this South Dakota Citizen runs afoul of the Fourteenth Amendment as described in *Zobel*.

I. In South Dakota (Iowa), Remedial Statutes Are LIBERALLY Construed, but (South Divorce Statutes are STRICTLY Construed: EverQuote Court improperly Construed SD's Anti-Spam Law and SD's Divorce Statute *In Pari Materia.*

"A law providing regulations conducive to public good or welfare, such as suppression of fraud, is ordinarily remedial, and as such liberally interpreted. *United States v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 245-246, 33 L.Ed. 555; *Schmitt v. Jenkins Truck Lines, Inc.*, 260 Iowa 556, 560-561, 149 N.W.2d 789." *State ex Rel. Turner v. Koscot Interplanetary*, 191 N.W.2d 624 (Iowa 1971). The South Dakota Supreme Court agrees. "A remedial statute is to be liberally construed to effectuate its purposes" *Weller v. Spring Creek Resort, Inc.*, 477 N.W.2d 839 (S.D. 1991), relying on *State for Use of Smith v. Tyonek Timber Inc.*, 680 P.2d 1148 (Alaska 1984). "[T]here are in the purpose and

policy of exemption and homestead statutes considerations which make them remedial, and which neutralize the principles of strict construction." *Noyes v. Belding*, 5 S.D. 603 (S.D. 1894). South Dakota undoubtedly considers its anti-spam law to be remedial, " In *Tischler*, we defined remedial statutes as those statutes 'that describe methods for enforcing, processing, administering, or determining rights, liabilities, or status.' " *In re Engels*, 687 N.W.2d 30 (S.D. 2004). More recently, *Abata v. Pennington Cnty. Bd. of Comm'rs*, 931 N.W.2d 714 (S.D. 2019) The Declaratory Judgment Act is remedial in nature and should be construed liberally, "particularly ... when the construction of statutes dealing with zoning, taxation, voting or family relations presents matters involving the public interest in which timely relief is desirable." *Kneip v. Herseth* , 87 S.D. 642, 648, 214 N.W.2d 93, 96-97 (1974). In sharp contrast, divorce statutes are strictly construed. Defendant follows the *EverQuote* courts reliance on two divorce cases heard by the South Dakota Supreme Court for the proposition that plaintiff lacks standing: *Parsley v. Parsley*, 2007 S.D. 58, ¶ 18, 734 N.W.2d 813, 818 "Parsley" and *Rush v. Rush*, 2015 S.D. 56, ¶ 14, 866 N.W.2d 556, 561 "Rush." Defendant argues "Parsley Court expressly acknowledged that "residence must be an actual residence as distinguished from a temporary abiding place[.]" 2007 S.D. 58, ¶ 17, 734 N.W.2d at 818" for the proposition that plaintiff was not a 'resident of this state' while traveling the world prior to his return home. This legal standard is flawed and should not be followed; it uses a *strictly* construed divorce statute as the basis for standing under a *liberally* construed remedial statute. The EverQuote court improperly construed South Dakota's spam law and South Dakota's divorce law *in pari materia. Lewis Clark Rural Water System v. Seeba,* 709 N.W.2d 824 (S.D. 2006) "Statutes are construed in pari materia when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz*, 2001 SD 138, ¶ 26, 636 N.W.2d at 683 (citing 2B Sutherland, Statutory Construction at § 51:03). However, "[c]haracterization of the object or purpose [of the statute] is more important than characterization of the subject matter in determining whether different statutes are closely related enough to justify interpreting one in light of another." "Here, the statutes that Lewis Clark seeks to construe in pari materia deal with different purposes and objects. SDCL Title 36 deals with the regulation of professions and occupations, whereas SDCL Title 46 deals with water rights and eminent domain.

Because the purposes and objects of these statutes are so different, we cannot construe them in pari materia to conclude that "other buildings" must be occupied structures." The South Dakota Supreme Court refused to construe SDCL 36 "regulation of professions and occupations" and SDCL Title 46 "water rights and eminent domain" *in pari materia* because the "purposes and objects of these statutes are so different." Indeed, there are more comparable cases from the South Dakota Supreme Court suggesting that statutes such as the anti-spam law would have much less stringent residency requirements for the purposes of standing: The South Dakota Supreme Court case *Parsley* relies on Iowa Supreme Court Case *Snyder v. Snyder*, 240 Iowa 239, 35 N.W.2d 32, 33–34 (1948), "Snyder,"which relies on a finding from yet another Iowa Supreme Court divorce case *Smith v. Smith*, 4 (Greene) Iowa 266 "Smith," which found that "the requirements of the statute relating to divorce should be strictly construed," [underline added] Snyder, referring to the findings of *Smith v. Smith*, 4 (Greene) Iowa 266 "Smith". However, the instant cause of action, being a remedial statute, is to be liberally construed. The Iowa Supreme Court more liberally construes the concept of residency even for other family matters, much less wholly distinct topics. In *Root v. Toney*, No. 12-0122 (Iowa Dec. 13, 2013) "Root," the Iowa Supreme court considered the residency requirements for the purposes of a protection order. Teri Root took her five kids and fled across state lines to Iowa, to live with family and escape her abusive husband, Talton. She first settled down in a temporary safe house in Howard County [Iowa] at a local domestic abuse center. The abuser-defendant-ex husband Talton argued, similarly to the EverQuote Court and the instant defendnats, that Teri's temporary relocation in Iowa was inadequate for the purposes of a protection order since she just moved there, and merely in a temporary place of dwelling. The Root court distinguished and rejected Mr. Abusers argument as follows, "The 1855 Iowa Code included a six-month minimum residency requirement to obtain a divorce. Id. at 38 (citing Iowa Code § 1488 (1855)). This minimum residency requirement guards against interstate forum shopping and protects Iowa decrees against collateral attack. See *Sosna v. Iowa*, 419 U.S. 393, 406-07, 95 S. Ct. 553, 561, 42 L. Ed. 2D 532, 545 (1975) ("Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant . . . ."); *In re Marriage of Kimura*, 471 N.W.2d 869, 877 (Iowa 1991) (equating

"residency" to "domicile" for chapter 598 dissolution of marriage action)." "This more stringent legal residency requirement for chapter 598 makes sense in the context of marital dissolutions involving residents of other states, because a more lenient actual residency test would allow litigants to maintain multiple residences to evade Iowa's minimum good-faith state residency requirement. Chapter 236, by contrast, lacks any equivalent provision imposing a minimum period or good-faith-test requirement for residency within Iowa. Accordingly, the chapter 598 cases are inapposite. We conclude a more relaxed residency requirement is appropriate to effectuate the purpose of chapter 236—protecting victims of domestic abuse. Section 236.4 provides for expedited orders of protection. Id. § 236.4. By omitting a minimum waiting period in section 236.3(1), the legislature presumably intended to allow emergency injunctive relief immediately upon the victim's arrival in the new county where she relocated to live to escape her abuser." Therefore, the strict construction of residency for the purpose of a divorce that the South Dakota Supreme Court adopted from the Iowa Supreme Court was limited to the procuring of a divorce only, and a more relaxed construction of residency is appropriate. The South Dakota Supreme Court has done the same:

J. South Dakota Supreme Court Has Recognized Full-Time Traveler's Residency

Payne v. State Farm Fire & Cas. Co., 2022 S.D. 3 (S.D. 2022), Notably, at *3, "John and Robin were married on April 30, 2011. In May or June of 2011, the Paynes moved from Virginia to Florida in a recreational vehicle (RV), intending to establish a domicile in Florida while traveling in the RV around the continental United States...The Paynes set up a private mailbox in Florida at which they received all of their mail. Their mailbox service then forwarded mail to them during their travels as directed." Notwithstanding the Paynes's functionally-identical living situation to the instant plaintiff's at times material herein, the SD Supreme Court recognized them as both domiciles and residents of Florida, at *5 "Because the Paynes did not apply for their Policy while domiciled in Florida or make a written request for UM coverage from State Farm, the court concluded that State Farm did not violate Florida's UM statute," see also at *2, "The Paynes, residents of Florida at the time of the accident, filed a declaratory action against State Farm seeking payment of $2,000,000 under Florida's UM statute, which they contend applies to this dispute." But this accident did not occur in Florida, as the Paynes had set up mail forwarding in Florida after

establishing domicile in FL in an RV with in-state mail forwarding; the accident occurred in South Dakota, but the South Dakota Supreme Court recognized the Paynes as residents of Florida, notwithstanding their traveling lifestyles, at *2 "John Payne (John) and his wife, Robin Payne (Robin), were riding their motorcycle in South Dakota on August 8, 2012, when they were in a motor vehicle accident with an uninsured motorist, Jody Kirk, sustaining significant injuries." (rewind to earlier at *2 "The Paynes, residents of Florida at the time of the accident...")
See also *Cummings v. Mickelson*, 495 N.W.2d 493 (S.D. 1993), Concluding that residency must be established at the time the candidate qualifies for office by taking the requisite oath rather than the time of appointment. In considering the residency requirement of a circuit court judge within the judicial circuit they're appointed, as required by Art. V, § 6 of the South Dakota Constitution, the South Dakota Supreme Court explained, at *500, "The 1972 Amendment also changed the requirement from "resident" to "voting residents." As was noted at oral argument, this was probably in reaction to the demise of durational residency requirements which had previously been used to determine "residency." "Voting residency" is defined in SDCL 12-1-4 which was enacted in 1973." Elaborating further on this amendment at *500, "This section omits the present period of residency and age requirements. Both are arbitrary standards which often have little relevance to the qualifications needed for a judicial position. A period of residency does not seem logical in the modern transitory society. . . ." This aligns with the spirit of the U.S. Supreme Court cases cited.

In *State ex Rel. Johnson v. Cotton*, 67 S.D. 63 (S.D. 1939), the South Dakota Supreme Court considered the residency requirement for children attending schools to a liberal construction, and accordingly found the following, "In *Grand Lodge Independent Order of Odd Fellows v. Board of Education*, 90 W. Va. 8, 110 S.E. 440, 443, 48 A.L.R. 1092, the facts are essentially parallel to the facts in this case and under a law in effect similar to our law held that: "The right to attend school is not limited to the place of the legal domicile. A residence, even for a temporary purpose * * * is sufficient to entitled children to attend school there." Comparable to Iowan Case *Root (Subsection I) Heitmann v. Am. Family Mut. Ins. Co.*, 883 N.W.2d 506 (S.D. 2016), interpreting the phrase "resident relative" in an insurance policy. "The phrase "if residents of your household," means that Buhl's relatives must be residents of Buhl's household. It is undisputed that Tammy and Dusty are

Buhl's relatives....The Policy does not define household. Nor has this Court defined the term. A review of cases from other jurisdictions reveals that courts have held that an insured can have more than one household for insurance contract purposes and the phrase resident of the household has no fixed meaning. *State Farm Fire & Cas. Co. v. Ewing*, 269 F.3d 888, 891 (8th Cir.2001) ; Am. Family Mut. Ins. Co. v. Thiem, 503 N.W.2d 789, 790 (Minn.1993) ; Erie Ins. Exch. v. Stephenson, 674 N.E.2d 607, 610 (Ind.Ct.App.1996). "[W]hether a person is a resident of a particular household is an elastic concept entirely dependent upon the context in which the question arises and the facts of the particular case." 9A Couch on Ins. § 128:6 (3d ed.). See also State Farm & Cas. Co. v. Martinez, 384 Ill.App.3d 494, 323 Ill.Dec. 501, 893 N.E.2d 975 (2008) ; Mut. of Enumclaw Ins. Co. v. Pedersen, 133 Idaho 135, 983 P.2d 208 (1999) ; AMCO Ins. v. Norton, 243 Neb. 444, 500 N.W.2d 542 (1993). And under certain circumstances courts have concluded that "members of a family need not actually reside under a common roof in order to be deemed part of the same household." *Farmers Mut. Ins. Co. v. Tucker*, 213 W.Va. 16, 576 S.E.2d 261 (2002)."

K. Recently Struck-Down Residency [Related] Laws in South Dakota

League of Women Voters of S. Dakota v. Noem, 4:22-CV-04085-RAL (D.S.D. Dec. 12, 2022), challenging 30 day residency requirement of petition circulator law, stipulated dismissal after S.B. 180 was struck down in related case *Dakotans for Health v. Noem*, 52 F.4th 381 (8th Cir. 2022). Significant because the decision in *Dakotans for Health* caused the state to stipulated to, and thereby concede, that the 30 day residency requirement of petition circulator law was unconstitutional and ran afoul of the first and fourteenth amendments.

See also *Voice v. Noem*, 380 F. Supp. 3d 939 (D.S.D. 2019): Enjoining Noem el al from enforcing S.D.Codified Laws § 12–27–18.2, which imposes civil penalties onto those who accept donations from non-residents of this state.

L. 8th Circuit Agrees Residency does not change "During Military Deployment"

Ellis v. Southeast Construction Co., 260 F.2d 280 (8th Cir. 1958), ""It has been pointed out, however, that during a long period of military service one may not be viewed as occupying, in a residential sense, `no man's land.' The fact that one is on military duty does not preclude him from

establishing his residence where he is stationed if the circumstances show an intent on his part to abandon his original domicil and adopt the new one..."A citizen of a state does not change his citizenship by entering military service even though he is assigned to duties in another state or country, and regardless of the term of service, unless he indicates an intent to abandon such original domicile and adopt a new one.," *Id.* Plaintiff never showed intent to abandon SD while "stationed" in various countries while traveling abroad, having always intended to return home to SD thereafter.

In *Eckerberg v. Inter-State Studio & Publ'g Co.*, 860 F.3d 1079 (8th Cir. 2017) "Eckerberg", the court found that evidence of voter registration, a driver's license, and a bank account in Florida was sufficient to support the district [lower] court's finding that the plaintiff's citizenship was in Florida rather than in Missouri, even though he had two properties in Missouri, a rental house in Platte City and a development property in Clay county that he intended to maintain from Florida. Upon information and belief, Eckberg had no house or apartment in Florida at the time. "To establish domicile, an individual must both be physically present in the state and have the intent to make his home there indefinitely." *Yeldell v. Tutt* , 913 F.2d 533, 537 (8th Cir. 1990). The court relied on the following testimony from Eckerberg: "Q. When you lived in Florida, did you intend to stop being a resident of Missouri and make Florida your legal residence? A. Yes. Q. And has that ever changed since that time? A. No. Q. and at the time that you retire from the Marine Corps, whatever the circumstances, in what state do you intend to reside? A. Florida. Eckerberg testified that if he were to leave the Marines, he would return to Florida." These questions are functionally identical to the ones the instant Plaintiff swore to in his residency affidavit.

Katcher v. Wood, 109 F.2d 751 (8th Cir. 1940) "a person may leave the state in which he has been domiciled and acquire a domicile in another state even though he establishes himself in temporary lodgings in a hotel and does not immediately settle in any particular building as a fixed place of abode." Plaintiff's steps to obtain SD residency took place through temporary lodgings. (*Ext. C*)

Stoner v. State Farm Mut. Auto. Ins. Co., 780 F.2d 1414 (8th Cir. 1986), "the court, in applying South Dakota law, concluded that the phrase 'lives with you' was unambiguous. The court found that unlike legal residence or domicile, which have specific legal meanings apart from their ordinary

usage, the phrase "lives with you" was susceptible of only one interpretation, that is, actually living in fact...we find no ambiguity in the phrase 'lives with you.' The cases to which Stoner cites in her brief all deal with some variation of the terms 'residence' or 'domicile,' both of which have specific legal meanings apart from their ordinary usage. See Black's Law Dictionary 435-36, 1176-77 (5th ed. 1979). No contradiction exists, as Stoner would suggest, between the district court's statement, 'there is no question that Monica Stoner remained a legal resident of her parents' household.' " The 8th Circuit admits Monica (soldier's daughter), remained a legal resident of her parents home even though she wasn't living with them. Court also admitting "residence" and "domicile" have legal meanings apart from their ordinary usage, in overwhelmingly direct contrast to the *Everquote* court's construction of the same, even though it was bound to the 8th circuit.

M. Precedent For Applying Spam Law To Residents Receiving Spams Out-Of-State

Marycle v. First Choice Internet, Inc., 166 Md. App. 481 (Md. Ct. Spec. App. 2006), "Recipient was a Maryland Resident but a law student in Washington D.C. 's George Washington Univeristy, received spams in D.C., but sued in Maryland State court under Maryland's spam law 'MCEMA.' Recipient faced the same legal hurdle as the instant plaintiff herein, and pltf was found to have standing despite living in D.C and receiving spams there, because he was still a maryland resident. Opinion attached as *Ext. H*, with relevant findings of the Maryland Special Court of Appeals Highlighted.

Certificate of Service

This brief and all of its supporting materials will be served onto Abigaile Farley of Cutler Law Firm LLP through Odyssey pursuant to SDCL §§ 15-6-5(b)(2) when the clerk enters this hand-delivered filing, causing electronic service to be made upon Ms. Farley through Odyssey. It will also be e-mailed to her and *pro hac vice* counsel Jacob Gillick of Morris Law Firm APC.

/s/ Joshua A. Lapin 7/25/23

Joshua A. Lapin
Pro Se plaintiff

EXHIBIT

A+B

EXHIBIT [redacted] A + B

CLERK OF COURTS, MINNEHAHA COUNTY
SECOND JUDICIAL CIRCUIT
425 N DAKOTA AVE
SIOUX FALLS, SOUTH DAKOTA 57104
(605)782-3062

February 7, 2023

[redacted]
401 E 8TH ST STE 214 PMB [redacted]1
SIOUX FALLS, SD 57103

Re: Specific Instructions Concerning Jury Service ***Save this letter****

Dear Juror:

This letter is to inform you that you have been assigned to **23-03E** for your current term which is **2/27/2023 through 3/31/2023.**

Starting 2/24/2023 Please call the automated telephone system at **(605) 782-3055** ***or*** check the Website every **Friday after 5:30pm.** For panel reporting instructions via the website please go to **ujsjurors.sd.gov**. Select Your E-Courthouse. Select Courthouse – in the drop-down box select Minnehaha County – View Courthouse. Select Juror Reporting Instructions, on the left-hand side of the page. We also strongly suggest checking in again the night prior to your assigned reporting date, to see if any changes have been made to the schedule. Before reporting to the courthouse we ask that you watch the Jury orientation video at following website: https://www.youtube.com/watch?v=fuI-P3dd06k you can watch this anytime prior to your jury service.

The juror information will remain on the automated telephone system and Website until the next update. The upcoming weeks scheduled will be listed and panels will be assigned to report on a specific date and time. Please note that all jurors are expected to report on the date and time listed for your panel. If your panel is not listed for the week, you will not report that week. However, you will check again Friday after 5:30pm for the next weeks update. If you have previously contacted the jury office and have been excused for a specific date(s), we do not expect you to report on the date(s) that you have previously been excused. However, your panel may still be called in for a date(s) you were excused. If you have vacation dates or dates you are requesting to be excused for, please contact the jury office. Within 48 hours prior to the dates you are requesting to be excused to make necessary arrangements.

Now, once you have been called to report. It does not mean you have been selected to sit on a case. However, it does mean we anticipate you being here for a few hours for the selection process. We will call in anywhere from 40 – 60 jurors, sometimes more for each case. We do selection mostly in the morning, but we have done it where we call jurors in to report in the afternoon for the selection process as well. Be sure to listen to date and time for your panels reporting time.

It is your responsibility to remember to call the recording or check the Website each week. We do try to send out text notification, and email reminders; however please do not rely on them.

If you need assistance or have questions, please feel free to contact the jury manager at 605-782-3062, or email: MinnehahaJury@ujs.state.sd.us.

Sincerely,

KATELYN BRINING
JURY MANAGER, MINNEHAHA COUNTY

EXHIBIT

C

RESIDENCY AFFIDAVIT
FOR SOUTH DAKOTA RESIDENTS WHO TRAVEL AND DO NOT HAVE A RESIDENCE IN ANOTHER STATE

The purpose of the following questions is to determine if you meet the qualifications for an exception of the proof of residency requirements for obtaining a South Dakota Driver License or non-driver ID card.

This form must be signed by a notary of the public or a South Dakota driver license examiner.

1. Is South Dakota your state of residence? _X_ Yes _____ No

2. Is South Dakota the state you intend to return to after being absent? _X_ Yes _____ No

3. Do you maintain a residence in another state? _____ Yes _X_ No

This form must be accompanied by a valid one night stay receipt (no more than one year old) from a local RV Park, Campground, or Motel for proof of the temporary address where you are residing.

In addition you must submit a document (no more than one year old) proving your personal mailbox (PMB) service address (receipt from the PMB business or a piece of mail with your PMB address on it).

PLEASE NOTE: South Dakota Driver Licensing records are used as a supplemental list for jury duty selection. Obtaining a South Dakota driver license or non-driver ID card will result in you being required to report for jury duty in South Dakota if selected.

I declare and affirm under the penalties of perjury (2 years imprisonment and $4000 fine) that this claim (petition, application, information) has been examined by me and, to the best of my knowledge and belief, is in all things true and correct. Any false statement or concealment of any material facts subjects any license or ID issued to immediate cancellation.

Joshua Lapin — PRINT NAME

03/05/21 — DATE

Joshua Lapin — SIGNATURE

Notary/South Dakota Driver License Examiner Signature — (SEAL)

Commission Expires: _____

If applicant is under the age of 18 a parent's signature is required.

_____ — PARENT'S NAME

_____ — DATE

_____ — PARENT'S SIGNATURE

REV 5-2019

Personal Mailbox Rental &
Mail Forwarding Agreement

This agreement, known as the Personal Mailbox Rental & Mail Forwarding Agreement, for the services specified below, is between, **Standing Bear LLC/Your Best Address** (known as (Your Best Address) and (Your Name's) Joshua Lapin
(known as ***Customer)*** was entered into on (**DATE**) 02/25/21.

A. **Payment for Services:**

Any services requested by the Customer, including personal mailbox rental, digital mail, and other services shall be paid by the Customer Annually (Once Per Year) and in advance. A standard handling charge of $1.50 per mailing shipment will be paid by the Customer. Any charges, including fax forwarding and copying charges, shall be paid from the Customer's Postage Escrow Account. If a customer calls into the office and requests a listing of the contents of their personal mailbox, a handling fee of $1.50 will be taken out of your Postage your Postage Escrow Account.

If Customer's Postage Escrow Account reaches a $0.00 balance, NO mail will be forwarded until Customer provides sufficient funds for the service to continue. If Customer's Personal Mailbox Rent is past due over 60 days; NO mail will be forwarded until Customer provides sufficient funds for the service to continue.

B. **Termination of Services**

Customer agrees that, upon termination of service for any reason, Your Best Address shall use all remaining Postage Escrow funds towards forwarding all mail currently held or delivered within 30 days of termination of services either to Customer's current address on file or to another address provided by Customer at the time of termination. If additional funds are required for the mail to be forwarded to Customer, Customer shall provide said funds. If Customer's Postage Escrow account remains at a $0.00 balance for 30 days, services will be automatically terminated. In the event of termination of services, there shall be no refund for unused or cancelled services. By signing this agreement, Customer provides written instructions that any mail need not be forwarded at termination of service with Your Best Address unless appropriate postage, has been paid. Your Best Address will adhere to applicable state law, federal law, and federal agency regulations.

C. **How to Begin Services**

The Customer is responsible for contacting the U.S. Post Office. www.USPS.com to initiate the mail Forwarding process. When completing this task complete the street address portion (401 E. 8th St, Suite 214) and then you will be prompted to add your PMB #.

All information in this contract must mirror the information on the USPS Form 1583.

D. **Sample Customer Mailing Address**

Line 1: Customer's Name and/or Business Name

Line 2: 401 E 8th St., Ste 214 (Your Personal Box (PMB) number) 7452

Line 3: Sioux Falls, South Dakota 57103

E. Confidentiality

All personal information give by Customer to Your Best Address shall remain strictly confidential. Your Best Address will not sell, rent, or otherwise give away any confidential information of Customer, except to satisfy requests made by local or federal law enforcement agencies or postal inspectors according to federal law. The use of Your Best Address for any unlawful purpose is strictly prohibited. If Customer uses any service provided by Your Best Address in violation of South Dakota or Federal Law, all services to Customer will be terminated pursuant to Section B (Termination of Services)

F. Arbitration Clause

Any claim or controversy arising out of or relating to this agreement shall be settled by binding arbitration. This Arbitration shall be conducted under the rules of the Commercial Arbitration Rules, promulgated by the American Arbitration Association, except for the provisions listed explicitly below. The arbitration hearing shall take place in Sioux Falls, South Dakota before single arbitrator who shall be chosen by the party not seeking arbitration. The arbitration will be done in accordance with relevant South Dakota and Federal Laws. The scope of discover for this process shall be decided by the arbitrator. No demand for arbitration may be made when the legal or equitable proceedings the claim is based on would be barred by the applicable statute of limitations. The arbitrator shall not award punitive damages. The party demanding arbitrations or any legal or equitable claim that will give rise to arbitral proceedings under this clause shall pay for arbitrator compensation and applicable filing fees. The arbitration proceedings and arbitration award shall be kept strictly confidential by the parties, except as otherwise required by law for enforcement of said agreement.

G. Contact Information

Customer service is very important to us. Your Best Address is happy to answer any questions that you might have. Please contact us through whichever method you would prefer.

Office hours are Monday thru Friday – 9:00 AM to 5:00 PM Central Daytime Time

Mail us at: **Your Best Address**
401 E 8th St., Ste. 214
Sioux Falls, SD 57103

Email us at: mail@yourbestaddress.com Mail

billing@yourbestaddress.com Billing

billing@yourbestaddress.com Clients and New Clients Registration

manger@yourbestaddress.com

vehicles@yourbestaddress.com - Vehicle Registration

Call us at 1-800-419-1690 or 605-334-5313.

H. Vehicle Registration

If you wish to request vehicle registration, please refer to the separate Vehicle Registration form. *Your Best Address is UNABLE to process any Vehicle Registration requests until the PERSONAL MAILBOX & MAIL FORWARDING AGREEMENT and all applicable paperwork has been received and processed by Your Best Address. This typically takes 1 week, at which point we will contact you.*

Your Best Address – 401 E. 8th St., Ste. 214, Sioux Falls, SD 57103

Please print and sign. Each person on the application must print and sign.

Print Customer's Name: Joshua Lapin *Date:* 02/25/21 *2020*

Customer's Signature: Joshua Lapin *Date:* _____ *2020*

Print Customer's Name: Joshua Lapin *Date:* 02/25/21 *2020*

Customer's Signature: Joshua Lapin *Date:* _____ *2020*

Your Best Address Representative Signature: [signature] Date: 2-26-21 ~~2020~~

Thank you for choosing Your Best Address!! We look forward to serving you!!

Your receipt from Airbnb

Receipt ID: RC46WK928Z · February 2, 2021

Rapid City

28 nights in Rapid City

Tue, Feb 23, 2021 Tue, Mar 23, 2021

Private room · 1 bed · 1 guest

Redacted
[illegible] SD 57701
[illegible]

[illegible]

[illegible]
Go to itinerary Go to listing

[illegible]

Cancellation policy

[illegible] Feb 23 [illegible] **Get full details**

[illegible]

Price breakdown

$54.00 x 28 nights	$1,512.00
20% monthly price discount	-$302.40
Cleaning fee	$7.00
Service fee	$129.17
Total (USD)	**$1,345.77**

Payment

MASTERCARD ···· 0840 February 2, 2021 [illegible]	$1,345.77
Amount paid (USD)	**$1,345.77**

Have a question?

Visit the Help Center

Airbnb service fee

[illegible] **Go to Payment Details to view VAT invoice.**

Occupancy taxes

[illegible]

Airbnb Payments, Inc.

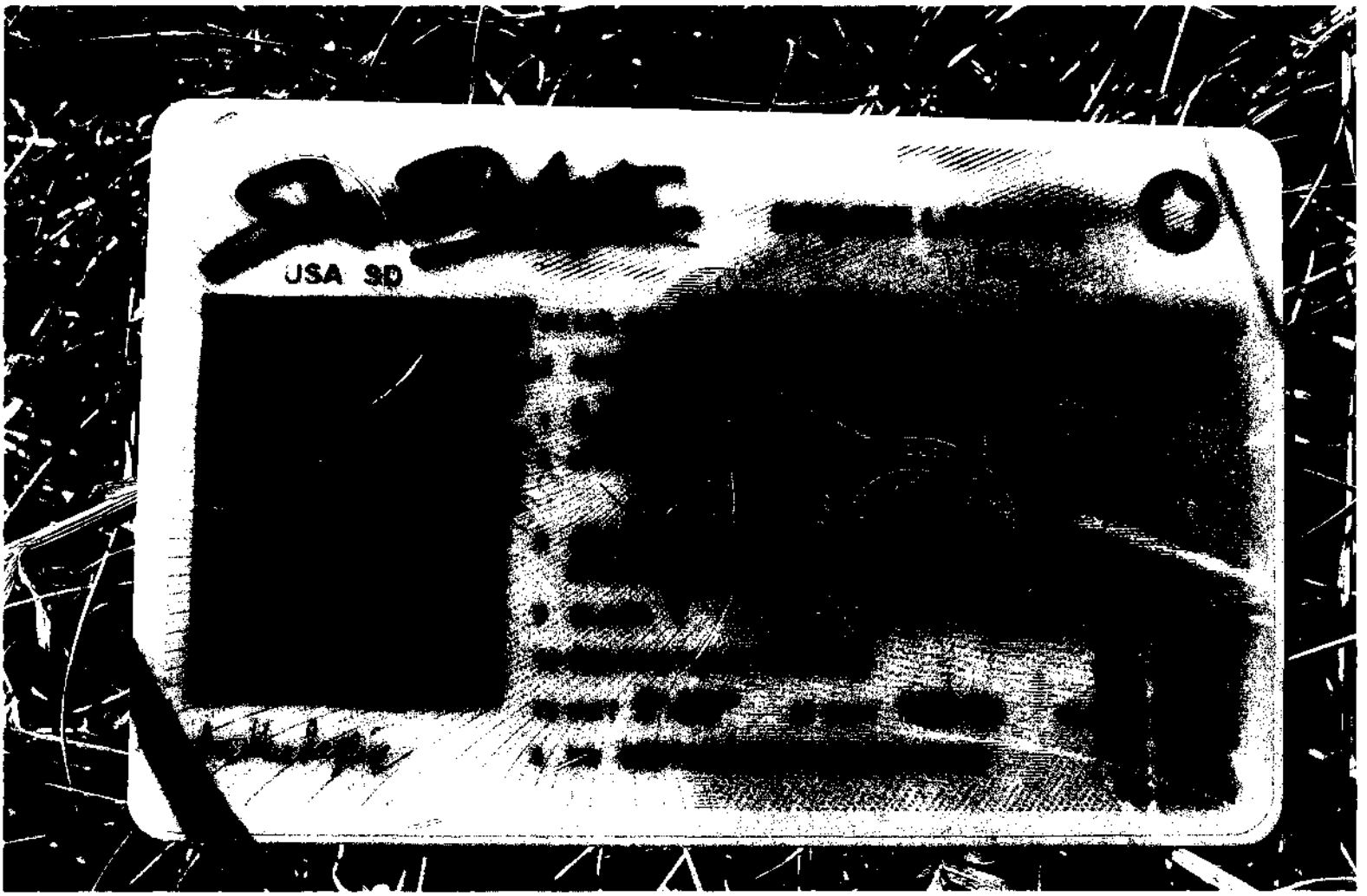
[illegible] **www.airbnb.com/terms** [illegible]

Airbnb Stays, Inc.

[illegible]

Payment processed by:
[illegible]
[illegible]

[illegible]
[illegible] CA [illegible]
www.airbnb.com



Voter Registration Information for

Residence Address
Joshua Albert Lapin
401 E 8TH ST, SIOUX FALLS
Political Party: REP

County: Minnehaha

Legislative District: 15

County Commissioner District:

Municipality: Sioux Falls

School District: Sioux Falls School District 49-5

[redacted]

Your sample ballot is not available for viewing yet.
Not all schools and municipalities currently conduct their elections with this system. If you believe this information is in error, please contact your County Auditor for more information.

Polling Place Name: Sioux Falls Main Library

Polling Place Address: 200 N Dakota Ave, Sioux Falls, SD

Precinct: Precinct-0414

EXHIBIT

D

Second Reading and Final Passage of S.B. 139

Mr. Chairman: 00:03
Senate Bill 139 Having had a second reading is up for consideration and final passage. Are there any remarks? Senator Deibert?

Senator Deibert: 00:13
Thank you, Mr. President. At this time, I'd like to move the amendment 139 G.

Mr. Chairman: 00:20
Motion to Amend 139 G has been made and seconded comments on the motion to amend Senator Deibert.

Senator Deibert: 00:26
Thank you, Mr. President. The amendment G is basically a clarification requested by the Secretary of State and the auditors. It just clarifies the language on the 30-day period. So I have...

Mr. Chairman: 00:40
Further remarks on the motion to amend. Hearing none members in favor of the motion to amend will say aye. Opposed nay. Motion carries. Several 139 is so amended for the remarks on Senate Bill 139, as amended. Senator diaper.

Senator Deibert: 00:59
Thank you, Mr. President. This bill came to us from a grassroots effort in painting County, my concern voters and citizens and the county commission, that we have facilities in the state that allow overnight residency and therefore you can register to vote the next day and vote so that this bill tries to offset that by requiring a 30 day residency in the state before you vote. Other thing this bill does in section four is brings the voter registration affidavit into statute. I urge you to vote for this bill.

Mr. Chairman: 01:37
Further remarks on Senate Bill 139. Senator Bolin

Senator Bolin: 01:42
Question for the prime sponsor.

Mr. Chairman: 01:45
State your question.

Senator Bolin: 01:47
My question is over the last 10 or 12 years have you seen any significant changes in voter results in Pennington county because of the influx of one day voters?

Mr. Chairman: 02:01
Senator Deibert you wish to answer?

Senator Deibert: 02:04
Yes, Mr. President, I do not have the statistics in Pennington County. But we have seen numerous new registrants using the one day residency, and we see some participation in the elections.

Mr. Chairman: 02:20
Senator Bolin, you have the floor.

Senator Bolin: 02:21
Thank you. Well, I'm going to urge you to resist this bill. We're a very we're becoming a more mobile society. We've got lots of people who are involved in the, you know, this RV people, they travel around, and they are American citizens, and they have a right to vote as well. We can talk about one day, 30 days a host of different things. But if we don't allow these people to vote, what we have done, I believe, is we've taken away the franchise from them.

And I don't want to do that. We don't know what other states do before we pass this bill. We should know what other states do to decide if everybody's going to have a 30 day pattern, then probably a number of people will be disenfranchised because they might be moving every two weeks. I just think there's a lot of problems with this particular bill. There's a lot of questions about residency. We've had various questions about residency in regards to political candidates. This question I believe, came up in district one this last year. This is a bill I believe that's premature at this time. So I would urge you to defeat this bill, thank you so much.

Mr. Chairman: 03:38
Further remarks. Sir Crabtree.

Senator Crabtree: 03:42
Thank you, Mr. Chair, I guess I would just like to mention a couple of things to the body. One, we're not talking about Canada's candidacy, or any of the other items, what we're talking about is not the right to vote, we're talking about registering. So if you look at this bill, this is about registering to vote, and having to be here 30 days, consecutive 30 days before you register to vote. So let's just make sure that everybody is aware of that key difference. Thank you

Mr. Chairman: 04:10
for the remarks. President sir Johnson.

David Johnson: 04:14
Thank you. So for the senator from Canton I. I've got a couple of responses. I think I heard the senators say there are a lot of questions about this. And there are a lot of questions about this. And they were a lot of questions about that. But I didn't hear a single question. What this bill does is defines residency. It's all it does. It doesn't take away any person's ability to vote. It defines the fact that you might have to, you might have to be an actual resident in South Dakota to vote in South Dakota is resident in South

Dakota's elections. Scoreboard County. ballot issues. State legislator, Governor, you know the way it is right now. You can vote in South Dakota, you can claim residency if you're here past midnight. If you're here for 12 hours, you can claim residency and then you can hop on down to the ballot box and vote as it South Dakota citizen. It's just wrong. Where are all these questions? This issue that came up back in 2020 would have been resolved.

There was a question in this in this legislature about residency of a couple of the senators and representatives. Had this bill been intact at that time, that question would have been resolved without even being brought up. residency, residency of South Dakota, do you want residents of South Dakota voting? Or do you want somebody who spent the night and then turns around votes? This is a solid, guess. Let's have people from South Dakota who actually live here, vote in our elections. Please vote positively. Senate Bill 139.

Mr. Chairman: 06:23
Further remarks, Senate Bill 139. Senator Anessba.

Senator Anessba: 06:30
Thank you, Mr. President. And the good senator from Canton raised a good question about are there other states that have a durational requirement, and I just pulled this up from the National homeless organization. And their whole point is you don't need a home to vote. But there are a number of states that do have durational requirements. So this isn't new. I just glanced at the list here and I could see that Alaska, Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, they all have 28 to 30 day state residents.

And I could keep going but this isn't a new thing. And I think it's important as we do become more mobile, that, that we want to know that people at least were in the state for 30 days before they register to vote. So I'm glad for the good senator from Morris Kenny brought this bill. Thank you, Mr. President. So please vote vote in favor.

Mr. Chairman: 07:25
Further remarks. Does any member wish to speak before Senator Deibert speaks a second time in closing? Hearing none, Senator Deibert and closing.

Senator Deibert: 07:43
Thank you, Mr. President. We've had a lot of conversation about this today. And a couple clarifications. It's 30 days not consecutive days, so it doesn't handicap these visitors. The other thing that I think is most important is that with the new dynamics were seen with ballot measures that people could have used this situation as it is now. I think 30 days is a reasonable time to be in the state to become a South Dakotan. And in closing, I'll say we want South Dakotans that are residents here which this bill is all about. We want South Dakotan voting on South Dakota elections. I urge your vote for for this bill. Thank you very much.

Mr. Chairman: 08:24
No further remarks a question before the Senate is final passage of Senate Bill 139. Members in favor vote aye. Those opposed nay? Secretary will call roll.

Secretary: 8:34
Senator Bill, yes. Bolin, no. Bardot, aye, Breitling, aye. Castleberry, no. Crabtree, aye. Davis, aye. Deibert, aye. Diedrich aye. Duhamel, aye. [inaudible] Mueller, aye. Hoffman, yes. Huntoff, aye. Johnson, aye. Klum, Pardon, Klum, nothing. Phobk Jack, no, Kopeck Steve, aye. Larson, aye. Maihar, aye. Mel Hoff, aye. Anessba, aye. Nordstrup, no. Odin, aye. Phishky, aye. Reed, aye. Rao, aye. Schoenebeck, aye. Shanek Fish, no. Stelzer, aye. Tobin, aye. Wheeler, aye. Wick, aye. Wink, aye. Sickment, aye.. Mr. President, there are 28 yays, 6 nays and one excused.

Mr. Chairman: 09:44
Senate Bill 139 have received an affirmative vote of a majority of the members elect is hereby declared passed. Any questions on the title? Hearing none titled incorrect.

EXHIBIT

E

Residency Laws

SOUTH DAKOTA LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

ISSUE MEMORANDUM 2020-05

Introduction

On the surface, residency appears to be a simple concept. However, being a "resident" or having "residency" can apply to many rights and responsibilities such as voting, hunting, fishing, education, taxes, marriage, divorce, wills, trusts, and welfare. Residency laws can vary depending on the context to which they are applied. A uniform definition, whether within a state or several states, could be difficult to achieve. Even the U.S. Supreme Court struggles with cases involving residency and what it means to be a resident. This issue memorandum will review the background of residency laws, what South Dakota's current residency laws are, and how they compare to other state residency laws.

Domicile and How it Applies to Residency

Before discussing residency, it is important to understand the legal concept of domicile. Each state may describe it a little differently, either through statute or through court cases, but the basic premise is the same. According to Black's Law Dictionary, domicile is "the place at which a person has been physically present and that the person regards as home." Domicile encompasses two concepts: (1) a person physically resides within a certain jurisdiction; and (2) the person intends to reside in that jurisdiction permanently. The concept of domicile is broad and used in many legal contexts, which can be subjective.

The concepts of residency and domicile are often intertwined. The difference between them is residency describes the physical locations where a person lives, while domicile is a legal concept that considers the intent of the person.

Residence	"I Live Here."
Domicile	"I Live Here and Plan to Do So Permanently."

A person can never have more than one domicile because a person can never intend to permanently reside in two different places. However, a person can never lose a domicile without gaining another. Alternatively, a person can have multiple residences. For example, a person owns homes in Arizona and South Dakota. The person lives in South Dakota eight months of the year and has a South Dakota driver license but lives in Arizona four months during the winter. The person may reside in both states, but that person is only domiciled in South Dakota because South Dakota is where the person considers home.

In statute, states frequently define residency as being domiciled in the state's jurisdiction, so the terms often get confused for one another. Regardless, domicile is typically the standard that will be applied when residency is a requirement.

Constitutional Considerations

There are several constitutional rights and protections that impact a state's ability to define and restrict residency. The U.S. Supreme Court has found three considerations that apply to residency: the right to interstate travel; federal jurisdiction over interstate commerce; and protection under the Privileges and

Immunities Clause. Because of these critical constitutional decisions, states must ensure any residency laws they impose have rational, compelling reasons to support them.

Right to Interstate Travel

A critical aspect of residency requirements is the right of interstate travel. Essentially, states cannot impose unreasonable barriers that would restrict a person's ability to travel between states. In *Shapiro v. Thompson* (1969), the U.S. Supreme Court determined that unreasonably requiring a person to live in a state for an established period before receiving certain benefits is unconstitutional. These are called durational residency requirements (DRRs). In *Shapiro*, California imposed a one-year DRR before a person could receive welfare benefits. California argued the requirement was necessary to prevent people from temporarily moving to California for purposes of qualifying for welfare benefits. The Supreme Court disagreed and found DRRs were constitutional if they advanced a compelling state interest. Preventing people from receiving the assistance they would otherwise be eligible for was not a valid reason.

In the wake of this decision, several Supreme Court cases addressed DRRs, including access to non-emergency medical care, voting, and professional licensure. One crucial case was *Dunn v. Blumstein* (1972). In *Dunn*, a college professor attempted to register to vote after moving to Tennessee for a new job. He was denied the right to register because Tennessee imposed a one-year DRR before being allowed to vote. The Court agreed it was important for Tennessee to ensure election integrity and complete administrative requirements before an election, but that could be achieved in thirty days; a year was not necessary. Therefore, the Court stated that DRRs could be imposed, but only if they were reasonable. Since one year was not reasonable, the Court voided the law.

Notably, the Court treats certain DRRs differently. For example, the Court has allowed significantly longer DRRs for in-state tuition rates (12 to 24 months) or obtaining a divorce (12 to 18 months). There is no stated justification for distinguishing these cases from others. Analyzing the cases, the Court seems to balance the benefits received; compelling state interests; and disparate impact caused between residents and nonresidents.

Federal Jurisdiction Over Interstate Commerce

Beyond the right of interstate travel, states must ensure they do not interfere with interstate commerce. Congress has the power over interstate commerce; therefore, states may not impose laws that would regulate or interfere with interstate commerce. In other words, states cannot favor in-state economic interests over out-of-state interests. For example, in *Tennessee Wine and Spirits Retailers Association v. Thomas* (2019), the court voided a Tennessee law that required a person to have lived in Tennessee for two years before being eligible to get an alcohol distributor license. This law protected resident alcohol distributors from out-of-state competition and thus violated the commerce clause of the U.S. Constitution.

Protection under the Privileges and Immunities Clause

Art. IV, Sec. 2 of the U.S. Constitution states *"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."* There are several U.S. Supreme Court cases that have restricted states' ability to impose residency requirements unless there is a compelling state objective because it would deny a nonresident the same "Privileges and Immunities" a resident has. For example,

in *Supreme Court of N.H. v. Piper* (1989), the U.S. Supreme Court ruled that New Hampshire could not require a person to be a resident in order to be a lawyer in the state.

Residency Laws

Voting and Elected Office

Voting laws use residency to determine who may vote in a state. States use domicile to determine whether a person is a resident of the state for purposes of voting. The major exception is about half of states impose a registration deadline. Because of the *Dunn* case discussed earlier, states only impose a deadline between ten and thirty days prior to the election.

South Dakota law defines residency under SDCL 12-1-4, which restates the legal concept of domicile. Additionally, under SDCL 12-4-5, a person must be registered to vote fifteen days prior to the election in order to vote. However, the South Dakota Constitution provides that a person does not lose the right to vote in one jurisdiction until that right is established in another (S.D. Const. Art. VII, Sec. 2).

Additionally, a person generally must be a registered voter or qualified elector in the jurisdiction where they are seeking elected or public office. Some examples are legislators (S.D. Const. Art. III, Sec. 3); judicial personnel (S.D. Const. Art. V, Sec. 6); county commissioners (SDCL 7-8-2); township offices (SDCL 8-4-1); mayors or aldermen (SDCL 9-8-1.1); sanitary districts (SDCL 34A-5-21.2); conservation districts (SDCL 38-3-39); and water districts (SDCL 46A-3B-2). An elected office becomes vacant when the person holding the office no longer maintains residence in the jurisdiction (SDCL 3-4-1). If a person is seeking to be a governor, lieutenant governor, or be a state senator or representative, S.D. Const. Art. III, Sec. 3 and Art. IV, Sec. 2 requires that the person be a resident for two years preceding the election.

Taxes

Tax laws also use domicile to determine whether a person is responsible for paying certain state taxes. Even if domicile is used, most states impose a certain amount of time a person must live in the state to be considered a resident. Typically, it is at least six months; some states require at least seven to nine months.

South Dakota does not levy several taxes that other states impose, such as a state income tax. However, other states may tax people or property within South Dakota based on those states' laws. For example, some states may tax trust distributions originating from a South Dakota resident's trust if the distributions go to a beneficiary in another state. Or, states may tax the income of South Dakota residents who work in their state or residents who split their time between South Dakota and another state. Therefore, being aware of how other states may define residency for the purposes of taxes can be important to know the impact on South Dakotans.

Hunting and Fishing Licenses

All states have two tiers of hunting and fishing licenses: resident and nonresident. To qualify for a resident license, almost all states apply the domicile standard in addition to a DRR. Some states have short periods, such as sixty days, while others require up to a year before one is eligible for a resident license. Almost all states specify that a person can only have a resident license from one state. South Dakota has similar laws.

According to SDCL 41-1-1(22), a resident is "*a person having a domicile within this state for at least ninety consecutive days immediately preceding the date of application for, purchasing, or attempting to purchase*

any license required under the provisions of this title or rules of the commission, who makes no claim of residency in any other state or foreign country for any purpose, and other than for a person described in § 41-1-1.1, claims no resident hunting, fishing, or trapping privileges in any other state or foreign country, and prior to any application for any license, transfers to this state the person's driver's license and motor vehicle registrations." Additionally, South Dakota statute provides a detailed list of categories of persons who qualify as state residents (SDCL 41-1-1.1) and what factors terminate South Dakota residence (SDCL 41-1-1.2).

In-State Tuition for Higher Education

State higher educational institutions, in compliance with state statutes, are generally responsible for developing their own policies regarding residency and in-state tuition as well as making residency determinations. Typically, the institutions also use the concept of domicile to determine whether a student is considered in or out of state. However, the U.S. Supreme Court has found that in-state tuition is not subject to the same restrictions as other residency-related laws and policies. Because of that, institutions require a student to have resided in the state for six to twenty-four months, depending on state law and the student's intention to remain in the state after graduation. If a student moves to a different state to attend a college or university, there is not an intention to stay. Therefore, domicile is not established.

South Dakota law is like the vast majority of states. SDCL 13-53-23.1 defines residence as *"the place where a person has a permanent home, at which the person remains when not called elsewhere for labor, studies, or other special or temporary purposes, and to which the person returns at times of repose. It is the place a person has voluntarily fixed as the person's permanent habitation with an intent to remain in such place for an indefinite period. A person, at any one time, has but one residence and a residence in not lost until another is gained."*

Additionally, SDCL 13-53-24 requires a person reside in South Dakota twelve months before being able to claim resident status. However, according to SDCL 13-53-25, moving to South Dakota to obtain resident status will not establish residence.

There are a few clarifications regarding in-state tuition. First, children generally always adopt the domicile of their parents. So, if both parents (or the custodial parent, if separated) are state residents, the minor will also be a resident for in-state tuition purposes. Second, veterans and active military personnel are exempt from the DRR (SDCL 13-53-29.1 and 13-53-41.2).

Other

As mentioned previously, other areas of law impacted by residency and domicile include:

Divorce - One party must be domiciled in the state to obtain a divorce decree (SDCL 25-4-30);

Welfare - The person applying for assistance must prove domicile through factors like voter registration in the county, having a state driver license, having a local bank account, or enrollment of their children in the local school (SDCL 28-13-3);

Education - Any person under the age of 21 whose parents are domiciled within a school district is entitled to free education through secondary school. For parents who are separated, the residence of the child is determined by which custodial parent has custody a greater portion of the school year (SDCL 13-28-9);

Wills - A deceased person's will is subject to the law where the person is domiciled. (SDCL 29A-2-401). Land and other real property are subject to the state law where it is located;

Agricultural Land - Only bona fide residents may own more than 160 acres of agricultural land, unless it is inherited (SDCL 43-2A-2);

Driver License - If someone has lived in the state 90 days, they are considered a resident eligible to obtain a driver license (SDCL 32-12-26.1); and

Property - Personal property is subject to the state law of the owner's domicile (SDCL 43-1-7).

Conclusion

Residency requirements impact South Dakotans every day. Residency is often defined using the domicile standard, which makes it subjective. However, a person can only have one domicile at a time. Once domicile is established, a person's residency is easy to resolve. However, when implementing residency requirements, states need to ensure they are not interfering with a person's constitutional rights. Presently, South Dakota's residency laws are like those in the rest of the country, but the laws differ in the definition of residency.

This issue memorandum was written by Matthew Frame, Legislative Attorney, on November 16, 2020, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

EXHIBIT

F

Business	Physical Address	District	County	Registered Voters
Dakota Post	3916 N Potsdam Ave. Sioux Falls, SD 57104	District 09	Minnehaha	4332
Buffalo Chip Campground LLC	20622 Fort Meade Way, Sturgis, SD 57785	District 29	Meade	6
Americas Way	514 Americas Way, Box Elder, SD 57719	District 33	Pennington	13,206
Walmart	1200 N Lacrosse St Rapid City, SD 57701	District 35	Pennington	46
Escapees	316 Villa Dr, Box Elder, SD 57719	District 29/31	Pennington	1432
Hart Ranch	23756 Arena Dr, Rapid City SD 57701	District 30/33	Pennington	453
Your Best Address	401 E 8th Street, Sioux Falls, SD 57103	District 15	Minnehaha	2291

EXHIBIT

G

Spend one night here and yo[illegible]be a [illegible]n Dakota resident

by: Rae Yost
Posted: Apr 2, 2021 / 02:58 PM CDT
Updated: Apr 2, 2021 / 03:07 PM CDT

SIOUX FALLS, S.D. (KELO) — South Dakota residency laws allow a person to spend one night in the state to qualify for residency.

"Stay one night at a South Dakota address," is one of three steps to obtaining South Dakota residency, according to the South Dakota Residency Center website.

There are a few caveats. The person cannot have a residence in another state and the individual is described as a traveler in the state's residency affidavit.

In order to qualify as a resident of South Dakota, you need a mailing address and a driver's license.

Businesses like the South Dakota Residency Center in Spearfish, Americas Mailbox in Box Elder and Dakota Post in Sioux Falls are able to help with establishing residency in South Dakota.

Would-be residents can get that address through at least three businesses that offer the service. Once the potential resident gets an address, they can obtain a driver's license.

The residency affidavit must be signed by a notary or South Dakota driver's license examiner. It is used to obtain a driver's license or state identification. The affidavit ask questions such as "Is South Dakota the state you intend to return to after being absent?"

Hint: Numerous blogs, videos and social media platforms on obtaining South Dakota as your domicile or becoming a South Dakota resident suggest saying "yes" to the question.

Once driver's license is approved, they need to return to South Dakota for only one day in five years so they are able to renew their driver's license.

RESIDENCY AFFIDAVIT
FOR SOUTH DAKOTA RESIDENTS WHO TRAVEL
AND DO NOT HAVE A RESIDENCE IN ANOTHER STATE

The purpose of the following questions is to determine if you meet the qualifications for an exception of the proof of residency requirements for obtaining a South Dakota Driver License or non-driver ID card.

This form must be signed by a notary of the public or a South Dakota driver license examiner

1. Is South Dakota your state of residence? _____Yes _____No

2. Is South Dakota the state you intend to return to after being absent? _____Yes _____No

3. Do you maintain a residence in another state? _____Yes _____No

This form must be accompanied by a valid one night stay receipt (no more than one year old) from a local RV Park, Campground, or Motel for proof of the temporary address where you are residing.

In addition you must submit a document (no more than one year old) proving your personal mailbox (PMB) service address (receipt from the PMB business or a piece of mail with your PMB address on it).

PLEASE NOTE: South Dakota Driver Licensing records are used as a supplemental list for jury duty selection. Obtaining a South Dakota driver license or non-driver ID card will result in you being required to report for jury duty in South Dakota if selected.

I declare and affirm under the penalties of perjury (2 years imprisonment and $4000 fine) that this claim (petition, application, information) has been examined by me and, to the best of my knowledge and belief, is in all things true and correct. Any false statement or concealment of any material facts subjects any license or ID issued to immediate cancellation.

_____ _____
PRINT NAME **DATE**

_____
SIGNATURE

_____ **(SEAL)**
Notary/South Dakota Driver License Examiner Signature

Commission Expires:_____

If applicant is under the age of 18 a parent's signature is required.

_____ _____

PARENT'S NAME DATE

_____

PARENT'S SIGNATURE

REV 5-2019

South Dakota's law appeals to full-time travelers such as those who live in a recreational vehicle.

Trade magazines and other source estimate there are about 1 million people in the U.S. who live full-time in a recreational vehicle. The data is from about 2018 and 2019. A University of Michigan study from about 2005 estimated there were about 500,000 full-time RVers.

South Dakota is so appealing to those who live full-time in a recreational vehicle that multiple traveler blogs, websites and social media pages promote the option. Former residents of New Jersey, California, Illinois, for example, have all posted on various social media sites and websites, about becoming South Dakota residents.

One site, called escapees.com provides details for full-time travelers on how to establish South Dakota residency.

So do the websites of three businesses which offer the mailing address service. Americas Mailbox in Box Elder, South Dakota Residency Center in Spearfish and Dakota Post in Sioux Falls are two address companies.

Nellie Taylor of Americas Mailbox said it has 15,500 members.

Members include full-time RVer's military members, snowbirds and traveling nurses, Taylor said.

Americas Mailbox and Dakota Post tout using the mail forwarding/address service as way to establish South Dakota residency, the businesses also say the forwarding service is a benefit to those who may be working in another state, for example.

| Vaccine passports: What you need to know
| Apartment projects by three companies driving up ...
| Possible 2035 Amtrak expansion skips on South Dakota

Both business websites lists partners and information as a way to help individuals use their services and potentially establish and maintain a South Dakota domicile or address.

Campgrounds and/or motels are some of the partners of mail forwarding services. At least one of the businesses has its own campground.

Individuals need a place to stay while they apply for a South Dakota residence or when they return to renew their driver's license.

Dakota Post lists the Tower Campground on 12th Street in Sioux Falls as one of its partners, for example.

- Other partners of the three companies include insurance businesses:
- The Americas Mailbox members list 514 Americas Way, Box Elder, S.D. 57719 as their address.
- The Dakota Post address is 3916 N Potsdam Ave, Sioux Falls, SD 57104-7048.

What are the benefits of benefits of being a South Dakota resident when the resident doesn't physically live here?

Here's what the mail forwarding businesses and social media supporters say: Tax savings.

Residents who spend only one day every five years here don't pay any state income taxes, their Social Security and retirement pensions are not taxed and there are no gift or inheritance taxes.

Vehicle registration fees, vehicle taxes and vehicle insurance fees are among the lowest in the nation. South Dakota does not require annual vehicle inspections.

Dollars Closeup Concept. American Dollars Cash Money. One Hundred Dollar Banknotes. (Getty)

What else do one-day state residents get to do? Vote.

There are 9,289 registered voters with the Americas Way address, said Lori Severson, the election supervisor for Pennington County.

(Getty Images)

The county created a voting precinct called AW for those voters, Severson said.

A total of 5,856 votes were cast in the AW precinct in the Nov. 3rd, 2020, general election, Severson said. The majority voted by mail (5,817), she said. Thirty-nine registered voters voted in person.

Minnehaha County sent out 2,226 absentee ballots for the November 2020 election to registered voters with the 3916 N. Potsdam Ave. address, county auditor Ben Kyte said.

One-day state residents can cast votes in elections for city council or school board.

The 2019 estimated population of Box Elder was 10,119, according to the U.S. Census Bureau.

The 5,856 votes cast by one-day residents is more than half the 2019 estimated population of Box Elder.

While lower vehicle registration fees are one benefit cited by advocates for establishing South Dakota residency, individuals don't need to be a state resident to register their vehicles in the state.

The South Dakota Department of Revenue website says: "You should know that your state may prohibit registering your vehicle in another state. You will need your original out of state titles, a copy of your state driver license, social security number, and a Motor Vehicle and Boat Title & Registration Application. Take this paperwork to your local county treasurer's office to complete registration process. They will be able to tell you the appropriate fees pertaining to that county."

EXHIBIT

H

No. 2321, September Term, 2004
Court of Special Appeals of Maryland

Marycle v. First Choice Internet, Inc.

166 Md. App. 481 (Md. Ct. Spec. App. 2006) · 890 A.2d 818
Decided Jan 26, 2006

No. 2321, September Term, 2004.

January 26, 2006.

Appeal from the Circuit Court, Montgomery
482 County, Durke G. Thompson, J. *482

Michael S. Rothman of Rockville, for appellant.

Andrew M. Dansicker (Schulman, Treem, Kaminkow, Gilden Ravenell, PA on the brief) Baltimore, for appellee.

Argued before SALMON, ADKINS and BARBERA, JJ.

487 *487

ADKINS, J.

This case requires us to consider how established law governing personal jurisdiction and the Commerce Clause applies in cyberspace. Asserting claims for both monetary and injunctive relief, appellants MaryCLE, LLC (MaryCLE) and NEIT Solutions, LLC (NEIT) filed suit against appellees First Choice Internet, Inc. and Joseph Frevola, the president of First Choice, in the Circuit Court for Montgomery County. Appellants maintained that appellees, whom we designate as "First Choice,"[1] violated the Maryland
488 Commercial Electronic *488 Mail Act ("MCEMA"), Md. Code (1975, 2005 Repl.Vol.), § 14-3001 *et seq.* of the Commercial Law Article (CL), by sending them 83 unsolicited false and misleading commercial emails.

[1] Although we generally refer to First Choice Internet, Inc. and its president, Frevola, collectively as "First Choice," in some contexts we shall distinguish between the corporation and the individual. Similarly, we refer to appellants collectively as "MaryCLE," but also sometimes refer to each appellant separately.

First Choice responded by filing a "Motion to Dismiss, or Alternatively, Motion for Summary Judgment," alleging that (1) MCEMA violates the "dormant Commerce Clause" of the United States Constitution, (2) the circuit court lacked personal jurisdiction over First Choice and Frevola, (3) Frevola could not be sued individually, and (4) First Choice had not violated MCEMA. After a hearing, the circuit court granted the motion to dismiss and issued a written opinion in which it ruled that (1) MCEMA violates the "dormant Commerce Clause" of the U.S. Constitution as applied in this case, (2) Maryland lacks personal jurisdiction over First Choice and Frevola, and (3) no cause of action was stated against Frevola individually. In doing so, the circuit court considered affidavits submitted by the parties. Accordingly, we treat the motion as one for summary, judgment as required by Md. Rule 2-322(c).

As discussed in detail below, we shall reverse because we conclude that personal jurisdiction over First Choice is proper and that MCEMA as applied in this case does not offend the Commerce Clause. We also determine that there were material disputed facts concerning the individual liability

of Frevola that rendered the grant of summary judgment in his favor erroneous. *See* Md. Rule 2-501.

FACTS AND LEGAL PROCEEDINGS The Parties

MaryCLE, LLC (pronounced "miracle"), an acronym for "Maryland Consumer Legal Equity," describes itself as a "consumer protection firm" 489 that "protects consumers wronged *489 by online . . . marketers[.]"[2] MaryCLE was founded by Eric Menhart, who at the time of the proceedings below, was a third-year law student at the George Washington University Law School. MaryCLE maintains a website on which it states its mission to "protect consumers via promotion of responsible marketing practices, mediation, and litigation." First Choice, on the other hand, describes MaryCLE as a company that

> [2] On review of a motion for summary judgment, we resolve all factual inferences against appellees, as the moving parties. *See Merchants Mortgage Co. v. Lubow*, 275 Md. 208, 217, 339 A.2d 664 (1975). This summary of facts reflects that standard.

> set up Internet email accounts to receive emails from Internet marketing companies . . . and, when it received a substantial number of email solicitations, contact[ed] the targeted marketing company and demand[ed] a substantial payment as "settlement" of its statutory damages claims under MCEMA in return for MaryCLE's promise not to file a lawsuit[.]

Although MaryCLE is registered in Maryland and has a Maryland mailing address, which is Mr. Menhart's home address in Adelphi, Maryland, the complaint and MaryCLE's own website and letterhead list its principal place of business as Washington, D.C. One of the email addresses "registered to and used by MaryCLE" is emj@maryland-state-resident.com.[3]

> [3] "EJM" are Mr. Menhart's initials.

NEIT Solutions, LLC is an interactive computer service provider ("ISP") that provides internet services, including the hosting of web space and use of email addresses, to MaryCLE. NEIT is a registered Maryland limited liability company that is located in Frederick, Maryland, although its computer servers are located in Colorado.

First Choice is an Internet marketing company based in New York that describes its purpose as "promot[ing] products for various third-party customers through 'opt-in' email mailings and promotions[.]" Joseph Frevola, who lives in New 490 York, is the President of First Choice. *490

Background

Before the events in this case began, First Choice entered into a partnership agreement with a company called Wow Offers, LLC.[4] Wow Offers supplied First Choice with email addresses of people who had allegedly "opted-in" to Wow Offers' services. First Choice asserts that ejm@maryland-state-resident.com was registered on a website called www.idealclick.com, which in turn provided that email address to Wow Offers. First Choice engaged the services of Master Mailings, LLC,[5] to send promotional emails, including those at issue in this case, to the email addresses obtained through Wow Offers. First Choice alleges that Master Mailings is located in Virginia.[6]

> [4] Wow Offers, LLC is not a party to this action.

> [5] Master Mailings, LLC is not a party to this action.

> [6] We can find no affidavit or other support for this contention in the record.

MaryCLE denies signing up for any "opt-in" services through www.idealclick.com or in any other way giving the email address ejm@maryland-state-resident.com to Wow Offers or First Choice. Nevertheless, on September 18,

2003, First Choice sent an email to MaryCLE at that address. The "From" line of the email indicated that the sender was "Exceptional Deals," with an email address of promotions@firstchoiceinternet.com. The "Subject" line of the email was "Interest Rates are at a 36 Year low-Act Now."

Although the email contained an "unsubscribe" link as well as a postal mailing address to which requests to be removed from the email list could be sent, MaryCLE did not avail itself of the "unsubscribe" option. Instead, it attempted to "Reply" to the email and requested to be removed from the mailing list. The reply was returned to MaryCLE as "undeliverable." MaryCLE did not send any written communications to the postal address contained in the email. Instead, for reasons not explained in the record, MaryCLE attempted to find a street mailing address for
491 "Exceptional Deals" through the *491 United States Postal Service. The Postal Service indicated that it had no address for "Exceptional Deals."

MaryCLE then utilized the free "WHOIS" feature on www.networksolutions.com, a website on which any member of the public can find contact information for the registrants of domain names.[7] After entering the domain "firstchoiceinternet.com," MaryCLE obtained Mr. Frevola's name, as well as an email and mailing address for First Choice. MaryCLE attempted to contact First Choice using this email address, but this email was also returned as "undeliverable." MaryCLE did not attempt to contact First Choice by postal mail at this point.

[7] A "domain name" is the "address of a computer network connection . . . that identifies the owner of the address," or ISP, such as "verizon.net" or "hotmail.com." *See* The American Heritage Dictionary of the English Language, 4th ed. 2000, http://www.bartleby.com/61/18/D0331850.html (last visited Jan. 13, 2005). *See also Verizon Online Servs., Inc. v. Ralsky*, 203 F.Supp.2d 601, 605 (E.D.Va. 2002) ("Subscribers use the ISP's domain name, . . . together with their own personal identifier to form a distinctive e-mail mailing address").

By September 30, 2003, MaryCLE had received an additional 23 emails from First Choice. MaryCLE maintains that it replied to each email with a request to be removed from the mailing list, but each time the reply was returned as "undeliverable."

MaryCLE next visited the First Choice website, www.firstchoiceinternet.com. On this site, MaryCLE found a working email address and phone number. MaryCLE sent an email to the email address, joe@firstchoiceinternet.com,[8] and left a voice mail at the phone number to inform First Choice that it did not wish to receive further emails. This email was not returned as undeliverable, which led MaryCLE to conclude that an email had finally been received by First Choice. MaryCLE's phone message was not returned.

[8] We assume this to be the email address of Mr. Frevola.

Despite these efforts, MaryCLE continued to receive 59 additional emails throughout the month
492 of October, at a rate *492 of approximately two per day. MaryCLE maintains that all 83 of the emails it received were opened in either Maryland or Washington, D.C. Examples of subject lines from these emails include "Urgent: Claim Now or Forfeit" and "Confirmation # 87717." MaryCLE asserts that it replied to every email, and each time its reply bounced back as "undeliverable." At no time, however, did MaryCLE click on the "unsubscribe" link located within the emails or send any written requests via postal mail to be removed from the mailing list. MaryCLE explains that it did not do so because "`unsubscribe' links are notoriously unreliable, and have been recognized by many to be a method via which marketers collect `live' e-mail addresses to be resold to other marketers."

On October 28, 2003, MaryCLE sent a second email to joe@firstchoiceinternet.com, and for the first time followed up with a letter sent via postal mail to Frevola. The letter was entitled "Notification of Violation of Maryland Law."[9] On October 29, 2003, the emails to MaryCLE ceased. On November 10, 2003, Mr. Frevola sent MaryCLE a letter in which he stated that MaryCLE's email address had been removed from First Choice's mailing list and that First Choice had ceased *all* of its mailings indefinitely.

[9] This letter is not contained in the record.

Court Proceedings

On December 31, 2003, MaryCLE and NEIT filed suit against First Choice and Frevola in the Circuit Court for Montgomery County. They alleged two counts for statutory damages under the Maryland Commercial Electronic Mail Act, and one count for injunctive relief. Before filing an answer, First Choice and Frevola filed a "Motion to Dismiss or, Alternatively, Motion for Summary Judgment," and MaryCLE filed a response. *See* Md. Rule 2-322(a). A hearing was held on October 13, 2004, and on December 9, 2004, the circuit court entered
493 an order granting the motion to dismiss. *493

Relying on the Maryland long arm statute, the circuit court determined that First Choice had not caused tortious injury in Maryland. Nor had it "regularly conduct[ed] business, engage[d] in persistent conduct or derive[d] revenues from Maryland." *See* Md. Code (1974, 2002 Repl.Vol. 2005 Cum.Supp.), § 6-103(b)(3)-(4) of the Courts and Judicial Proceedings Article (CJP).[10] The circuit court also declared that the exercise of personal jurisdiction over First Choice would violate its right to due process, because First Choice "did not intentionally direct their emails to the Plaintiffs in Maryland because the Defendants did not even know, and had no ability to know, where the Plaintiffs would actually open the email." The court explained that the geographic options were limitless.

[10] In 2000, the General Assembly added subsection (c) to Md. Code (1975, 2005 Repl.Vol.), section 6-103 of the Commercial Law Article (CL), which states that its provisions apply to "computer information and computer programs in the same manner as they apply to goods and services." "Computer information" is defined in CL section 22-102 as "information in electronic form which is in a form capable of being processed by a computer."

The email addresses of MaryCLE are connected to a computer registered in Virginia, MaryCLE's principal place of business is in Washington, D.C. and MaryCLE is a registered Maryland corporation. The Defendants had no way of knowing whether MaryCLE would receive its email in Virginia, D.C., Maryland, or any other state for that matter. Thus, the Defendants did not "purposely" direct their emails to Maryland residents.

In considering the constitutionality of MCEMA, the circuit court explained that, "[o]n its face, [the] language [of MCEMA] does not discriminate against residents from other states." It determined, however, that, "when the language **is applied to the case at bar** it does violate the dormant Commerce Clause because the law crosses state boundaries to reach persons who open their email in other states." *Id.* (emphasis added). The court reasoned that First Choice "had no contact with the State of Maryland because their emails were sent from New York, routed through Virginia and
494 Colorado, *494 and finally were received in Washington, D.C." It explained that MCEMA violates the Commerce Clause because it regulates conduct occurring wholly outside Maryland borders.

> The statute does not provide that the email must be received in Maryland, instead the statute pertains to situations where an email sender in one state sends an email to a Maryland resident living or working in another state. Thus, the statute, *as applied in this case,* seeks to regulate the transmission of commercial email between persons in states outside of Maryland, even when the email never enters Maryland, as long as the recipient is a Maryland resident. (Emphasis added.)

The circuit court finally ruled that Frevola had no personal liability for the alleged MCEMA violations. It reasoned that, under Maryland law, an officer of a corporation can only be held personally liable for a tort if he "specifically directed the particular act to be done or participated or co-operated therein." *Shipley v. Perlberg,* 140 Md.App. 257, 265-66, 780 A.2d 396, *cert. denied,* 367 Md. 90, 785 A.2d 1293 (2001). The court decided, as a matter of law, that Mr. Frevola "did not specifically direct First Choice to send an email to MaryCLE or to any Maryland residents."

QUESTIONS PRESENTED

MaryCLE poses three questions for our review:

> I. Did the circuit court err when it determined that Maryland lacks personal jurisdiction over First Choice and Frevola?
>
> II. Did the circuit court err when it determined that, as applied in this case, the Maryland Commercial Electronic Mail Act violates the Commerce Clause of the U.S. Constitution?[11]

495 *495

[11] The circuit court decided the constitutional issue first, and then addressed jurisdiction "to further substantiate" its ruling. We will address the jurisdictional question first, for if we have no jurisdiction, then the constitutional issue is not properly before us. *See, e.g., Curran v. Price,* 334 Md. 149, 171, 638 A.2d 93 (1994) ("If a decision on a constitutional question is not necessary for proper disposition of the case, we will not reach it").

[11] The circuit court decided the constitutional issue first, and then addressed jurisdiction "to further substantiate" its ruling. We will address the jurisdictional question first, for if we have no jurisdiction, then the constitutional issue is not properly before us. *See, e.g., Curran v. Price,* 334 Md. 149, 171, 638 A.2d 93 (1994) ("If a decision on a constitutional question is not necessary for proper disposition of the case, we will not reach it").

> III. Did the circuit court err when it determined that Mr. Frevola could not be held personally liable for the statutory violations alleged by MaryCLE?[12]

[12] MaryCLE framed the issues in a different manner:

> I. Whether the trial court erred, as a matter of law, when it granted Appellees' Motion to Dismiss and found the MCEMA violative of the dormant Commerce Clause because it regulated conduct occurring wholly outside of Maryland and unduly burdened interstate commerce, even though the MCEMA applied by its very terms only to entities who send spam to Maryland residents.

> II. Whether the trial court erred, as a matter of law, when it held that Maryland could not exercise personal jurisdiction over Appellees because they did not purposefully direct their electronic mail to Maryland residents, despite the fact that the Complaint clearly stated the facts essential to the exercise of jurisdiction and the court made its own independent, unsupported findings of fact regarding Appellees' connections to Maryland without allowing jurisdictional discovery.
>
> III. Whether the trial court erred, as a matter of law, when it held that Appellee Frevola could not be held personally liable for fraudulent and misleading email sent to Petitioners although the Complaint clearly stated Frevola's personal involvement in sending the spam and the court was required to assume the truth of all well-pleaded facts contained in the complaint, as well as the logical inferences that flow from those allegations.

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> III. Whether the trial court erred, as a matter of law, when it held that Appellee Frevola could not be held personally liable for fraudulent and misleading email sent to Petitioners although the Complaint clearly stated Frevola's personal involvement in sending the spam and the court was required to assume the truth of all well-pleaded facts contained in the complaint, as well as the logical inferences that flow from those allegations.

Because we conclude that jurisdiction is proper and that this application of MCEMA does not offend the Commerce Clause, we will reverse the grant of summary judgment in favor of First Choice. We also reverse the circuit court's order granting summary judgment in favor of Frevola.

DISCUSSION Standard Of Review

Whether the circuit court erred in granting summary judgment in favor of First Choice and Frevola is a question of law that we review on the same record as the motion court, to determine if its decision was legally correct. *See Heat Power Corp. v. Air Prods. Chems., Inc.*, 320 Md. 584,

496 591, *496 578 A.2d 1202 (1990). Summary judgment is proper where there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Md. Rule 2-501.

The Maryland Commercial Electronic Mail Act

The Maryland Commercial Electronic Mail Act ("MCEMA," or "the Act") was passed by the Maryland General Assembly in 2002, and became effective October 1 of that year.[13] *See* CL § 14-3001 *et seq.* The Court of Appeals has recognized that this statute was passed "to curb the dissemination of false or misleading information through unsolicited, commercial e-mail, as a deceptive business practice." *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC,* 388 Md. 1, 16, 878 A.2d 567 (2005). At the time of its enactment, 21 other states had enacted laws to curb the proliferation of "spam"[14] email, or "UCE" (unsolicited commercial email).[15] *See id.* "Spam is

497 *497 the twenty first century version of junkmail and over the last few years has quickly become one of the most popular forms of advertising over the Internet, as well as one of the most bothersome." *Verizon Online Servs., Inc. v. Ralsky,* 203 F.Supp.2d 601, 606 (E.D.Va. 2002).

[13] Federal legislation to control the proliferation of unwanted email also exists. In 2003, Congress passed the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" ("CAN-SPAM Act"), which became effective January 1, 2004. *See* 15 U.S.C. § 7701 *et seq.* This law expressly supercedes all state regulation of email "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." 15 U.S.C. § 7707(b)(1).

The circuit court determined that because the federal law specifically reserves to states the right to control fraudulent and deceptive emails, which the Maryland statute does, the analysis in this case should focus on MCEMA. Neither party disputes this approach, and thus we also focus on the Maryland Act.

[14] The term "spam" originates from a skit by the British comedy troupe Monty Python, in which a group of Vikings, singing about the Hormel Foods meat product SPAM, "sang a chorus of `spam, spam, spam . . .' in an increasing crescendo, drowning out other conversation. Hence, the analogy applied because [spam email] was drowning out normal discourse on the Internet." Spam and the Internet, http://www.spam.com/ci/ci — in.htm (last visited Jan. 16, 2006). *See also Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC,* 388 Md. 1, 16 n. 12, 878 A.2d 567 (2005) (spam can be either commercial or noncommercial).

[15] Because not all spam is UCE, and because MCEMA only regulates UCE, we will be cautious in our use of these terms throughout this opinion.

MCEMA provides that a person may not "initiate," "conspire to," or "assist in" the "transmission of commercial electronic mail" either **from** a computer within Maryland or **to** an email address "that the sender knows or should have known is held by a resident of" Maryland, if the mail "[c]ontains false or misleading information" about either the origin or transmission path of the email, *see* CL § 14-3002(b)(2)(ii),[16] or "in the subject line" of the email, *see* § 14-3002(b)(2)(iii). "Commercial electronic mail" is defined as "electronic mail that advertises real property, goods, or services for sale or lease." § 14-3001(b)(1).

[16] In this section, unless otherwise noted, all citations to statutory sections refer to the Commercial Law Article.

The Act contains a presumption that the sender of UCE knows the recipient is a Maryland resident "if the information is available on request from the registrant of the Internet domain name contained in the recipient's electronic mail address." § 14-3002(c). The statutory damages allowed by the Act are the greater of $500 or actual damages to the recipient of the email, and the greater of $1000 or actual damages to the ISP. *See* § 14-3003(1) and (3). The Act also provides for the recovery of reasonable attorneys' fees. *See* § 14-3003.

I. Personal Jurisdiction A. Constitutional Framework

The question of whether a Maryland court can exercise personal jurisdiction over an out-of-state defendant starts with a two-part inquiry. *See Beyond Sys.*, 388 Md. at 14, 878 A.2d 567 "First, we consider whether the exercise of jurisdiction
498 *498 is authorized under Maryland's long arm statute," which is CJP section 6-103. *Id.* "Our second task is to determine whether the exercise of jurisdiction comports with due process requirements of the Fourteenth Amendment" of the Federal Constitution. *Id.* at 15, 655 A.2d 1265. With respect to this two-part test, Maryland courts "have consistently held that the purview of the long arm statute is coextensive with the limits of personal jurisdiction set by the due process clause of the Federal Constitution." *Id.* Thus, "our statutory inquiry merges with our constitutional examination." *Id.* at 22, 655 A.2d 1265.78 A.2d 567

In order to pass constitutional muster under the Due Process Clause, the defendant must have "minimum contacts" with Maryland such that our exercise of jurisdiction "does not offend `traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (citation omitted). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities" within Maryland. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). While the "nature" of the defendant's contacts with Maryland are important, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984), we must additionally consider "the relationship among the defendant, the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977), to determine whether the defendant "should reasonably anticipate being haled into court" in Maryland. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Generally, there are two types of jurisdiction: "specific" and "general."[17] "If the defendant's contacts with [Maryland also] form the basis for the suit," then Maryland courts have specific
499 jurisdiction. *Beyond Systems*, 388 Md. at 26, *499 878 A.2d 567. "If the defendant's contacts . . . are not the basis for the suit," then the defendant must have "continuous and systematic" contacts with Maryland such that we may exercise general jurisdiction. *Id.* at 22, 878 A.2d 567 (citations omitted).

[17] The Court of Appeals has explained that sometimes cases do not fit "neatly" into one category or the other. *See Camelback Ski Corp. v. Behning*, 312 Md. 330, 338-39, 539 A.2d 1107, *cert. denied*, 488 U.S. 849, 109 S.Ct. 130, 102 L.Ed.2d 103 (1988) ("*Camelback II*"). If this is the case, then

> there is no need to jettison the concept, or to force-fit the case. In that instance, the proper approach is to identify the approximate position of the case on the continuum that exists between the two extremes, and apply the corresponding standard, recognizing that the quantum of required contacts increases as the nexus between the contacts and the cause of action decreases.

Id. at 339, 539 A.2d 1107.

Because First Choice's email contacts with Maryland also form the basis of this suit, our analysis will be focused on whether Maryland can exercise specific jurisdiction over First Choice.[18] The Court of Appeals has adopted the Fourth Circuit's three-part test for determining whether specific jurisdiction exists:

> In determining whether specific jurisdiction exists, we consider (1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.

Id. at 26, 878 A.2d 567 (citing *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003)). We will discuss each prong of this test, and its application to First Choice, in the sections that follow.

[18] Neither party specifically addresses the type of jurisdiction that would or would not be appropriate here, although MaryCLE's argument more closely resembles one for specific jurisdiction.

B. The Parties' Contentions

MaryCLE's argument in favor of personal jurisdiction boils down to the allegation that
500 "sending `hundreds of thousands' *500 of commercial email messages would lead any rational marketer to believe that his messages would be received and read by residents in most any state in the nation." MaryCLE analogizes First Choice's email contacts with Maryland residents to "traditional mail, telephone calls, or even advertisements placed in a newspaper," which it contends Maryland courts have found to be sufficient contacts to meet jurisdictional requirements. MaryCLE further points out that, under the terms of MCEMA, the sender of a commercial email is presumed to know that the recipient of the email is a resident of Maryland if the information about the holder of the email account is available upon request from the domain name registrant. *See* CL § 14-3002(c). Referring to free searches available on websites such as www.networksolutions.com, MaryCLE explains that the domain name registry for "maryland-state-resident.com" contains a Maryland address.

First Choice, on the other hand, 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. It argues that the fact that it could have found out that "maryland-state-resident.com" was registered in Maryland does not mean that it "knew that the emails would be *received* in Maryland[.]" At 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.

C. Jurisdiction Over First Choice Is Proper In Maryland

This case amply demonstrates that "[e]ach new development in communications technology brings new challenges to applying the principles of personal jurisdiction." *Verizon Online,* 203 F.Supp.2d 601, 604 (E.D.Va. 2002). *See also McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957) (recognizing that advances in communications
501 *501 and technology have expanded the "permissible scope of personal jurisdiction"); *Hanson,* 357 U.S. at 250-51, 78 S.Ct. at 1238 ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone a similar increase"); *World-Wide Volkswagen,* 444

U.S. at 293, 100 S.Ct. at 565 (observing that, since *McGee,* "historical developments" have further relaxed the limits of due process).

Maryland state appellate courts have not had many opportunities to consider the application of personal jurisdiction law to cases concerning email and the Internet. *Beyond Systems* involves both, but is quite unlike this case.[19] Indeed, at oral argument, each party acknowledged that, because of the factual differences, *Beyond Systems* did not advance its arguments here. In the absence of an analogous email case, we will apply the three-part test adopted in *Beyond Systems,* [20] *see* 338 Md. at 26, 655 A.2d 1265, using three cases decided by
502 other courts to help shape our reasoning. *502

[19] In *Beyond Systems,* the Court of Appeals affirmed the Circuit Court for Montgomery County's dismissal of an MCEMA-based lawsuit on the grounds that the defendants did not have sufficient minimum contacts with Maryland. *Beyond Systems,* 388 Md. at 28, 878 A.2d 567. Unlike First Choice, the defendants in *Beyond Systems* did not direct the sending of the allegedly MCEMA-violative emails, and the connection between the sender of the email and the defendants was distant and tenuous. These contacts are markedly more attenuated than those in this case, and thus *Beyond Systems* is not particularly instructive, beyond its statement of the general principles.

[20] The circuit court relied on a more specific personal jurisdiction test for cases involving the Internet, articulated by the Fourth Circuit in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002). Under this test,

> a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Id. at 715.

We conclude that the result is the same no matter which of these tests is applied.

1. The Reasoning Of Three Other Courts

In a case in which the defendant corporation sent **one** commercial email to the plaintiff, a Utah resident, the Court of Appeals of Utah decided that the one email was sufficient to warrant the exercise of personal jurisdiction in a cause of action for violation of Utah's commercial email statute. *See Fenn v. MLeads Enters., Inc.*, 103 P.3d 156, 164 (Utah Ct.App. 2004), *cert. granted* 109 P.3d 804 (Utah 2005). The Utah court, considering that the Utah long arm statute (like Maryland's) extends as far as the limits of due process, found that the defendant "directed its agent [a marketing company] to solicit business, and that direction instantiates the purpose that makes the connection more than an `attenuated nexus.'" *Id.* at 162 (citation omitted). The court further determined that, even though the sender of the email did not know where geographically the email was opened, it was reasonable for the defendant to expect to be haled into court "wherever its email[s] were received." *Id.* Finally, the court concluded that Utah had an interest in "preventing its residents from receiving noncompliant email" and that this interest, among others, outweighed the burden placed on the out-of-state defendant. *See id.* at 163-64.

The U.S. District Court for the Southern District of Mississippi reached a similar conclusion in a case in which the defendant sent an unsolicited email to people "all over the world, including Mississippi residents, advertising a pornographic web-site." *See Internet Doorway, Inc. v. Parks,* 138 F.Supp.2d 773, 774 (S.D.Miss. 2001). The defendant altered the email so that it appeared to have been delivered from an email address held by the plaintiff corporation. *See id.* The corporation complained that the emails caused it to suffer damages in the form of losing goodwill in the community and expending time and resources in responding to the complaints of people who received the offensive email. Applying the Mississippi long arm statute, which is similar to
503 Maryland's, the court determined: *503

> [W]hen [the defendant] allegedly transmitted the e-mail to a recipient or recipients in Mississippi, it was an attempt to solicit business for a particular web-site. Thus, [the defendant] committed a purposeful act that occurred in Mississippi, just as if she had sent via United States Mail a letter to a Mississippi resident advertising a particular product or service.

Id. at 776.

The federal court went on to explain that, in sending emails all over the world, the defendant "had to have been aware that the e-mail would be received and opened in numerous fora, including Mississippi." *Id.* at 779. Thus, it was fair for Mississippi to exercise personal jurisdiction.

> 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.

Id. at 779-80.

The U.S. District Court for the Eastern District of Virginia has also decided that email solicitations can constitute the basis for the exercise of personal jurisdiction. *See Verizon Online Servs. Inc. v. Ralsky,* 203 F.Supp.2d 601, 622-23 (E.D.Va. 2001). In *Verizon Online,* the court considered the defendants' argument that they had not purposefully availed themselves of the laws of Virginia because they did not know, or have any way of knowing, that they were sending commercial emails to Virginia residents or through a server located in Virginia. *See id.* at 612. In a carefully reasoned opinion, the court found that the emails were "knowing and repeated commercial transmissions" that the defendants knew would be routed through Verizon's servers in Virginia because the defendants sent their emails to Verizon-based domain names. *See id.* at 617-18 (citations omitted).

When the defendants compared their emails to the placement of an item in the stream of commerce, which a plurality of the Supreme Court has
504 rejected as the sole basis for the *504 exercise of jurisdiction, *see Asahi Metal Indus. Co. v. Superior Court of Cal.,* 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987), the federal court rejected the argument. In its view, " [d]efendants' conduct and connections to Virginia were of their own choosing, not someone else's . . . They cannot seek to escape answering for these actions by simply pleading ignorance as to where the servers were physically located." *Id.* at 620. The court further concluded that, considering Virginia's interests in adjudicating the claim, which was filed by a Virginia corporation under a Virginia statute governing email use, jurisdiction was constitutionally reasonable. *See id.* at 621-22.

We find the reasoning of these three cases instructive, and rely on them in performing our analysis under the three-part inquiry adopted by the Court of Appeals in *Beyond Systems.* [21]

> [21] We have found that other cases in which emails have not served as a sufficient basis for personal jurisdiction are easily

distinguishable from this case and therefore not instructive. *See, e.g., Burleson v. Toback*, 391 F.Supp.2d 401, 421-22 (M.D.N.C. 2005) (email from defendant to plaintiff insufficient for personal jurisdiction where plaintiff had not shown relationship between email and claim asserted, or that email created the cause of action); *Bible Gospel Trust v. Wyman*, 354 F.Supp.2d 1025, 1031 (D.Minn. 2005) (email not authorized by out-of-state defendant but received by him and forwarded to Minnesota resident was not sufficient contact for exercise of jurisdiction); *Hydro Eng'g, Inc. v. Landa, Inc.*, 231 F.Supp.2d 1130, 1135-36 (D.Utah 2002) (in a libel suit, there was no proof that emails were received in Utah to constitute "publication" in Utah, so exercise of jurisdiction was improper); *Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assurance Corp.*, 160 F.Supp.2d 1327, 1333 (M.D.Ala. 2001) (emails not sent to Alabama residents but forwarded to them were insufficient for exercise of jurisdiction).

2. Claim Arising Out Of Forum Activities

We begin with the second factor, as it is the simplest. "If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996). Here, the "connection to [Maryland] is the claim
505 *505 itself — the transmission of [email] to Maryland residents." *Verizon Online*, 203 F.Supp.2d at 620. MaryCLE's claims are based upon First Choice's action in sending emails to MaryCLE in Maryland. Thus, First Choice's alleged contacts with Maryland are related to the "operative facts" of this case. In other words, "[b]ut for [First Choice's] alleged transmission of this spam," MaryCLE and NEIT "would not have suffered an injury." *Id.* at 621. This requirement for personal jurisdiction is therefore met.

3. Purposeful Availment

We next address the first factor, purposeful availment. The Supreme Court has emphasized that the "quality and nature" of the defendant's contacts are critical to the question of purposeful availment. *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1240. Looking to the quality and nature of First Choice's contacts, we observe that First Choice admits that it sent "hundreds of thousands" of email advertisements to recipients all over the country.

First Choice contends that, although it sent emails everywhere, it did not purposefully avail itself of "the privilege of conducting business in Maryland." We disagree. This argument resembles the one made in *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. at 566, that "foreseeability" that a product would cause injury in another state was insufficient for jurisdiction. In *World-Wide Volkswagen*, the Supreme Court did conclude that "mere" "foreseeability" that a product (in that case, an automobile), would "find its way into the forum State" was not enough **on its own** to exercise jurisdiction. *See id.*, 444 U.S. at 297, 100 S.Ct. at 567. It cautioned, however, that jurisdiction could be proper when "the defendant's conduct and connection with the forum State" rendered it foreseeable that he might be expected to answer for his actions in that State.[22] *See id.*
506 *506

[22] Several years later, a plurality of the Supreme Court clarified the meaning of *World-Wide Volkswagen*. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987). The plurality rejected cases decided after *World-Wide Volkswagen* that interpreted it to mean that jurisdiction could be founded on the foreseeability that a product would enter other states because of its placement in the stream of commerce. *See id.*, 480 U.S. at 111, 107 S.Ct. at 1032. The plurality determined that, because the exercise of jurisdiction

> requires that the defendant have purposefully directed some action towards the forum, "[t]he placement of a product into the stream of commerce, **without more,** is not an act of the defendant purposefully directed toward the forum State." *Id.*, 480 U.S. at 112, 107 S.Ct. at 1032. The plurality did advise, however, that jurisdiction could be justified if " [a]dditional conduct of the defendant indicate[s] an intent or purpose to serve the market in the forum State, for example . . . **advertising** in the forum State, . . . or **marketing** the product through a distributor[.]" *Id.*
>
> Four justices disagreed and joined in the opinion of Justice Brennan, who wrote separately to explain their belief that *World-Wide Volkswagen* does in fact stand for the proposition that foreseeability that a product would enter another state through the stream of commerce **is, by itself, enough** for jurisdiction. *See id.* at 116-21 (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan reasoned that
>
> > [t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.
>
> *Id.*, 480 U.S. at 117, 107 S.Ct. at 1034 (concurring opinion).

First Choice's emails did not merely "find [their] way" into Maryland the way a car, sold in one state by the defendant, might find its way to another because the **plaintiff** drove it into another state. *See id.* Rather, First Choice **directly** caused the emails to be sent to Maryland, among other states. It is thus reasonable for First Choice to expect to answer for those emails in Maryland, or any other state to which they were sent. *See Fenn,* 103 P.3d at 162; *Internet Doorway,* 138 F.Supp.2d at 776.

The Court of Appeals has explained that there is a difference between a merchant who purposefully "sends a product" into another jurisdiction and one that simply receives business from another state. In *Camelback Ski Corp. v. Behning,* 312 Md. 330, 340-41, 539 A.2d 1107, *cert. denied,* 488 U.S. 849, *507 109 S.Ct. 130, 102 L.Ed.2d 103 (1988) (" *Camelback II*"), the Court elaborated:

> [A] significant difference exists between regularly placing goods into a stream of commerce with knowledge they will be sold in another state on the one hand, and knowingly accepting the economic benefits brought by interstate customers on the other hand. Ordinarily, one who **purposefully sends a product into another jurisdiction for purposes of sale may reasonably expect to be haled into court in that State** if the product proves to be defective and causes injury there. In addition to having caused a direct injury within the forum State, **that manufacturer or distributor has purposefully availed himself of the laws of the forum State that regulate and facilitate such commercial activity.** The same cannot be said of the fixed-site merchant who is simply aware that a portion of his income regularly is derived from the patronage of customers coming from other states . . . Although he may cause an indirect impact on the forum State by injuring one of its residents, he causes no direct injury in the State, and does not avail himself of the protection or assistance of its laws. (Emphasis added.)

The Court in *Camelback II* concluded that jurisdiction was not proper. *See id.* at 343, 539 A.2d 1107. The defendant in *Camelback II,* however, was a "fixed-site" ski resort whose limited contacts with Maryland included mailing brochures to Maryland ski shops **upon the request of the Maryland shops.** [23] *See id.* at 341, 508 539 A.2d 1107. In contrast, First *508 Choice **reached out** to other jurisdictions, including Maryland, by sending their uninvited advertisements there.[24]

[23] Camelback's other "involvement" with Maryland included awareness that

> others, for their own economic purposes, were publicizing the Camelback resort within the Washington and Baltimore metropolitan areas; that wire services routinely carried information concerning snow conditions on its slopes and that this information was reproduced in Maryland newspapers; that Maryland residents could, and probably were, using a toll-free telephone number to obtain information concerning snow conditions at the resort[.]

Camelback II, 312 Md. at 341, 539 A.2d 1107. None of this "involvement" constitutes attempts by the resort itself to reach out to Maryland residents. Indeed, the *Camelback II* Court indicated that Camelback rejected Maryland as a target for its business:

> Camelback did not devote its energy or financial resources to the marketing of Maryland. It allocated no part of its advertising budget to Maryland, and following one very brief and unsuccessful attempt to solicit business in this State in 1982, it abandoned any attempt to include Maryland in its primary marketing area, or to conduct any active solicitation here.

Id.

[24] Although First Choice alleges that MaryCLE "opted-in" to its mailings, at this juncture we must view the parties' contentions in the light most favorable to MaryCLE as the non-moving party. *See Faya v. Almaraz,* 329 Md. 435, 443, 620 A.2d 327 (1993). MaryCLE pleaded that it never submitted its email address to www.idealclick.com or First Choice.

Additionally, unlike *Camelback II* and *World-Wide Volkswagen,* **the emails themselves were the product.** First Choice made its money by the very act of identifying email account holders nationwide, and transmitting emails from one state to residents of other states, including Maryland. Without the information identifying email addresses and transmittal to those addresses, First Choice **had no product.** In contrast, Camelback's product was a ski resort located in Pennsylvania, and World-Wide Volkswagen's product was a car sold to a New York customer in New York, and driven **by the customer** to Oklahoma, the forum in which the plaintiff tried to sue for injuries allegedly caused by a defect in the car.

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, 509 but knowing nonetheless that harm in *509 the forum state may be caused by its actions outside it"). *Cf.* Charles E. Moylan, Jr., *Criminal Homicide Law* § 3.25 (MICPEL 2002) ("Where a wide-ranging lethal attack is unleashed, even though its primary intended target is a single person in the killing zone or target area, there may be a murderous *mens rea* with respect to all persons who are also coincidentally in the line of fire. . . . [T]here is a concurrent murderous intent directed towards all who are in harm's way").

In *Digital Equipment,* a trademark infringement case, the federal court reasoned that jurisdiction was proper because,

> **[w]here the case involves torts that create causes of action in a forum state . . . the threshold of purposeful availment is lower.** The defendant allegedly causing harm in a state may understandably have sought no privileges there; instead **the defendant's purpose may be said to be the targeting of the forum state and its residents.**

Digital Equip., 960 F.Supp. at 469 (emphasis added). First Choice's purpose in sending commercial emails was likewise the targeting of its email recipients, who included Maryland residents.

In sum, First Choice cannot plead lack of purposeful availment because the "nature" of the Internet does not allow it to know the geographic location of its email recipients. *See Verizon Online,* 203 F.Supp.2d at 620. Rather, when considering the "nature" of First Choice's contacts, our focus should be on the fact that the emails are communications specifically and deliberately designed to convince the recipients to engage the services of First Choice and to promote the products of its customers. 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." *Fenn,* 103 P.3d at 162 (citations 510 omitted). *510

4. Constitutional Reasonableness

We also conclude that the exercise of jurisdiction over First Choice would be constitutionally reasonable. To determine what is reasonable, we look to several factors:

> the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief . . ., the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen, 444 U.S. at 292, 100 S.Ct. at 564 (citations omitted). The Supreme Court has asserted that, once purposeful availment has been established, a defendant must make a "compelling case" that it is unreasonable or unfair to require it to defend a suit out of State. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985).

First Choice contends that the burden on it to comply with MCEMA is too great because there is no way to know where the emails will be received. It disputes MaryCLE's contention that it can discover the location of the email recipient by looking up the domain name registrant's address on searches such as the one available on www.networksolutions.com, explaining that in

cases where the domain is a common one, such as "hotmail," it is impossible to figure out where an individual recipient of an email would be located.

We reject First Choice's argument for two reasons. First, while it might be impossible to determine the location of an email recipient in cases of common domain names such as "hotmail," in this case that is not true. MaryCLE has demonstrated that a search on www.networksolutions.com indicates that "maryland-state-resident.com" is, unsurprisingly, registered in Maryland.

Second, we reject First Choice's approach to analyzing the "burden" imposed on it. The burden
511 of complying with MCEis *511 to disseminate truthful, non-deceptive emails; it is **not** to determine the location of email recipients. *See Washington v. Heckel,* 143 Wash.2d 824, 24 P.3d 404, 411, *cert. denied,* 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001) (discussed *infra* in Section II). First Choice remains free to send emails into Maryland so long as it does not violate the truth requirements of MCEMA. This is not a great burden to meet. First Choice attempts to distract us from the real burden here — sending only truth — by arguing that it is impossible to determine residency or location of receipt. "This focus on the burden of *non* compliance" misses the point. *See id.* at 411; *see also Ferguson v. Friendfinders, Inc.,* 94 Cal.App.4th 1255, 1265, 115 Cal.Rptr.2d 258 (Cal.Ct.App. 2002) (rejecting argument that burden imposed by UCE statute to determine residency is too great; concluding that real burden is to comply with statute's substantive terms).

Turning to Maryland's interest in adjudicating this dispute, we observe that MCEMA was passed largely because the financial and social burden of UCE on Maryland consumers is great. Maryland certainly has an interest in protecting its consumers, not only from the costs associated with UCE proliferation, but also from becoming the victims of fraud and schemes initiated by false and misleading email. *Cf. Verizon Online,* 203 F.Supp.2d at 621-22 ("Virginia has a strong interest in resolving this dispute because it involves a Virginia resident and Virginia law. Indeed, Virginia recently enacted [a computer crime statute] to specifically address the conduct Defendants are accused of committing"); *Heckel,* 24 P.3d at 411 (state has a legitimate interest in creating a penalty for sending false and misleading spam to its residents).

Additionally, as the State of Maryland and the United States Internet Service Provider Association ("US ISPA") point out in the *amici* briefs filed in this case, the financial costs of spam
512 and UCE are great.[25] To this effect, a recent *512 University of Maryland study concluded that deleting unwanted email costs nearly $22 billion annually in lost productivity. *See* National Survey Finds 22.9 Million Hours a Week Wasted on Spam, (http://www.rhsmith.umd.edu/ntrs/) (last visited Jan. 16, 2006). Congress has similarly concluded that "spam would cost corporations over $113 billion by 2007." S.Rep. No. 108-102 (2003), http://www.thomas.loc.gov/cgi-bin/cpquery/T? report=sr102 dbname108/(last visited Jan. 16, 2006). The costs associated with spam or UCE can largely be explained by the time and effort that must be expended to delete it. Each unwanted email that a recipient attempts to respond to "instantly becomes three separate e-mail messages (and additional computer log entries)[.]" *Heckel,* 24 P.3d at 410 n. 8. This is

[25] Again, we observe that not all spam is UCE.

> because: (1) the ISP server that is the victim of the fraudulent return address or domain name sends an error message back to the Internet user and their ISP announcing that the return path was invalid, (2) a message is sent to the server administrator requesting an investigation of the return address for potential problems, and (3) a message is sent to the server log in case the ISP wishes to track down the problem later.

Id. With mass mailings such as those sent by First Choice, "these messages snowball to clog ISP resources, and ISPs have little choice but to purchase additional equipment at a significant cost." *Id.* The cost is then passed onto consumer subscribers of Internet services. *See also Heckel,* 24 P.3d at 409-11 (detailing the costs associated with spam); *Ferguson,* 94 Cal.App.4th at 1267-68, 115 Cal.Rptr.2d 258 (same); 15 U.S.C. §§ 7701(a) (Congressional findings for the CAN-SPAM Act on the costs associated with spam).

With respect to MaryCLE's interest in obtaining relief, we similarly conclude that Maryland is the appropriate forum. MaryCLE has a financial interest in recovering for the injury it allegedly suffered and has also asserted a claim for injunctive relief. Maryland is the state in which
513 MaryCLE *513 suffered that injury.[26] The Supreme Court has reasoned that jurisdiction is proper in the state in which "the brunt of the injury would be felt[.]"[27] *Calder v. Jones,* 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984). First Choice is aware that by sending potentially false and misleading emails, any injuries caused by those emails would be felt in the state in which they were received, rather than the state from which they were sent. *See Verizon Online,* 203 F.Supp.2d at 617-18, 621-22.

[26] Although it admits that some of the emails were opened in Washington, D.C., MaryCLE alleged that some were opened in Maryland at Mr. Menhardt's residence. Further, NEIT Solutions, MaryCLE's ISP, is a Maryland corporation located in Maryland.

[27] This case, along with *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), establish what has become known as the Supreme Court's "effects test" in personal jurisdiction cases. *See Verizon Online,* 203 F.Supp.2d at 613. Under this approach, jurisdiction is proper if the "brunt of the injury," or the effects of the defendant's wrongful conduct, is felt most in the forum State. *See Calder v. Jones,* 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984).

Regarding the interstate judicial system's interest in obtaining the most efficient resolution of controversies, we conclude that because this claim is based on a Maryland state statute, the most efficient locus for the suit is Maryland itself. As we explained above, the Maryland legislature created a private cause of action to further the state's financial and social goals in reducing the number of deceptive emails sent here. The interstate judicial system has an interest in Maryland adjudicating this claim because it seeks to enforce a Maryland prohibitory statute. Maryland courts can do so most efficiently because they are familiar with the Maryland statute.

We also consider that there is no showing in the record that this is a case in which the defendant will be required to bring numerous witnesses from another state. *See Burger King,* 471 U.S. at 483, 105 S.Ct. at 2188. This is simply not a case in which defending the suit in Maryland is "'so gravely difficult and inconvenient' that [First Choice] unfairly is at a 'severe disadvantage' in
514 comparison" to MaryCLE, or a disadvantage *514 of "constitutional magnitude." *Id.,* 471 U.S. at 476, 484, 105 S.Ct. at 2185, 2188.

Finally, we look at the shared interest of the several states in furthering fundamental substantive social policies. In doing this aspect of the analysis, we consider whether there might be a potential conflict between two states' social policies that would impact the exercise of jurisdiction. *See Burger King,* 471 U.S. at 477, 105 S.Ct. at 2185. We observe that New York has no commercial email or spam statute; thus, there is no potential conflict with respect to the two states' "social policies." *See* David E. Sorkin, Spam Laws, http://www.spamlaws.com/state/ny/shtml (information verified through Mar. 20, 2005) (last visited Jan. 16, 2006).

If we were to accept First Choice's argument that jurisdiction is not proper in Maryland because it is impossible to determine the residency of an email recipient, that would be equivalent to saying that First Choice could only be sued in New York. While certainly New York courts are capable of adjudicating a suit based entirely on a Maryland statute, limiting jurisdiction to New York does not promote Maryland's social policies *or* efficiency, particularly when the alleged harm occurs in Maryland. Applying similar reasoning, the federal court in *Verizon Online* commented that jurisdiction is proper in the state in which the harm is suffered, especially considering that many states have enacted anti-spam laws:

> [P]ermitting Defendants to escape personal jurisdiction simply because they claim they were unaware that Verizon's email servers were located in Virginia would be fundamentally unfair. Setting such a precedent would allow spammers to transmit UBE[28] with impunity and only face suit if the injured party had the resources to pursue the litigation where the tortfeasor resides rather than where the injury occurred. . . . [A]llowing the
> 515 spammer to evade personal *515
> jurisdiction in the forum where their conduct causes the greatest harm would frustrate [anti-spam] laws.

28 "UBE" is "unsolicited *bulk* email."

28 "UBE" is "unsolicited *bulk* email."

Verizon Online, 203 F.Supp.2d at 622.

Because we determine that all three parts of the jurisdictional test are met, we conclude that personal jurisdiction over First Choice is proper. Our next step is to examine First Choice's challenge to MCEMA under the Commerce Clause of the Federal Constitution.

II. The Commerce Clause A. Constitutional Framework

The Commerce Clause, U.S. Const., art. I, § 8, cl. 3, empowers Congress "to regulate Commerce with foreign Nations, and among the several States." "The Clause is both an affirmative grant of legislative power to Congress and an implied limitation on the power of state and local governments to enact laws affecting foreign or interstate commerce." *Bd. of Trs. of the Employees' Ret. Sys. of Baltimore City v. Mayor and City Council of Baltimore,* 317 Md. 72, 131, 562 A.2d 720 (1989), *cert. denied,* 493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990) (citations omitted). "The aspect of the Commerce Clause which operates as an implied limitation upon state and local government authority is often referred to as the `dormant' or `negative' Commerce Clause." *Id.*

In *Pike v. Bruce Church,* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), the Supreme Court established a two-part inquiry for determining whether a state statute violates the dormant Commerce Clause. A reviewing court must first decide whether "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental[.]" *Id. See County Comm'rs of Charles County v. Stevens,* 299 Md. 203, 208, 473 A.2d 12 (1984). In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 106 S.Ct. 2080, 2084, 90 L.Ed.2d
516 552 (1986), the Court explained that, if the *516

statute does not regulate evenhandedly, or, in other words, discriminates against out-of-state commerce, then the statute is unconstitutional.

If the statute survives the first part of the test, a court must then engage in a balancing test to determine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142, 90 S. Ct at 847. With respect to both parts of the *Pike* test, the Supreme Court has held that "the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers,* 476 U.S. at 579, 106 S.Ct. at 2084.

In several cases applying the *Pike* test, the Supreme Court has invalidated statutes on the grounds that their "extraterritorial effect" rendered them unconstitutional.[29] *See* Jack L. Goldsmith Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 Yale L.J. 785, 804-06 (2001) (examining cases and commenting on extraterritoriality jurisprudence). In *Healy v. Beer Institute,* 491 U.S. 324, 336-37, 109 S.Ct. 2491, 2499-2500, 105 L.Ed.2d 275 (1989) (plurality opinion), the Supreme Court explained its extraterritoriality jurisprudence:

> The principles guiding [an extraterritoriality] assessment, principles made clear in *Brown-Forman* and in the cases upon which it relied, reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States with their respective spheres. Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, **the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the** *517 **commerce has effects within the State".** . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. **The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.** Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by **considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.** Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. (Emphasis added; citations and footnotes omitted.)

517

[29] We are mindful that some legal scholars have concluded that the Supreme Court's extraterritoriality jurisprudence, the major decisions of which are plurality opinions, are "unsettled and poorly understood[.]" Jack L. Goldsmith Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 Yale L.J. 785, 789 (2001).

The *Healy* Court explained that the extraterritoriality principles detailed above are not a separate or distinct Commerce Clause analysis. *See id.*, 491 U.S. at 337 n. 14, 109 S.Ct. at 2500 n. 14. Rather, they are simply a more detailed way of explaining the two-part test established in *Pike* and clarified in *Brown-Forman:*

> We further recognized in *Brown-Forman* that the critical consideration in determining whether the extraterritorial reach of a statute violates the Commerce Clause is the overall effect of the statute on both local and interstate commerce. Our distillation of principles from prior cases involving extraterritoriality is meant as **nothing more than a restatement of those specific concerns that have shaped this inquiry.**

Id. (emphasis added).

B. The Parties' Contentions

MaryCLE asserts that the circuit court's ruling is erroneous for several reasons. First, MaryCLE
518 maintains that the court *518 made "unsupported evidentiary findings" in determining that the emails never "entered" Maryland, because the pleadings asserted that MaryCLE and NEIT are Maryland corporations with principal places of business in Maryland. Second, arguing that the relevant inquiry is whether the email was sent to a Maryland resident, MaryCLE states that "[t]he plain language of the MCEMA focuses on the intent of the entity that is sending . . . unsolicited, commercial email. It does *not* focus on where the email is opened."

Finally, MaryCLE presses us to adopt the reasoning employed by courts in Washington and California, which determined that statutes specifically relating to the sending of spam and UCE passed constitutional muster. *See Washington v. Heckel,* 143 Wash.2d 824, 24 P.3d 404, *cert. denied,* 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001); *Ferguson v. Friendfinders, Inc.*, 94 Cal.App.4th 1255, 115 Cal.Rptr.2d 258 (Cal.Ct.App. 2002). MaryCLE points out, as does the State of Maryland in its *amicus* brief, that MCEMA is modeled on the Washington statute found to be constitutional in *Heckel,* and that the Maryland legislature relied on the Washington Supreme Court's decision when deciding whether to enact MCEMA.

In response, First Choice argues that "[t]here are two fundamental legal problems" with MCEMA. First, it asserts that the Act subjects parties to liability if they send commercial email "not to Maryland, but rather to Maryland residents, even if those residents do not receive email in Maryland, the email is not sent to those residents in Maryland, the residents are not harmed in Maryland, and the email never enters Maryland." This broad application, argues First Choice, is burdensome to the point that it is "impossible for First Choice to continue to do business," and has a "chilling effect on interstate commerce." First Choice also asserts that the Act is burdensome because the "false and misleading" standard is subject to different interpretations such that senders of emails will self-censor in order to avoid
519 prosecution under the Maryland Act. *519

Second, First Choice reiterates its concerns that the Act "fails to explain how a party can realistically obtain knowledge of the residency of a holder of an email address." Challenging MCEMA's residency presumption, *see* CL § 14-3002(c), First Choice urges us to rely on the same three cases as the circuit court to conclude that "the reality of the Internet cries out for federal regulation" because "the Intenet does not recognize geographic boundaries." *See Am. Booksellers Found. v. Dean,* 342 F.3d 96, 103 (2d Cir. 2003); *PSINet, Inc. v. Chapman,* 362 F.3d 227 (4th Cir. 2004); *Am. Libraries Ass'n v. Pataki,* 969 F.Supp. 160 (S.D.N.Y. 1997).

C. MCEMA Does Not Violate The Commerce Clause As Applied In This Case

The Commerce Clause question is closely intertwined with the jurisdictional question addressed in Section I. The Supreme Court has recognized this correlation.

> The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt `directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."

Edgar v. MITE Corp., 457 U.S. 624, 643, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L.Ed.2d 683 (1977)) (plurality opinion) (citation omitted). For many of the same reasons that we disagreed with the circuit court's jurisdictional analysis, we also find error in the court's invalidation of MCEMA under the Commerce Clause.

Although the parties and *amici* seem to interpret the circuit court's ruling to be that MCEMA is unconstitutional **on its face,** a closer examination of the court's opinion reveals that it determined the Act to be unconstitutional **as applied** in this case. The court wrote that "the statute, **as applied in this case,** seeks to regulate the transmission of commercial email between persons in states
520 outside of Maryland[.]" (Emphasis *520 added.) In its conclusion, the court again stated that MCEMA "violates the dormant Commerce Clause **when applied to the case at bar."** (Emphasis added.)

The circuit court reasoned that First Choice "had no contact with the State of Maryland because its emails were sent from New York, routed through Virginia and Colorado, and finally **were received in Washington, D.C."** [30] (Emphasis added.) This statement is inaccurate. An affidavit filed by MaryCLE with its opposition to the motion to dismiss alleges that all of the emails were opened "in Maryland **and** Washington, DC[.]" (Emphasis added.) Viewing the evidence in the light most favorable to MaryCLE, as the applicable standard of review requires, we must assume that at least some of the emails did "enter" Maryland, so that the circuit court's conclusion to the contrary was erroneous. This erroneous factual premise permeated its Commerce Clause analysis, causing it to distinguish and reject the decision of the Supreme Court of Washington in *Washington v. Heckel*, 143 Wash.2d 824, 24 P.3d 404, *cert. denied*, 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001), a case we consider instructive and persuasive.

[30] In *Heckel*, 24 P.3d at 407 n. 4, the Washington court explained the transmission path of an email:

> The message generally passes through at least four computers: from the sender's computer, the message travels to the mail server computer of the sender's Internet Service Provider (ISP); that computer delivers the message to the mail server computer of the recipient's ISP, where it remains until the recipient retrieves it onto his or her own computer.

In *Heckel*, the Supreme Court of Washington considered the constitutionality of the Washington version of MCEMA, which is virtually identical to the Maryland Act. *See* Wash. Rev. Code, § 19.190.010 *et seq.* The court applied the *Pike* test diligently, first deciding that the Washington UCE act was not facially discriminatory because it "applies evenhandedly to in-state and out-of-state spammers" in declaring that "no person" can transmit emails with a false or misleading subject line. *Id.* at 409. *See* Wash. Rev. Code §
521 19.190.020(1). *521

With respect to the balancing part of the *Pike* test, the Washington court determined that the "local benefits surpass any alleged burden on interstate commerce[.]" *Id.* The court recognized the benefits of shifting the costs of UCE away from consumers, and explained that the burden on

senders of commercial email was minimal because the statute only requires them to send truthful emails. *See id.* at 409-11. The Washington court further explained that the trial court's focus on the alleged burden to determine which recipients were Washington residents was misplaced:

> [T]he trial court apparently focused not on what spammers must do to comply with the Act but on what they must do if they choose to use deceptive subject lines or to falsify elements in the transmission path. To initiate *deceptive* spam without violating the Act, a spammer must weed out Washington residents by contacting the registrant of the domain name contained in the recipient's e-mail address. **This focus on the burden of *non* compliance is contrary to the approach in the *Pike* balancing test,** where the United States Supreme Court assessed the cost of compliance with a challenged statute. *Pike,* 397 U.S. at 143, 90 S.Ct. 844, 25 L.Ed.2d 174. Indeed, the trial court could have appropriately considered the filtering requirement a burden only if Washington's statute had banned outright the sending of UCE messages to Washington residents. We therefore conclude that Heckel has failed to prove that "the burden imposed on . . . commerce [by the Act] is *clearly excessive* in relation to the putative local benefits." *Id.* at 142, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (emphasis added).

Id. at 411 (bold added).

The *Heckel* Court also rejected the advertisers' extraterritoriality argument that the statute included regulation of conduct occurring wholly outside Washington because Washington residents might open their email while traveling in another state. *See id.* at 412. It explained that there was "no `sweeping extraterritorial effect' that would outweigh the local benefits of the Act" because the *522 statute regulates only those emails directed to a Washington resident, or sent from a computer located within Washington. *See id.* at 412-13 (*quoting Edgar v. MITE Corp.,* 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982)). It pointed out that "the Act does not burden interstate commerce by regulating **when** or **where** recipients may open the proscribed UCE messages. Rather, the Act addresses the conduct of spammers in targeting Washington consumers." *Id.* at 412 (emphasis added).

The Washington law at issue in *Heckel* is virtually identical to MCEMA. Indeed, the legislative history reveals that the Maryland General Assembly modeled MCEMA on the Washington law and relied on *Heckel* when it did so.[31] We also must give deference to the legislature and presume the constitutionality of a statute unless the party challenging it "`affirmatively and clearly establish[es] its invalidity.'" *Governor of Maryland v. Exxon Corp.,* 279 Md. 410, 426, 370 A.2d 1102 (1977), *aff'd,* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (citation omitted).

[31] MaryCLE attached to its opposition to the motion to dismiss a letter, which is in the legislative Bill File for the bill that became MCEMA, sent from the Attorney General's Office to the Chairman of the House Economic Matters Committee. *See* Letter from Steven M. Sakamoto-Wengel, Ass't Att'y Gen., to Del. Michael E. Busch, Maryland House of Delegates, Economic Matters Committee Chair, regarding House Bill 915 (Feb. 28, 2002) (on file with Md. Dep't of Legislative Servs.). This letter states that the Attorney General "believes that the Committee should consider the approach taken by the Washington State law concerning deceptive spam[.]"

To that effect, the Floor Report for the bill directly states that it is "modeled after a Washington statute[.]" Floor Rep., H.B. 915, 2002 General Assembly, Economic Matters Committee. Documents written by the Attorney General's office indicate that

the bill was given a favorable constitutional review by the Attorney General's office, which relied on *Heckel*. *See* Letter from Kathryn M. Rowe, Ass't Att'y Gen., to Del. Robert C. Baldwin, Maryland House of Delegates, regarding H.B. 280 and H.B. 915 (Feb. 19, 2002) (on file with Md. Dep't of Legislative Servs.).

Applying the *Pike* test, we, like the Washington Supreme Court, find that MCEMA is facially neutral because it applies to all email advertisers, regardless of their geographic location. It does not
523 discriminate against out-of-state senders. *523 As discussed in greater detail above with regard to personal jurisdiction, we further conclude that the benefits of MCEMA clearly outweigh the burden on First Choice and other email advertisers. When the only burden MCEMA imposes is that of sending truthful and non-deceptive email, "[t]hat [First Choice] considers [MCEMA's] requirements inconvenient and even impractical does not mean that statute violates the [C]ommerce [C]lause." *Ferguson,* 94 Cal.App.4th at 1265, 115 Cal.Rptr.2d 258.

We similarly agree with the Washington court that MCEMA does not regulate exclusively extraterritorial conduct because its focus is not on "when or where recipients may open the proscribed . . . messages. Rather, the Act addresses the **conduct of spammers in targeting [Maryland] consumers.**"[32] *Heckel,* 24 P.3d at 412 (emphasis added). The choice to send UCE all over the country, invoking the probability that it will be received by Maryland residents, is First Choice's "business decision." *Ferguson,* 94 Cal.App.4th at 1265, 115 Cal.Rptr.2d 258. "Such a business decision simply does not establish that [MCEMA] controls conduct occurring wholly outside" Maryland. *Id.*

[32] In so reasoning, the *Heckel* Court addressed the facial validity of the statute. The court also noted that the issue of a Washington resident opening his email in another State was not before it. *See Heckel,* 24 P.3d at 413.

The Supreme Court's extraterritoriality cases invalidated laws that had markedly different "practical effects" than MCEMA. *See Brown-Forman,* 476 U.S. at 583, 106 S.Ct. at 2086 (holding that the "practical effects" of the statute should be considered in a Commerce Clause analysis). In *Edgar v. MITE Corp.,* 457 U.S. at 643, 102 S.Ct. at 2641, the Court struck down the Illinois Business Takeover Act because the statute had a "nationwide reach which purport[ed] to give Illinois the power to determine whether a tender offer may proceed anywhere." MCEMA does not have such a nationwide reach; nor does it purport to give Maryland any "power" to determine where
524 an email is sent. It only mandates that all *524 email addressed to Maryland residents be truthful and non-deceptive.

Similarly, in *Brown-Forman* the Court invalidated the New York Alcoholic Beverage Control Law, which required liquor distillers and producers who sold liquor to wholesalers in New York to do so at prices no greater than those used in any other state. Because the liquor prices must be filed with the New York State Liquor Authority the 25th day of the month preceding their effective dates, the statute "[f]orc[ed] a merchant to seek regulatory approval in one State before undertaking a transaction in another[.]" *Brown-Forman,* 476 U.S. at 582, 106 S.Ct. at 2086. In other words, "[o]nce a distiller has posted prices in New York, it is not free to change its prices elsewhere . . . during the relevant month[,]" which was an unconstitutional projection of legislation into other states. *See id.,* 476 U.S. at 582-83, 106 S.Ct. at 2086.

MCEMA, in contrast, does not prevent senders of email advertisements from soliciting the residents of other states; it merely regulates those that are sent **to** Maryland residents or from equipment located in Maryland. The Act does not project

Maryland's regulatory scheme into other states because email advertisers remain free to send emails to other states.

The *Brown-Forman* Court also considered whether the statute subjected defendants to "inconsistent obligations in different States." *Id.*, 476 U.S. at 583, 106 S.Ct. at 2086. *See also Healy*, 491 U.S. at 339-40, 109 S.Ct. at 2501 (explaining that the grant of power to the Federal Government under the Commerce Clause is designed to prevent inconsistent state regulations). Although First Choice argues that MCEMA has "an enormous chilling effect on interstate commerce," undoubtedly other states would neither desire the sending of false and misleading emails into their borders, nor object to Maryland's exclusion of them.

As the Supreme Court has explained,

> The Commerce Clause [has a] purpose of preventing a State from retreating into economic isolation or jeopardizing the
> 525 *525 welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus "`reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'"

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-80, 115 S.Ct. 1331, 1335-36, 131 L.Ed.2d 261 (1995) (quoting earlier Supreme Court cases). We cannot imagine how MCEMA's regulation of false or misleading commercial email addressed to Maryland residents would promote "economic Balkanization" or "plague relations" between Maryland and other states. No state is likely to consider that the welfare of a business that engages in false or misleading advertising is a legitimate interest, worthy of state protection. We therefore conclude that MCEMA does not subject email advertisers to inconsistent obligations.

To be clear, MCEMA avoids violation of the Commerce Clause because it has built-in safeguards to ensure that it does **not** regulate conduct occurring wholly outside Maryland. In order to violate the Act, an email advertiser must either use equipment located in the State of Maryland or send prohibited UCE to someone he knows or should know is a Maryland resident. *See* CL § 14-3002(b)(1). CL section 14-3002(c) states that Maryland residency is presumed if the sender of UCE can discover that an email address is registered to a Maryland resident. In this case,
526 First Choice could have done so.[33] *526

> [33] In other cases, such as those involving more common domain names like "hotmail," First Choice argues that it would be impossible to determine residency, and so the statutory presumption would not apply. That issue is not before this Court.

The cases relied upon by First Choice and the circuit court do not persuade us otherwise. *See PSINet*, 362 F.3d 227; *Am. Booksellers Found.*, 342 F.3d 96; *Am. Libraries Ass'n*, 969 F.Supp. 160. The statutes that were invalidated in these cases regulated the dissemination of sexually explicit material to minors over the Internet. They prohibited posting material on a website accessible across the United States, where the user must choose and take affirmative steps to access the site and view the contents. We consider MCEMA to be markedly different because it regulates only those commercial marketers who purposefully send emails to passive recipients, who have no choice about receiving the email.

Additionally, whereas a commercial emailer can choose between one recipient and another, "no Web siteholder is able to close his site to" persons

from other states. *See Am. Libraries Ass'n,* 969 F.Supp. at 174. In contrast, as we said earlier, First Choice could have determined that MaryCLE was a Maryland resident by accessing, *inter alia,* www.networksolutions.com., and then excluded MaryCle from its mailing list.

The cases relied on by First Choice are also different because the statutes at issue were sufficiently broad to prohibit non-commercial speech that is protected by the First Amendment. For example, the statute in *Am. Libraries Ass'n* made it a crime for an individual to use any computer system to engage in communication with a minor, which, to the knowledge of the individual, "depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors[.]" *Id.* at 169. The federal District Court stated that "the range of Internet communications potentially affected by the Act is far broader than the State suggests. . . . [I]n the past, various communities . . . have found works including . . . *The Adventures of Huckleberry Finn* by Mark Twain, and *The Color Purple by Alice Walker* to be indecent." *Id.* at 180. Although a challenge on First Amendment grounds stands separately and independently from a Commerce Clause analysis, the nature of the
527 speech prohibited is *527 still significant because it reflects the nature and extent of the burden imposed by the statutes on interstate commerce.[34]

[34] We observe that the Commerce Clause still applies to regulation of interstate internet use by non-profit entities. *See Am. Libraries Ass'n,* 969 F.Supp. at 172.

Unlike in First Choice's cases, there are no First Amendment concerns here because MCEMA regulates only false or misleading commercial emails. "Commercial speech enjoys a lower level of protection when it is true, and **no protection at all** when it is false or misleading." *Lubin v. Agora, Inc.,* 389 Md. 1, 22, 882 A.2d 833 (2005). In conclusion, for the foregoing reasons, we hold that the circuit court erred in declaring MCEMA unconstitutional as applied to the facts of this case.[35]

[35] We recognize that on remand that trier of fact may ultimately decide that MaryCLE did not open any of the emails in Maryland. If so, the circuit court likely would have to decide whether MCEMA is constitutional as applied to those circumstances. Although we do not decide that issue on this appeal, we urge the circuit court to consider on remand the reasoning in *Heckel* that the statute "addresses the conduct of spammers in targeting [Maryland's] consumers[,]" rather than the location the Maryland resident opened the email. *Heckel,* 24 P.3d at 412.

III. Individual Liability

Our final issue is whether Frevola was properly dismissed as a defendant in this suit. MaryCLE asserts that it named Frevola in the complaint "because it could uncover no evidence that First Choice is anything more than an alter ego of Frevola to avoid liability for the false and misleading email he ha[d] been sending to Maryland residents." MaryCLE asserts that Mr. Frevola is the only human being associated with First Choice.

First Choice argues that Mr. Frevola did not personally play any role in obtaining MaryCLE's email address or sending any emails, and that "those actions were performed by First Choice through its partnership with Wow Offers" and
528 Master Mailings. *528

MaryCLE sued Frevola in an individual capacity for his limited liability company's alleged violation of a civil statute. In *T-Up, Inc. v. Consumer Prot. Div.,* 145 Md.App. 27, 72, 801 A.2d 173, *cert. denied,* 369 Md. 661, 802 A.2d 439 (2002), this Court held that a corporate officer could be personally liable for his corporation's violations of the Consumer Protection Act. *See CL* § 13-101 *et seq.* We reasoned that violations of the

Consumer Protection Act violations are "`in the nature of a tort action[,]'" then explained Maryland law on personal liability for torts committed by a corporation:

> Officers of a corporation may be individually liable for wrongdoing that is based on their decisions. And, where a corporate officer is present on a daily basis during commission of the tort and gives direct orders that cause commission of the tort, the officer may be personally liable. **If an officer either specifically directed, or actively participated or cooperated in the corporation's tort, personal liability may be imposed.**

Id. at 72-73, 801 A.2d 173 (emphasis added and citations omitted). Thus, officers and agents of a corporation or limited liability company may be held personally liable for CPA violations when they direct, participate in, or cooperate in the prohibited conduct. *See id.; B S Marketing Enters., LLC v. Consumer Protection Div.*, 153 Md.App. 130, 170-71, 835 A.2d 215 (2003), *cert. denied*, 380 Md. 231, 844 A.2d 427 (2004).

MCEMA violations, like violations of the Consumer Protection Act, are "in the nature of a tort." Indeed, both statutes regulate false and deceptive trade practices. *See* CL § 13-303. Both are included in the same Article of the Maryland Code, and MCEMA falls under Chapter 14, entitled "Miscellaneous Consumer Protection Provisions." Thus, the same principles that guide us when faced with questions of individual liability for torts apply here.

In *Shipley v. Perlberg*, 140 Md.App. 257, 780 A.2d 396, *cert. denied*, 367 Md. 90, 785 A.2d 1293 (2001), this Court reviewed the grant of summary judgment in favor of a corporate officer. We affirmed the circuit court because the director
529 had put *529 forward sufficient evidence to show his **lack of** participation in the wrongful act, while the plaintiff had not "show[n] with `some precision' that there was a genuine dispute" regarding the director's participation. *Id.* at 268, 780 A.2d 396 (citations omitted). This Court explained that a "simple failure of proof" on the part of the plaintiff was sufficient grounds to grant summary judgment in favor of the defendant director. *See id.* at 281, 780 A.2d 396. First Choice prevailed on a similar theory below.

But here, Frevola did **not** put forth sufficient evidence to show his lack of participation. MaryCLE's amended complaint included the following allegations about Frevola:

> • Frevola is the president of First Choice and is a New York resident. His home address is also listed as First Choice's resident agent address.
>
> • Frevola sent 83 UCE messages to MaryCle, including UCE that "disguis[ed] the origins of these messages," and he "creat[ed] misleading subject lines" for these messages. He "transmitted or assisted in the transmission of" these messages.

Frevola's affidavit, attached to First Choice's motion to dismiss, was carefully worded:

> I did not play any role in **choosing MaryCLE's email address** or **actually sending any promotional emails to MaryCLE's email address** — those actions were performed by First Choice through its partnership with Wow Offers, LLC. In fact, . . . First Choice retained the services of Master Mailings, LLC, a company that specializes in delivering promotional messages to "opt-in" email address lists, to send the promotional emails to MaryCLE's email address along with hundreds of thousands of other email addresses. **At no time did I or First Choice actually perform the physical act of sending any promotional emails or mailings to MaryCLE,** as the emails were sent through the servers operated by Master Mailings, LLC.

Close examination of his words reveal that important disclaimers are missing from this affidavit. Frevola does not deny making the
530 decision to cause a mass mailing of emails, *530 including the ones sent to MaryCLE. He does not deny personally arranging to retain the services of Master Mailings to achieve the goal of transmitting mass advertising emails to, as he phrased it, "hundreds of thousands of other email addresses." He does not deny "play[ing] any role" in directing that the mass mailings be done. He never attested that First Choice had any employees or officers other than himself.

It is **not** the law that corporate officers and agents can escape personal liability for tortious violations of a consumer protection statute committed by the corporation **merely** because they were not "hands on" at every step of the way. As Judge Rodowsky said in *T-Up,* "[o]fficers of a corporation may be individually liable for wrongdoing that is based on their decisions." *T-Up,* 145 Md.App. at 72, 801 A.2d 173. Frevola's denials that he "actually sen[t]" or committed "the physical act of sending" the emails leaves a gaping hole: the answer to the question of whether he intentionally directed the mass mailings to be made.

Frevola specifically denies "play[ing] any role in choosing MaryCLE's email address." This is not enough. If Frevola directed First Choice to send hundreds of thousands of email advertisements to persons all over the country, it is not necessary for him to have selected any particular recipient for him to be personally liable for tort violations of this consumer protection statute. Just as First Choice knew it was sending emails into Maryland, so did Frevola, if he directed that mass mailing.

In sum, we hold that MaryCLE's allegations that Frevola transmitted or assisted in the transmission of mass email advertisements to Maryland that violated MCEMA were sufficient to surpass a motion for summary judgment because Frevola did not produce an affidavit denying his participation in those mailings.

CONCLUSION

For the foregoing reasons, we reverse the summary judgment granted by the circuit court, and remand to that court for further proceedings
531 consistent with this opinion. *531 **JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.**

EXHIBIT [redacted] A + B

CLERK OF COURTS, MINNEHAHA COUNTY
SECOND JUDICIAL CIRCUIT
425 N DAKOTA AVE
SIOUX FALLS, SOUTH DAKOTA 57104
(605)782-3062

February 7, 2023

[redacted]
401 E 8TH ST STE 214 PMB [redacted]61
SIOUX FALLS, SD 57103

Re: Specific Instructions Concerning Jury Service ***Save this letter****

Dear Juror:

This letter is to inform you that you have been assigned to **23-03E** for your current term which is **2/27/2023 through 3/31/2023.**

Starting 2/24/2023 Please call the automated telephone system at **(605) 782-3055** ***or*** check the Website every **Friday after 5:30pm.** For panel reporting instructions via the website please go to **ujsjurors.sd.gov**. Select Your E-Courthouse. Select Courthouse – in the drop-down box select Minnehaha County – View Courthouse. Select Juror Reporting Instructions, on the left-hand side of the page. We also strongly suggest checking in again the night prior to your assigned reporting date, to see if any changes have been made to the schedule. Before reporting to the courthouse we ask that you watch the Jury orientation video at following website: https://www.youtube.com/watch?v=fuI-P3dd06k you can watch this anytime prior to your jury service.

The juror information will remain on the automated telephone system and Website until the next update. The upcoming weeks scheduled will be listed and panels will be assigned to report on a specific date and time. Please note that all jurors are expected to report on the date and time listed for your panel. If your panel is not listed for the week, you will not report that week. However, you will check again Friday after 5:30pm for the next weeks update. If you have previously contacted the jury office and have been excused for a specific date(s), we do not expect you to report on the date(s) that you have previously been excused. However, your panel may still be called in for a date(s) you were excused. If you have vacation dates or dates you are requesting to be excused for, please contact the jury office. Within 48 hours prior to the dates you are requesting to be excused to make necessary arrangements.

Now, once you have been called to report. It does not mean you have been selected to sit on a case. However, it does mean we anticipate you being here for a few hours for the selection process. We will call in anywhere from 40 – 60 jurors, sometimes more for each case. We do selection mostly in the morning, but we have done it where we call jurors in to report in the afternoon for the selection process as well. Be sure to listen to date and time for your panels reporting time.

It is your responsibility to remember to call the recording or check the Website each week. We do try to send out text notification, and email reminders; however please do not rely on them.

If you need assistance or have questions, please feel free to contact the jury manager at 605-782-3062, or email: MinnehahaJury@ujs.state.sd.us.

Sincerely,

KATELYN BRINING
JURY MANAGER, MINNEHAHA COUNTY

EXHIBIT

E

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

SOUTH DAKOTA CIRCUIT COURT

2ND JUDICIAL CIRCUIT (MINNEHAHA COUNTY)

Joshua Lapin Plaintiff, vs. Zeetogroup LLC Defendant	Case No.: 49CIV22-000725 **AFFIDAVIT OF JOSHUA LAPIN IN SUPPORT OF HIS OPPOSITION TO DEFENDANT ZEETOGROUP LLC'S MOTION FOR [redacted] SUMMARY JUDGMENT**

I, Joshua Lapin, declare as follows:

1) I am over the age of eighteen, competent to testify to the matters set forth in this declaration, and I make this declaration from personal knowledge unless otherwise specified.

2) I am the self-represented plaintiff in the above-captioned matter.

3) From the night of Feb 23rd – March 23rd of 2021, I stayed in an AirBnb in Rapid City, South Dakota, the receipt for which is submitted herewith as "Exhibit C, page 5."

4) During the timeframe of #3, I obtained a PMB Mailbox from Standing Bear LLC dba Your Best Address, a Sioux Falls, SD Limited Liability Company, a true and correct copy being submitted herewith as Exhibit C, pages 2-4. My full PMB Address, which also appears on my drivers license, is "401 E 8th St STE 214 PMB7452 Sioux Falls SD 57103."

5)During the timeframe of #3, I obtained a South Dakota drivers license using the "Residency Affidavit" form attached as Exhibit C, page 1, together with my new PMB Mailbox address. The residency affidavit was signed in front of the person at the DMV, shortly before she gave me my then-new South Dakota Drivers License on March 5th 2021. A true and correct copy of my drivers license is submitted herewith as Exhibit C, page 6.

6) Also during the timeframe of #3, I registered to vote in Minnehaha County, the same county as my PMB Mailbox, which is accurately depicted in Exhibit C, page 7.

7) After the conclusion of my AirBnb stay on March 23rd 2021, I began traveling the country for a few months, followed by international travel which continued for over a year. I usually stayed in each state-or-country for 30-60 days in temporary lodgings, before moving onto the next state-or-country.

8) The travel described in #7 continued for an estimated one year and nine months in total.

9) On Jan 9th 2023, I "ended" my time as a full-time traveler aka "Digital Nomad" by returning to my home state of South Dakota, as sworn in my aforementioned Residency Affidavit nearly two years prior. I stayed for five days in an AirBnb in Sioux Falls, SD before signing a lease and moving into my new apartment.

10) On Jan 14th 2023, I began my new one-year lease in an apartment in downtown Sioux Falls, where I have lived ever since. I continue to receive my mail at my PMB address of 401 E 8th St STE 214 PMB 7452, and approximately 2-3 times a month I walk seven (7) minutes from my apartment to Standing Bear LLC dba Your Best Address to pick up my mail.

11) The only reason I did not maintain an apartment in my home state of South Dakota during my travels is because I didn't want to "double pay" for a South Dakota lease AND the temporary lodging in whatever state/country I could be found at any given time during this time of perpetual travel, nor could I afford to do so at most times therein.

12) At all times during my travel, without interruption, I intended to return to my home state of South Dakota as soon as my travels were over, consistent with the terms of the Residency Affidavit.

13) At no time during my full-time travels did I become a resident and/or domiciliary of any other US State or Foreign Country.

14) I met the owner of Standing Bear LLC dba Your Best Address, William "Bill" Linsenmeyer, and asked him if he had any jury summons(es) that were directed at his other clients, so that I can demonstrate that I, along with other Your Best Address customers, are routinely summoned for jury duty just like other South Dakota Residents. He responded with the document submitted herewith as "Exhibit A+B", including the pen-made redactions as he felt necessary to protect his client's privacy, which is a true and correct copy of a "Specific Instructions Concerning Jury Service that was sent to a different Your Best Address customer similarly situated to plaintiff, in which THIS court summoned someone similarly situated to me to Jury Duty at a different PMB

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30597

JOSHUA LAPIN

Plaintiff and Appellant,

v.

ZEETOGROUP, LLC

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable James A. Power
Circuit Court Judge

APPELLEE ZEETOGROUP, LLC'S BRIEF

Notice of Appeal: January 17, 2024

PRO SE APPELLANT:
Joshua Lapin
401 E. 8th Street, STE 214
PMB 7452
Sioux Falls, SD 57103

ATTORNEYS FOR DEFENDANT/APPELLEE:
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Filed: 10/1/2024 1:12 PM CST Supreme Court, State of South Dakota #30597

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PRELIMINARY STATEMENT

Lapin/Appellant Joshua Lapin shall be referred to as "Lapin," unless otherwise specified herein. Defendant/Appellee Zeetogroup, LLC shall be referred to as "Zeeto," unless otherwise specified herein. References to the Settled Record are cited as (SR) followed by the corresponding pin citation. References to Zeeto's Appendix are cited as (Zeeto App.) followed by the corresponding page number. References to the summary judgment transcript are referred to as (Tr.) followed by the corresponding page and line number.

JURISDICTIONAL STATEMENT

Lapin appeals from the Order Granting Zeeto's Motion for Summary Judgment, entered on December 18, 2023, and noticed on December 19, 2023. (Zeeto App. 00004-00006); (SR 1119, 1126). Lapin's Notice of Appeal was filed on January 17, 2024. (SR 1132).

STATEMENT OF LEGAL ISSUE

1. **The Circuit Court Properly Determined that "Resident" Must be Applied in Accordance with Its Plain and Ordinary Meaning for Purposes of SDCL § 32-24-41(14)(c) when It Granted Zeeto's Motion for Summary Judgment.**

   The circuit court properly determined that Zeeto was entitled to summary judgment on Lapin's claims because there was no genuine dispute of material fact that Lapin did not satisfy the plain and ordinary meaning of "resident" under SDCL § 32-24-41(14)(c).

   - SDCL § 32-24-41(14)(c)
   - SDCL § 2-14-1
   - *Parsley v. Parsley*, 2007 S.D. 58, 734 N.W.2d 813
   - *Rush v. Rush*, 2015 S.D. 56, 866 N.W.2d 556

INTRODUCTION

The circuit court correctly determined that the phrase "resident of this State," as it is used in SDCL § 37-24-41(14)(c), must be interpreted and applied according to its plain meaning. Lapin did not and has not disputed that the plain meaning of resident requires a modicum of permanent physical connection to South Dakota. He also has not disputed that he does not satisfy that definition of resident. Instead, Lapin has only asserted the plain meaning should not apply without arguing, let alone establishing, that SDCL § 37-24-41(14)(c) is ambiguous. However, ambiguity is a prerequisite to applying anything other than the plain meaning. Therefore, this Court should affirm the circuit court's entry of summary judgment for Zeeto without reaching the merits of Lapin's appeal because the circuit court adhered to the principles of statutory interpretation by applying the undisputed plain meaning of a term in an undisputedly unambiguous statute.

Lapin's appeal also fails on the merits because the requirement to apply the plain meaning of an undefined term in a statute is mandated by statute and this Court's precedent setting forth the principles of statutory interpretation. No absurd result is reached when applying the plain meaning of resident to SDCL § 37-24-41(14)(c). Indeed, this Court has already observed twice that being a "resident of this state" under a different statute required an "actual residence, as opposed to temporary abiding place" under a different statute. Lapin did not dispute that he never had a job, a lease to an apartment, a deed to a house or any other permanent dwelling in South Dakota, and that he was physically absent for almost two years. Rather, he repeatedly conceded that he was a "full-time traveling digital nomad" without any permanent residence. As such, there was no genuine issue of material fact to preclude summary judgment for Zeeto. Zeeto respectfully requests this Court affirm the judgment of the circuit court.

STATEMENT OF THE CASE

Lapin, pro se, filed a 46-count lawsuit against Zeeto based upon allegations that he received a number of e-mailed advertisements that he claims violate South Dakota's anti-spam law, namely, SDCL § 37-24-47. In order to bring a cause of action under this statute, the alleged e-mails must have been sent to a "South Dakota e-mail address," as defined by SDCL § 37-24-41(14). Lapin narrowly alleged that he satisfied subsection c of the foregoing statute, which required that he possess an e-mail "furnished to a resident of this State." Zeeto moved for summary judgment on the basis that Lapin was not a resident of South Dakota during the time that he alleged to have received the e-mails. The circuit court applied the plain meaning of resident to determine that Lapin was not a resident when his cause of action arose and entered summary judgment for Zeeto.

A. Factual Background

The first time Lapin ever visited the State of South Dakota was in February of 2021. (Zeeto App. 00009-10)[1]; (SR 208). He had not been born or raised in the State or had otherwise visited previously. (Zeeto App. 00009-10, 13-14). Rather, at the time he visited in 2021 and until at least 2023, Lapin described himself as a "full-time traveling 'digital nomad,' who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence in or out of the United States." (Zeeto App. 00008-9, 13). As a result, when Lapin first visited South Dakota on February 23, 2021, he rented a bedroom in another individual's home in Rapid City through the online travel

[1] In setting forth a factual background, Lapin recites number of allegations he claims were undisputed at the trial level. Appellant Brief at pp. 6-8. Most, if not all, of these allegations were not included in Zeeto's Statement of Material Undisputed Facts, which Lapin did not genuinely dispute. (Zeeto App. 00008-11); Appellant Brief at p. 5 ("The parties agree and the court likewise found, that '[t]he material facts as it pertains to whether Plaintiff was a "resident of this state" are not genuinely disputed by the parties[.]'").

accommodation platform, AirBnB. *Id.* While in Rapid City, Lapin set up a "personal mailbox" that was located in a commercial strip in Sioux Falls, he obtained a South Dakota driver's license, and registered to vote. (Zeeto App. 00015); (SR 209). On March 24, 2021, 28 days after his arrival, Lapin departed South Dakota and was not physically present in the State again for nearly two years. (Zeeto App. 00010, 16).

Lapin alleged that between June 14, 2021, and July 25, 2021, approximately three to four months after he departed South Dakota, a number of advertisements were received by the e-mail address ketosoup97@gmail.com. (Zeeto App. 00013); (SR 8-56 (Complaint)). Approximately nine months after Lapin claimed to have received such e-mails and while still physically absent from the South Dakota, he filed a 133-page 46-count Complaint against Zeeto and "John Doe Sender" claiming that e-mails were in violation of SDCL § 37-24-47 and that Zeeto and "John Doe Sender" were responsible for them[2] (SR 6-138 (Complaint)). Because Lapin's claims required that the subject e-mail address be a "South Dakota e-mail address" as defined by SDCL § 37-24-41(14), he also narrowly alleged that he was a "resident of this state" for purposes of satisfying subsection c of that statute. *Id.*

As of December 1, 2022, Lapin did not have any "anticipated travel" plans to South Dakota. (Zeeto App. 00010, 17). He did, however, travel to Sioux Falls on January 9, 2023. *Id.* During his almost two-year absence from South Dakota, Lapin did not attempt to rent an apartment, buy a house, or otherwise maintain some form of a dwelling in the State. (Zeeto App. 00010, 16). He never attended a South Dakota school and did not work for a South Dakota employer. (Zeeto App. 00009, 14). Rather, Lapin

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[2] Lapin voluntarily dismissed John Doe Sender as a party on or about April 25, 2023. (SR 195).

was the CEO of a business, SkyCap Solar, Inc., which was registered under the laws of the State of Wyoming. (Zeeto App. 00009, 15). Lapin also "preferred" to receive his mail at an address in Wyoming, despite him having set one up in Sioux Falls in 2021. *Id.*

B. Procedural History

On May 1, 2023, Lapin filed a Motion for Partial Summary Judgment asking the circuit court to determine he was a South Dakota "resident" as contemplated by SDCL § 37-24-41(14)(c). (SR 198). Lapin's claim of residency was principally based on the allegation that he "maintains a drivers [sic] license, voter registration, and Personal Mail Box in Sioux Falls, South Dakota, and all three documents list the PMB as his legal address." On June 6, 2023, Zeeto filed a cross-Motion to Dismiss. (SR 260). The two motions came on for hearing on June 16, 2023, before the Honorable Sandra Hoglund Hanson. (Zeeto App. 00001). Judge Hanson denied Lapin's Motion for Partial Summary Judgment and converted Zeeto's Motion to Dismiss into one for Summary Judgment, requesting that the matter be briefed in accordance with SDCL § 15-6-56. (Zeeto App. 00002).

Zeeto's converted motion for summary judgment came on for hearing on December 7, 2023, before the Honorable James A. Power. (Zeeto App. 00004). Judge Power determined that the plain and ordinary meaning of "resident" controlled the application of SDCL § 37-24-41(14)(c), which required some form of a physical permanent physical connection to the State. (Zeeto App. 00005-6). When applying the statute to the undisputed facts, Judge Power determined there was no genuine issue of material fact that Lapin was not a resident of this State for purposes of SDCL § 37-24-41(14)(c) and granted Zeeto's motion for summary judgment. (Zeeto App. 00006). Lapin filed his Notice of Appeal on January 17, 2024. (SR 1132).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT LAPIN WAS NOT A "RESIDENT OF THIS STATE" UNDER SDCL § 37-24-41(14)(C).

The circuit court properly granted Zeeto's motion for summary judgment. "This Court reviews a grant of summary judgment to determine whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law.'" *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398 (quoting *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444) (alteration in original). However, Lapin's appeal is based on the circuit court's determination that SDCL § 37-24-41(14)(c) must be interpreted in accordance with the plain and ordinary meaning of "resident." Accordingly, "[s]tatutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review." *Nelson v. Promising Future, Inc.*, 2008 S.D. 130, ¶ 5, 759 N.W.2d 551, 553 (quoting *Rotenberger v. Burghduff*, 2007 S.D. 7, ¶ 8, 727 N.W.2d 291, 294).

All of Lapin's claims against Zeeto are based on allegations that he received e-mails in violation of SDCL § 37-24-47, which provides, in pertinent part, as follows:

> No person may advertise in a commercial e-mail advertisement . . . sent to a South Dakota 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;
> (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.

SDCL § 37-24-47. In order for Lapin's claims under this statute to survive summary judgment, the subject e-mail address must have been a "South Dakota electronic mail

address." Chapter 37-24 defines a South Dakota e-mail address as follows:

> (a) 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;
> (b) An e-mail address ordinarily accessed from a computer located in this state; or
> (c) An e-mail address furnished to a resident of this state.

SDCL § 37-24-41(14). Lapin alleged that the subject e-mail address satisfied subsection c because he was a "resident of this state." (Tr. 5:5-21).

"Resolving an issue of statutory interpretation necessarily begins with an analysis of the statute's text." *Matter of Appeal by Implicated Individual*, 2021 S.D. 61, ¶ 16, 966 N.W.2d 578, 583 (citing *Long v. State*, 2017 S.D. 78, ¶ 12, 904 N.W.2d 358, 363). "This [C]ourt assumes that statutes mean what they say and that legislators have said what they meant. When the language of a statute is clear, certain and unambiguous, there is no occasion for construction, and the [C]ourt's only function is to declare the meaning of the statute as clearly expressed in the statute." *Delano v. Petteys*, 520 N.W.2d 606, 608 (S.D. 1994) (quoting *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 886 (S.D. 1984)). When declaring the meaning of the statute, the Court "must confine itself to the language used." *Rowley v. S.D. Bd. of Pardons & Paroles*, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363 (citation omitted). Any terms that the South Dakota Legislature chose not to define in the statutory scheme must "be understood in their ordinary sense." SDCL § 2-14-1; *see also Rowley*, 2013 S.D. 6, ¶ 7, 826 N.W.2d at 363 ("[w]ords and phrases in a statute must be given their plain meaning and effect."); *City of Sioux Falls v. Strizheus*, 2022 S.D. 81, ¶ 20, 984 N.W.2d 119, 124 ("When a term is not defined in an ordinance, we interpret the term according to its usual and ordinary meaning.").

Here, the circuit court properly determined that resident must be interpreted in

accordance with its plain meaning for purposes of SDCL § 37-24-41(14)(c) because although the term was undefined, the statute was not ambiguous. Therefore, Zeeto respectfully requests that this Court affirm.

A. Lapin's Failure to Assert that SDCL § 37-24-41(14)(c) is Ambiguous or that he Satisfied the Plain Meaning of "Resident" Precludes his Appeal.

"This court has said on countless occasions that an issue may not be raised for the first time on appeal." *See, e.g., Mortweet v. Eliason*, 335 N.W.2d 812, 813 (S.D. 1983). At the trial court level, Lapin consistently and exclusively asserted that the plain meaning of resident should not apply to SDCL § 37-24-41(14)(c). (Tr. 17:4-9); (SR 990-1014 (Response Brief)). However, Lapin never asserted that the text of SDCL § 37-24-41(14)(c) is ambiguous. *See, e.g.*, (SR 993 (Lapin writing, "we immediately see a clear and unambiguous intention," with regard to SDCL § 37-24-41(14))). This was the case even though Zeeto asserted throughout the course of the summary judgment proceedings that Lapin had failed to claim or demonstrate that the statute was ambiguous. (Tr. 9:21-25); (SR 815-16, 1082). Lapin also never argued that Zeeto or the circuit court incorrectly determined *what* the plain meaning of resident is. (SR 990-1014). And he did not alternatively argue that he satisfied the ordinary definition or dispute that the material facts did not satisfy it, as he tries to do now. *See, e.g.*, Appellant Brief at pp. 15-17; (SR 990-1014 (Response Brief); (SR 1007-1010 (writing, "[t]his legal standard is flawed and should not be followed.")). Accordingly, Lapin cannot argue for the first time on appeal that the circuit court incorrectly determined the plain meaning of resident or alternatively argue that he satisfied that definition.

Importantly, a court is only able deviate from the plain and ordinary meaning if the term at issue is defined by the statutory scheme or the statute is ambiguous. *See, e.g.*,

SDCL § 2-14-1; *Farm Bureau Life Insurance Co. v. Dolly*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 200 ("ambiguity is a prerequisite of construction."). Here, it was undisputed that "resident" was not defined and that SDCL § 37-24-41(14) is unambiguous. (Tr. 16:22-25). As such, the circuit court interpreted an unambiguous statute in accordance with the undisputed plain and ordinary meaning of an undefined term in that statute. This is wholly consistent with the rules of statutory interpretation. *See Stern Oil Co.*, 2012 S.D. 56, ¶ 9, 817 N.W.2d at 399 ("this Court will affirm the circuit court's ruling granting a motion for summary judgment if any basis exists to support the ruling."). This Court does not need to reach the merits of Lapin's appeal and should affirm the order of the circuit court.

B. The Plain Meaning of "Resident" Requires Some Form of Permanent Physical Connection to South Dakota.

Even assuming, *arguendo*, this Court evaluates the text of SDCL § 37-24-41(14)(c) further, "failing to define terms does not automatically result in an ambiguity . . . . [The Court] may use statutes and dictionary definitions to determine the plain and ordinary meaning of undefined words." *Jackson v. Canyon Place Homeowner's Ass'n, Inc.*, 2007 S.D. 37, ¶ 11, 731 N.W.2d 210, 213. Consistent with this command, the circuit court turned to dictionary definitions and this Court's precedent to determine the plain and ordinary meaning of "resident." *See, e.g., Strizheus*, 2022 S.D. 81, ¶ 20, 984 N.W.2d at 124 (providing that this Court has "often applied dictionary definitions for an undefined term in an ordinance or statute.") (citations omitted). In doing so, the circuit court observed that dictionary definitions for resident or residence "always ha[ve] an element of physicality to it that you're physically dwelling in a particular place, and that it's not just a temporary abode like a hotel. There's some element of permanence." (Tr.

32:12-22). From there, the court correctly determined that "when you use resident in the ordinary meaning you're asking where someone physically resides on a permanent basis." *Id.*

Notably, this was the same approach followed by the Honorable Karen E. Schreier when she confronted the same issue in a similar lawsuit filed by Lapin in the district court for the District of South Dakota.[3] *See Lapin v. EverQuote Inc*, No. 4:22-CV-04058-KES, 2023 WL 2072059, at *10 (D.S.D. Feb. 17, 2023). Judge Schreier observed how all of the following "definitions of 'resident' contemplate some form of physical presence:"

> Black's Law Dictionary defines "resident" in a few ways. First, it defines a resident as "[s]omeone who **lives permanently** in a particular place[.]" Resident, BLACK'S LAW DICTIONARY (11th ed. 2019). It also defines it as "[s]omeone who has **a home** in a particular place[,]" and "[s]omeone who is **staying** in a particular hotel, apartment building, etc." *Id.* Similarly, Merriam-Webster's Collegiate Dictionary defines "resident" as "one who **resides** in a place." Resident, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999). In turn, it defines "reside" as "to **dwell permanently or continuously**." *Reside*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999).

Id. (bold emphasis added).

The conclusion reached by Judge Power and Judge Schreier is consistent with this Court's decisions in *Parsley v. Parsley* and *Rush v. Rush*, which, in striking similarity to SDCL § 37-24-41(14)(c), interpreted SDCL § 25-4-30's requirement that a plaintiff be a "resident of this state" before commencing a divorce action. *Parsley v. Parsley*, 2007 S.D. 58, ¶ 17, 734 N.W.2d 813, 818; *Rush v. Rush*, 2015 S.D. 56, ¶ 12, 866 N.W.2d 556, 561. To determine whether the plaintiff had satisfied SDCL § 25-4-30, the *Parsley* Court

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[3] Lapin filed an appeal in this case based on an argument that Judge Schreier did not have jurisdiction to adjudicate the matter. The Eighth Circuit Court of Appeals recently affirmed the order dismissing Lapin's claims for failure to state a claim. *See Lapin v. EverQuote, Inc.*, No. 23-2184, 2024 WL 1109067 (8th Cir. Mar. 14, 2024) ("After careful de novo review of the record and the parties' arguments on appeal, this court concludes that Lapin had standing to raise his claims . . . and finds no basis for reversal").

held that a "residence must be an actual residence as distinguished from a temporary abiding place[.]'" 2007 S.D. 58, ¶ 17, 734 N.W.2d at 818. In 2015, the *Rush* Court re-affirmed *Parsley* when applying SDCL § 25-4-30 again. *Rush*, 2015 S.D. 56, ¶ 12, 866 N.W.2d at 561 ("The Legislature has not defined 'resident' as it is used in SDCL 25–4–30. In *Parsley*, we said that '[i]t follows that the residence must be an actual residence as distinguished from a temporary abiding place [.]'").

Conversely, this Court has never recognized "full-time traveler's residency." Lapin's claim to the contrary is based solely on information mentioned in this Court's recitation of the factual background in *Payne v. State Farm Fire & Casualty Company*. 2022 S.D. 3, ¶ 3, 969 N.W.2d 723, 724-25. That information is never referenced again in *Payne* because residency was not an issue on appeal. *See id.* at ¶¶ 9-10.[4] The sole holding in *Payne* was that Florida law only requires an insurance carrier to offer UM coverage upon the insured's application. *Id.* at ¶¶ 12-20; *see also Payne v. Kirk*, 2016 WL 11771678 at *1-2 (S.D.Cir. Feb. 23, 2016) (providing that "[the plaintiffs] moved to Florida in May of 2011" was an undisputed fact). Insurance policies are also subject to specific rules of regulation, interpretation, evidentiary presumptions, and application. *See Friesz v ex rel. Friesz v. Farm & City Ins. Co.*, 2000 S.D. 152, ¶ 7, 619 N.W.2d 677, 679 ("specific rules of construction apply to the interpretation of an insurance policy.").

While Lapin has never disputed that the plain meaning of resident contemplates

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[4] Lapin's reliance on *MaryCLE, LLC v. First Choice Internet, Inc.* is similarly misplaced. The case did not address "standing" or residency as Lapin posits. Rather, the case concerned only the following three issues: (1) whether personal jurisdiction required the defendant to "purposefully direct" e-mails to Maryland residents; (2) whether a statute violated the dormant Commerce Clause when it purported to regulate e-mails received outside of Maryland; and (3) whether defendant's president could be held individually liable. 890 A.2d 818, 825-26 n.12 (Md.Ct.App. 2006). No determination of the plaintiff's residency was made. *See generally id.*

physical presence, many of the cases he cites also support the conclusion that the that it contemplates physical presence. For example, he relies on *State ex Rel. Johnson v. Cotton* for its holding that children who resided in the Beresford school district could attend public school there without paying tuition. 289 N.W. 71, 72 (S.D. 1939) ("the children living in the Bethesda Children's Home are entitled to attend school in the Beresford Independent School District No. 87 without paying tuition"). In rendering its holding, the Court specifically noted that "[t]he inmates of the Home ***live therein*** and make it their permanent home." *Id.* (emphasis added); *see also Cox, Cox, Filo, Camel & Wilson, LLC v. Sasol N. Am., Inc.*, No. 2:11-CV-856, 2012 WL 262613, at *5 (W.D.La. Jan. 30, 2012) (holding that one of the parties established a domicile in Texas for diversity jurisdiction purposes when "he resides in Texas most of the time," even if it was in an RV); *McHenry v. Astrue*, No. 12-2512-SAC, 2012 WL 6561540, at *3 (D.Kan. Dec. 14, 2012) ("He lived and/or worked in Kansas from 2003–2011, and he moved to Missouri in October 2011 only because he was homeless and he was told that the only homeless shelter available was in Missouri.").

The circuit court properly determined that the plain and ordinary meaning of residency contemplates a permanent physical connection to South Dakota and that SDCL § 37-24-41(14)(c) must be interpreted in accordance with that meaning. Such ruling was consistent with dictionary definitions for the term and this Court's well-settled precedent concerning statutory interpretation. Therefore, this Court should affirm.

C. The South Dakota Legislature Intended for SDCL § 37-24-41(14)(c) to be Applied Consistent with the Plain Meaning of Resident.

Just as he did before the circuit court, Lapin fails to assert or establish that SDCL § 37-24-41(14)(c) is ambiguous despite arguing that he only prevails when principles of

statutory construction apply. However, this Court's precedent is clear that "[w]hen the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and [this] Court's only function is to declare the meaning of the statute as clearly expressed." If applying the plain meaning of resident led to absurd results, this Court would not have done so in *Parsley* and *Rush*. Neither case indicated that SDCL § 25-4-30 was being strictly or liberally construed by the Court. Instead, the Court simply declared the plain meaning of resident as it was clearly expressed in the subject statute and applied it to the facts before it. There is no ambiguity or absurd result which supports deviating from the ordinary meaning of resident in SDCL § 37-24-41(14)(c). Indeed, it employs the same phrase as the statute at issue in *Parsley* and *Rush*—"resident of this state."

Even if this Court had to resort to principles of statutory construction, which it does not, no different result is produced. The Legislature's intent for the plain and ordinary meaning of "resident" to be applied is clear from its decision to not define the term in Chapter 37-24. *See* SDCL § 2-14-1 (requiring the words in a statute be "understood in the ordinary sense" unless otherwise defined). If the Legislature wanted a different meaning to apply, it would have supplied a definition as it does for the same in numerous other chapters in the code. For example, under SDCL Chapter 9-3, which concerns the incorporation of municipalities, the Legislature clarified, "[f]or purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition[.]" SDCL § 9-3-1. Similarly, SDCL § 13-53-24 states that "[a] person entering the state . . . does not at that time become a resident for the purposes of §§ 13-53-23 to 13-53-41, inclusive, unless, except as

provided in §§ 13-53-29 to 13-53-29.2, inclusive, the person is a resident for twelve months in order to qualify as a resident student for tuition and fee purposes."

Subparts (a) and (b) of SDCL § 37-24-41(14) also do not reveal a contrary intent that would support deviating from the plain meaning of resident. Both subsections require some form of physical connection to South Dakota. For subsection a, it requires that the provider of the e-mail address send bills to a mailing address *in this State*. SDCL § 37-24-41(14)(a). The mailing address is the physical connection. (Tr. 33:10-23). Lapin did not even prefer to receive his mail in South Dakota. (SR 6). Under subsection b, the e-mail address has to be ordinarily accessed from a computer located in South Dakota. SDCL § 37-24-41(14)(b). Accordingly, the entirety of SDCL § 37-24-41(14) demonstrates that the Legislature was "trying to find ways to attach email addresses to a real physical connection with South Dakota." (Tr. 34:6-18).

Notably, Lapin has never explained what definition applies to "resident" for purposes of SDCL § 37-24-41(14)(c) in lieu of the ordinary meaning of the term, which is especially problematic given the myriad of definitions which exist in codified law. Instead, he has frequently made an amorphous argument that he is a "resident" under the statute because he supposedly intended to return to South Dakota, a standard applied for determining one's domicile. However, "[r]esidence and domicile are not interchangeable concepts." *State ex rel. Jealous of Him v. Mills*, 2001 S.D. 65, ¶ 10, 627 N.W.2d 790, 793; *People In Interest of G.R.F.*, 1997 S.D. 112, ¶ 16, 569 N.W.2d 29, 32 (citation omitted) ("one can reside in one place but be domiciled in another"). SDCL § 37-24-41(14)(c) uses the term resident, not domicile, and there are no express or implied references to domicile in Chapter 37-24. If the Legislature wanted the domicile analysis to apply, it would have stated as much. Indeed, SDCL § 12-1-4, which provides the

criteria for determining voting residence, provides that, "[f]or the purposes of this title, the term, residence, means the place in which a person is domiciled as shown by an actual fixed permanent dwelling, establishment, or any other abode to which the person returns after a period of absence."

Moreover, when the Legislature has offered a specific definition for resident or residence, it typically specifies that the definition only applies for purposes of that title or chapter. This includes the statutes that Lapin heavily relies upon, including SDCL § 12-1-4, quoted above, and the chapter governing driver's licenses. *See* SDCL § 32-12-1 ("For purposes of this chapter, terms are defined in § 32-14-1. Terms used in this chapter mean: . . . (4) Principal residence"). These statutes cannot be construed in pari materia when the Legislature has specifically written that these definitions were offered strictly for the purposes of acquiring driver's licenses and voter registration.

In any case, interpreting SDCL § 37-24-41(14)(c) in accordance with its plain meaning is not at odds with Lapin's South Dakota driver's license. An applicant for a South Dakota's driver's license must show that they have a "principal" residence" in the State. SDCL § 32-12-3.5. Importantly, SDCL § 32-12-1 defines a "[p]rincipal residence" as the "location where a person currently resides even if at a temporary address." Unlike Chapter 37-24, a specific and express carveout was made by the Legislature to allow "travelers" like Lapin to obtain a driver's license despite the temporariness of their physical presence. This does not mean that one is now a resident for any and all issues which implicate the term. The Legislature's decision to include that language in one part of the code while omitting it from Chapter 37-24 is demonstrative of that conclusion.

Lapin's voter registration produces the same result.[5] In fact, this Court has held that a person's voting residence is the place they *actually* live. *See Heinemeyer v. Heartland Consumers Power Dist.*, 2008 S.D. 110, ¶ 21, 757 N.W.2d 772, 778. In *Heinemeyer*, the Court explained that "[p]rior to November 1, 2006, [the plaintiff] was living at his home at 927 Jennifer Street in Madison, South Dakota. Since this was the only residence [plaintiff] kept at the time, this was in fact his voting residence." *Id.* at ¶ 14. However, "[o]n November 1, 2006, [plaintiff] ceased to actually live in his home in Madison" because he had sold it and he "effectively gained voting residence at his home in Wentworth on November 1, 2006, because he began actually living in his Wentworth home." *Id.* The Court held that this result was not changed even though the following facts "certainly establish [the plaintiff's] strong ties and service to the community of Madison, they do little to aid in the evaluation of where he actually lives and whether he has any present intention of leaving:"

> a. voting as a registered voter in Madison for several years;
> b. attending church regularly in Madison;
> c. maintaining membership on the Chamber of Commerce;
> d. volunteering on city and community boards;
> e. renting an apartment in Madison;
> f. maintaining his mailing address in Madison;
> g. using his Madison address as his bank address;
> h. receiving newspapers in Madison; and
> i. daily employment duties.

Id. at ¶¶ 17-18. The Court emphasized the plaintiff's admissions that he "does not spend

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[5] The Secretary of State is required to rely on Lapin's word that he is qualified to vote in South Dakota. *See* SDCL § 12-4-1.2. Both Zeeto and the circuit court expressed doubt that Lapin was qualified to be a South Dakota voter when he first registered. (Tr. 15:1-16:18). At that time, SDCL § 12-1-4 defined a voting "residence" as the "place in which a person has fixed his or her habitation and to which the person, whenever absent, intends to return" Lapin registered in Minnehaha County. However, he stayed in Pennington County for 28-days in the guest room of another person's by making a reservation through AirBnB and he had admitted that he never had an "actual fixed permanent dwelling" in South Dakota until 2023. (SR 208); (Zeeto App. 00010).

any substantial amount of leisure time at his apartment, keeps few, if any, personal effects at the apartment," "rarely sleeps there overnight," obtained the apartment in order to have a place to eat lunch during the workday and occasionally take naps," and "he began renting the apartment to satisfy the residency requirement[.]" *Id.* at ¶ 17. Here, the *Heinemeyer* plaintiff's "strong ties" to Madison dwarf the connection Lapin had to South Dakota between 2021 to 2023.

The fact that the voter registration statute defining residence, SDCL § 12-1-4, was amended in 2023, to include a domicile standard in lieu of a "habitation" requirement is of not import. The Legislature chose to supply that definition for purposes of voter registration, but not for Chapter 37-24. The amendment also occurred over two years after Lapin purportedly registered to vote and well after he alleges to have received e-mails. Amendments to statutes are not retroactively applied unless the Legislature expressly provides as much. *See, e.g., West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990) ("the general rule of statutory construction is that a statute will not operate retroactively unless the act clearly expresses an intent to do so."). Furthermore, Lapin exclusively relies on statements made by individual legislators concerning the amendment. Yet, "this Court has 'consistently held that statements of individual legislators are not persuasive to establish the intent of the Legislature for a particular statute' . . . . this Court's rule of statutory interpretation "is that the Legislature said what it meant and meant what it said *from the text of the statute.*" *Farm Bureau Life Ins. Co.*, 2018 S.D. 28, ¶ 12, 910 N.W.2d at 201 (quoting *Benson v. State*, 2006 S.D. 8, ¶ 72, 710 N.W.2d 131, 159 n.15) (emphasis in original).

D. SDCL § 37-24-41(14)(C) is Not Unconstitutional.

While Lapin has made constitutional arguments concerning SDCL § 37-24-

41(14)(c) previously, it has never been entirely clear what his purpose in doing so has been. Regardless, each time Lapin has raised the issue, it has been improper for him to do so. Lapin never plead a claim for a declaratory judgment that SDCL § 37-24-41(14)(c) is unconstitutional. (SR8). However, the determination of a statute's validity and a declaration of a person's right thereunder falls within the Uniform Declaratory Judgments Act. SDCL § 21-24-3. Lapin also never gave proper notice to the South Dakota Attorney General of his supposed constitutional challenge. SDCL § 15-6-24(c) requires that he do so because the State is not a party to this lawsuit:

> When the constitutionality of an act of the Legislature affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him the opportunity to intervene.

Lapin also does not appear to challenge the circuit court's determination that SDCL § 37-24-41(14)(c) does not create a durational requirement under the Constitution. Instead, he argues that the circuit court failed to address his Equal Protection challenge. Appellant's Brief at p. 38-39. Although Lapin referenced the Equal Protection Clause in his briefing to the circuit court, he still seemingly appeared to be arguing it was violated due to a durational requirement, rather than matters relating to a physical dwelling. (SR 1016 ("The statutory prohibition of benefits to residents of less than a year creates a classification which denies equal protection of the laws . . .")). If there was another issue which needed to be decided by the circuit court, Lapin did not bring that to the court's attention or otherwise object, which waives the issue. *See In re Estate of Dimond*, 2008 S.D. 131, 759 N.W.2d 534, n. 1 ("The circuit court did not rule on Twila's promissory estoppel claim. She did not object to the court's failure to rule or submit proposed findings and conclusions on this issue. Therefore, it is waived.").

Even so, the case Lapin relies upon concerned a New York statute that defined "residence" for purposes of voter registration as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." *Pitts v. Black*, 608 F.Supp. 696, 698 (S.D.N.Y. 1984). The statute's proponents admitted that the definition excluded homeless individuals because they do not reside in "traditional residences." *Id.* at 698-99. No such definition for resident appears in SDCL Chapter 37-24. More importantly, neither the circuit court nor this Court when it handed down *Parsley* and *Rush* ruled that a person must own a traditional house to satisfy the ordinary meaning of resident. The circuit court ruled that a residence "always has an element of physicality to it that you're physically dwelling in a particular place, and that it's not just a temporary abode like a hotel. There's some element of permanence." (Tr. 32:12-22). While having a dwelling structure would be evidence that one is physically dwelling somewhere, it is not required. Staying in the functional equivalent of a hotel for 28 days and then leaving for nearly two years is not comparable to a homeless individual who eats, sleeps, and otherwise lives their life in South Dakota.

In summary, the circuit court correctly determined that the plain and ordinary meaning of "resident" must be used when applying SDCL § 37-24-41(14)(c) to the facts. Indeed, it was undisputed that this is the plain and ordinary meaning of resident, that resident was an undefined term, and that SDCL § 37-24-41(14)(c) was unambiguous. Regardless of whether statutory construction is necessary, no different result is produced. One may be a resident for one purpose, like obtaining a driver's license, and not another, such as qualifying for in-state tuition. The premise is neither novel nor does it contravene the Constitution. The Legislature is cognizant of this given its decision to provide specific definitions for the term in some chapters of the Code. This Court should affirm

the circuit court's issuance of summary judgment to Zeeto.

II. THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT LAPIN WAS NOT A RESIDENT OF SOUTH DAKOTA DURING THE APPLICABLE TIME PERIOD.

Again, Lapin did not offer an alternative definition for resident to the circuit court, did not dispute that the underlying facts of his case would not satisfy the plain meaning resident, and he did not alternatively argue that he satisfied the definition of resident offered by *Parsley* and *Rush*. *See, e.g., Mortweet*, 335 N.W.2d at 813 ("This court has said on countless occasions that an issue may not be raised for the first time on appeal."). Thus, this Court need not review whether the circuit court properly applied SDCL § 37-24-41(14)(c). Even so, a grant of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL § 15-6-56(c). "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Stern Oil Co.*, 2012 S.D. 56, ¶ 8, 817 N.W.2d at 398. The undisputed facts did, in fact, conclude that Lapin was not a resident of this state during the applicable time frame, June and July of 2021.

SDCL § 37-24-47 determines the relevant time period to consider. The statute which pertinently provides that "[n]o person may advertise in a commercial e-mail advertisement . . . ***sent to*** a South Dakota electronic mail address[.]" (Emphasis added). The phrase "sent to" in this statute "means that the relevant time in which to determine whether the recipient is a resident of South Dakota is at the time the e-mail was sent." (SR 958 (The Honorable Karen E. Schreier's Order Denying Lapin's Motion for Reconsideration)); (Tr. 31:14-17). As Judge Schreier observed when she denied Lapin's motion for reconsideration, this conclusion "makes sense" because "adopting Lapin's

argument would allow any current resident of South Dakota to theoretically resurrect emails it received several years ago back when such individual resided in a different state, all because the individual currently lives in South Dakota." *Id.* (also writing that this could "pose a serious Due Process notice issue" by "impos[ing] liability on a sender of an email to a recipient who was not a resident of South Dakota at the time the email was sent but later moved to South Dakota) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994)). In this case, all 46-counts of Lapin's Complaint pertain to the alleged receipts of e-mails during the months of June and July of 2021. As these e-mails are the events giving rise to the Complaint, June and July of 2021 is when he must have been a "resident" of South Dakota.

There was no genuine dispute of material fact that Lapin was not physically present in South Dakota during June and July of 2021, let alone did he have a residence here. (Tr. 31:1-32:3). Lapin conceded in his Complaint and in his discovery responses that he did not consider South Dakota a "home," if even a "temporary abiding place." Instead, he defined himself as a "full-time traveling 'digital nomad', ***who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence*** in or out of the United States[.]" (SR 7 (Complaint at p. 2)) (emphasis added); *see also* (SR 900 (writing in response to discovery that he is a "digital nomad" without a "permanent house or apartment who travels from 'from place to place' often country-to-country, and explores the world while making a living over the internet (as opposed to going to work in- person in an office, which would [sic] one of the ability to travel the world constantly).")); (SR 905 (writing on social media,"[f]or approximately the last two years, I was traveling full-time as a 'digital nomad,' spending 30-60 days in each country, living in an AirBnb, and then moving onto the next country, and the next, and the

next.")); *compare Parsley*, 2007 S.D. 58, ¶ 18, 734 N.W.2d at 818 (specifically acknowledging that the plaintiff had a "permanent residence" in South Dakota); *In Re G.R.F.*, 1997 S.D. 112, ¶ 16, 569 N.W.2d at 33 n. 4 (domicile means "living in that locality with intent to make it a fixed and permanent home.") (quoting Black's Law Dictionary 485 (6th ed.)).

Lapin's failure to allege a meaningful connection to South Dakota was not an oversight. Lapin was not born or raised in the State and did not attend school here either. (Zeeto App. 00009-10, 13-14). In reality, the first time Lapin had ever visited South Dakota was when he stayed at an AirBnB in Rapid City for 28-days in February of 2021, several months before he claims to have received the alleged e-mails. (Zeeto App. 00009-10, 16); *see also* (SR 901 (Lapin conceding that March 5, 2021, is "earlier than any time material to this dispute" in response to discovery)). Lapin did not stay in South Dakota then to scout out apartments or jobs. He did so only that he could be subject to more favorable tax treatment while he "move[d] from place to place, generally internationally in 30 day cycles, without a permanent residence in or out of the United States." Indeed, Lapin previously boasted online that he only had to spend a "mere" thirty days in South Dakota to claim the benefits of the State's favorable tax laws. (SR 905 (writing on social media, "South Dakota allows anyone to become a resident of the state after spending a mere 24 hours in the state")).

After January of 2021, it was undisputed that Lapin was not physically in South Dakota for approximately two years. (Zeeto App. 00010, 16). When Lapin arrived in the State in January of 2023, he was not "returning" to anything. He had never had a job here, never rented an apartment, purchased a house, or otherwise secured a dwelling over the course of those two years. *Id.* Instead, Lapin had only ever rented a mailbox at the

8th & Railroad complex, a commercial strip mall, in Sioux Falls, but he "preferred" to receive his mail in Wyoming. (Zeeto App. 00009, 15); (SR 6 (Complaint at p. 1)); *compare Rush*, 2015 S.D. 56, ¶ 14, 866 N.W.2d at 561 (noting that the Plaintiff was receiving his mail in South Dakota and had a South Dakota telephone number). Lapin's claim that this mailbox made him a "resident" is akin to claiming that a P.O. Box makes the post office a home. A P.O. box is not a temporary abiding place because a person cannot sleep or store personal effects (other than mail) in one. Rather, the only utility it serves is to receive and hold mail.

The undisputed facts demonstrated that Lapin was not a resident of this State for purposes of SDCL § 37-24-41(14)(c). He was not physically present in the State when he alleged to have received the e-mails and did not have anything here in which to return to that end. His claimed intent to return is not supported by any evidence other than his own self-serving statements. *See Mills*, 2001 S.D. 65, ¶ 10, 627 N.W.2d at 793 ("[a] person's declared intentions may be discounted when they conflict with the facts."); *Steed by & through Steed v. Missouri State Highway Patrol*, 2 F.4th 767, 770 (8th Cir. 2021) (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)) ("[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")). As such, this Court should affirm the circuit court ruling.

CONCLUSION

For the foregoing reasons, Zeeto respectfully requests that this Court affirm the circuit court's entry of summary judgment in Zeeto's favor.

Dated this 1st day of October, 2024.

CUTLER LAW FIRM, LLP
Attorneys at Law

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 7,357 words, exclusive of the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Abigale M. Farley

CERTIFICATE OF SERVICE

I, Abigale M. Farley, do hereby certify that on this 1st day of October, 2024, I have electronically filed the foregoing with the Supreme Court using the Odyssey File & Serve system. A true and correct copy of the same was sent to by U.S. Mail and electronic e-mail to the following:

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/s/ Abigale M. Farley
Attorney for Appellee Zeetogroup, LLC

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30597

JOSHUA LAPIN

Plaintiff and Appellant,

v.

ZEETOGROUP, LLC

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable James A. Power
Circuit Court Judge

APPELLEE ZEETOGROUP, LLC'S APPENDIX

Notice of Appeal: January 17, 2024

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INDEX TO APPELLEE'S APPENDIX

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

JOSHUA LAPIN, Plaintiff, vs. ZEETOGROUP, LLC, Defendant.	49CIV22-000725 **ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, CONVERTING DEFENDANT'S MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, HOLDING THE MOTION FOR COSTS AND ATTORNEYS' FEES IN ABEYANCE, AND SETTING A SCHEDULING ORDER**

Plaintiff Joshua Lapin ("Plaintiff") filed a Motion for Partial Summary Judgment on May 1, 2023. Defendant Zeetogroup, LLC ("Defendant") filed a Motion to Dismiss and Motion for Costs and Attorneys' Fees on June 2, 2023. At 11:00 a.m., on June 16, 2023, a hearing on the three foregoing motions was held before the Honorable Sandra Hoglund Hanson at the Minnehaha County Courthouse in Sioux Falls, South Dakota. Plaintiff appeared personally and was not represented by counsel. Defendant was represented by and through its attorneys, Abigale M. Farley of the Cutler Law Firm, LLP, and Jacob Gillick, admitted *pro hac vice*, of PHG Law Group.

After considering Plaintiff's Motion for Partial Summary Judgment, Defendant's Motion to Dismiss and Motion for Costs and Attorneys' Fees, the written briefs, the arguments of Plaintiff and counsel, all of the materials on file, and otherwise being fully advised, this Court hereby enters the following ORDER:

1. Plaintiff's Motion for Partial Summary Judgment is DENIED in its entirety;

2. Any Motion to Strike made by Plaintiff is DENIED in its entirety;

3. Any Motion to Amend made by Plaintiff is DENIED in its entirety;

4. Defendant's Motion to Dismiss is converted into a Motion for Summary Judgment with notice of the same being given to the parties at the hearing on June 16, 2023;

5. Defendant's Motion to Dismiss as converted into a Motion for Summary Judgment is held in ABEYANCE until the parties have been given a reasonable opportunity to present all pertinent materials related thereto, with such pertinent materials being presented in conformity with the following Scheduling Order:

a. Defendant shall file a Brief in Support of Summary Judgment, a Statement of Undisputed Facts, and any supporting materials contemplated by SDCL § 15-6-56(c) on or before ten (10) business days from the date that Notice of Entry of this Order is filed;

b. Plaintiff shall file any responses and any supporting materials contemplated by SDCL § 15-6-56(c) to Defendant's Brief in Support of Summary Judgment and Statement of Undisputed Facts on or before ten (10) business days from the date that Defendant's Brief in Support of Summary Judgment and Statement of Undisputed Facts are filed;

c. Defendant shall file its Reply Brief in Support of its Motion for Summary Judgment and any supporting materials contemplated by SDCL § 15-6-56 on or before five (5) business days from the date that any responsive briefing is filed by Plaintiff;

d. Absent leave of Court, which must be given prior to any filing being made, Defendant's principal Brief in Support of Summary Judgment and Plaintiff's Brief in Response are limited to a maximum of 25 pages, and Defendant's Reply Brief in Support of Summary Judgment is limited to a maximum of 15 pages; and

e. Absent leave of Court, which must be given prior to any filing being made, all filings must be made in conformity with the deadlines provided herein and no filings other than those specified herein are permitted.

6. Defendant's Motion for Costs and Attorneys' Fees is held in ABEYANCE pending the Court's ruling on Defendant's Motion to Dismiss as converted into a Motion for Summary Judgment.

6/20/2023 4:29:08 PM

Dated: _____

BY THE COURT:

Sandra Hanson

Honorable Sandra Hoglund Hanson
Circuit Court Judge

Attest:
Russell, Lisa
Clerk/Deputy

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

JOSHUA LAPIN, Plaintiff, vs. ZEETOGROUP, LLC, Defendant.	49CIV22-000725 **ORDER DENYING PLAINTIFF'S MOTION TO STAY, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES**

On or about June 20, 2023, the Honorable Sandra Hoglund Hanson entered an Order in the above-referenced matter denying Plaintiff Joshua Lapin's ("Plaintiff") Motion for Partial Summary Judgment, converting Defendant Zeetogroup, LLC's ("Defendant") Motion to Dismiss into a Motion for Summary Judgment, setting a briefing scheduling order for the converted motion, and holding Defendant's Motion for Costs and Attorneys' Fees in Abeyance pending a ruling on the converted motion.

On or about July 7, 2023, Defendant filed a Motion for Summary Judgment on the basis that Plaintiff failed to satisfy the requirement that he was a "resident of this state" as contemplated by SDCL § 32-24-41(14)(c). Plaintiff filed a Motion to Stay Ruling on Defendant's Motion for Summary Judgment and the Entirety of this Case re: 8th Circuit Appeal on or about August 7, 2023. At 9:00 a.m., on December 7, 2023, a hearing on the two foregoing motions was held before the Honorable James A. Power at the Minnehaha County Courthouse in Sioux Falls, South Dakota. Plaintiff appeared personally and was not represented by counsel. Defendant was represented by and through one of its attorneys, Abigale M. Farley of the Cutler Law Firm, LLP.

After considering the written briefs, the arguments of Plaintiff and counsel, all of the materials on file, and otherwise being fully advised, it is hereby

ORDERED, ADJUDGED AND DECREED that this Court is not bound by the Eighth Circuit Court of Appeal's decisions as it pertains to the application and interpretation of South Dakota law;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED Plaintiff's Motion to Stay is DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

1. Plaintiff's claims in this matter require certain types of e-mails to have been "sent to a South Dakota electronic mail address" as provided in SDCL § 32-24-47;

2. In order for Plaintiff to satisfy the "South Dakota electronic mail address" requirement, the alleged e-mails must have been "sent to" "an e-mail address furnished to a resident of this state" as provided under SDCL § 32-24-41(14)(c);

3. The phrase "sent to" as provided by SDCL § 32-24-47 requires Plaintiff to have been a "resident of this state" when the alleged e-mails were claimed to have been sent;

4. Pursuant to SDCL § 2-14-1, the term "resident," as used in SDCL § 32-24-41(14)(c), must first be understood in its ordinary sense because the term is not defined by SDCL Chapter 32-24;

5. According to basic dictionary definitions, the plain and ordinary meaning of the term "resident" requires elements of permanence and physical presence in South Dakota, as opposed to a temporary abiding place;

6. SDCL § 2-14-4 is not applicable because the South Dakota Legislature has provided multiple different definitions for "resident" or "resident" in the chapters of South Dakota Codified Law that specifically define either term;

7. When the South Dakota Legislature has intended to depart from the plain and ordinary meaning of "resident," it has clearly done so by specifically defining the term;

8. The terms "domicile" and "resident" are not synonymous;

9. The plain and ordinary meaning of "resident" does not impose a duration requirement for establishing residency;

10. The plain and ordinary meaning of the term "resident" is not a strict construction or a strict interpretation of SDCL § 32-24-41(14)(c);

11. Applying the plain and ordinary meaning of the term "resident" contextually makes sense because SDCL §§ 32-24-41(14)(a) and 32-24-41(14)(b) reflect a physical connection to South Dakota;

12. The material facts as it pertains to whether Plaintiff was a "resident of this state" are not genuinely disputed by the parties; and

13. Plaintiff was not a "resident of this state" under the plain and ordinary meaning of the term "resident" during the time he has alleged to have received certain e-mails.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment is GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Costs and Attorneys' Fees is DENIED.

The Court incorporates by reference its conclusions stated during the Dec. 7, 2023 hearing.

12/18/2023 12:18:21 PM
BY THE COURT:

James A. Power

Honorable James A. Power
Circuit Court Judge

Attest:
Russell, Lisa
Clerk/Deputy

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

JOSHUA LAPIN, Plaintiff, vs. ZEETOGROUP, LLC, Defendant.	49CIV22-000725 **DEFENDANT ZEETOGROUP, LLC's STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW Defendant Zeetogroup, LLC, by and through counsel, for its Statement of Undisputed Material Facts in support of its Motion for Summary Judgment.

1. Plaintiff Joshua Lapin ("Plaintiff") initiated the above-mentioned matter on or about March 30, 2022. *See generally* Complaint, filed March 30, 2022.

2. Plaintiff's Complaint asserts claims based on the alleged receipt of e-mails on the following dates in 2021: June 15, 16, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, and July 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 25. Complaint at pp. 5-50.

3. Plaintiff is a "full-time traveling 'digital nomad,' who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence in or out of the United States." Complaint at p. 2; Affidavit of Abigale M. Farley filed July 7, 2023 ("Aff. of Counsel"), Ex. 1 (Plaintiff's Answer to Interrogatory No. 4 (writing that "as applied to [Plaintiff]," he "is someone who does not have a permanent house or apartment, who travels 'from place to place,' often country-to-country, and explores the world while making a living over the internet (as opposed to going to work in- person [or] in an office, which would [sic] one of the ability to travel the world constantly.")); Ex. 2 (Plaintiff's Reddit Post dated March of 2023) (writing, "[f]or approximately

the last two years, I was traveling full-time as a 'digital nomad,' spending 30-60 days in each country, living in an AirBnb, and then moving onto the next country, and the next, and the next. Meanwhile, South Dakota allows anyone to become a resident of the state after spending a mere 24 hours in the state")).

4. Plaintiff was not born in the State of South Dakota. Aff. of Counsel, Ex. 1 (Plaintiff's Answer to Interrogatory No. 1).

5. Plaintiff did not attend college in the State of South Dakota. Aff. of Counsel, Ex. 3 ("About the Founder" captured from skycapsolar.com).

6. Plaintiff did not maintain employment in the State of South Dakota. Aff. of Counsel, Ex. 1 (Response to Interrogatory No. 4 (writing that he makes "a living over the internet (as opposed to going to work in- person [or] in an office, which would [sic] one of the ability to travel the world constantly.")).

7. Plaintiff is the CEO of a business, SkyCap Solar, Inc., which is not registered under South Dakota law. Aff. of Counsel, Ex. 4 (Plaintiff's LinkedIn Profile), Ex. 5 (Wyoming 2022-2023 Annual Reports).

8. Plaintiff preferred to receive mail at an address located in the State of Wyoming. Complaint at p. 1; *see also* Aff. of Counsel, Ex. 1 (Response to Interrogatory No. 5).

9. Plaintiff did not have a lease to any real property located in the State of South Dakota until January 14, 2023. Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 4 (writing that he "is someone who does not have a permanent house or apartment"))); *see also* Plaintiff Joshua Lapin's Declaration in Support of his Motion for Partial Summary Judgment ("Plaintiff's Declaration") at ¶¶ 10-11, filed May 1, 2023.

10. Between March 24, 2021, and January 9, 2023, Plaintiff was not physically present in the State of South Dakota. Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 6).

11. Plaintiff has never had a deed to any real property located in the State of South Dakota. *See* Complaint at pp. 1-2; Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 4 (stating that he "is someone who does not have a permanent house or apartment")).

12. Plaintiff did not have a permanent house or apartment in the State of South Dakota until January 9, 2023. *See* Complaint at pp. 1-2; Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 4 (stating that he "is someone who does not have a permanent house or apartment")).

13. As of December 1, 2022, Plaintiff did not have any "anticipated travel" plans to the State of South Dakota. Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 6).

Dated this 7th day of July, 2023.

CUTLER LAW FIRM, LLP

/s/ Abigale M. Farley

Abigale M. Farley
140 North Phillips Avenue, 4th Floor
PO Box 1400
Sioux Falls, SD 57101-1400
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and

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Telephone: (619) 826-8060
jgillick@phglawgroup.com
Attorneys for Defendant Zeetogroup, LLC
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I, Abigale M. Farley, do hereby certify that on this 7th day of July, 2023, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system. A true and correct copy of the same was mailed via First Class Mail, postage prepaid to the following:

Joshua Lapin
401 E 8th Street STE 214 PMB 7452
Sioux Falls, SD 57103

Additionally, a courtesy copy was sent via electronic mail to the following:

Joshua Lapin
thehebrewhammerjosh@gmail.com

/s/ *Abigale M. Farley*
Attorney for Defendant Zeetogroup, LLC

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

SOUTH DAKOTA CIRCUIT COURT

2ND JUDICIAL CIRCUIT (MINNEHAHA COUNTY)

Joshua Lapin Plaintiff, vs. Zeetogroup LLC Defendant	Case No.: 49CIV22-000725 **PLAINTIFF JOSHUA LAPIN'S RESPONSE TO DEFENDANT ZEETOGROUP LLC'S STATEMENT OF [PURPORTED] UNDISPUTED MATERIAL FACTS**

COMES NOW Plaintiff Joshua Lapin, pro se, respectfully admitting and denying Defendant Zeetogroup LLC's Statement of Statement of [purported] Undisputed Material Facts.

1. Plaintiff Joshua Lapin ("Plaintiff") initiated the above-mentioned matter on or about March 30, 2022. See generally Complaint, filed March 30, 2022.

Plaintiff's Answer: Admit

2. Plaintiff's Complaint asserts claims based on the alleged receipt of e-mails on the following dates in 2021: June 15, 16, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, and July 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 25. Complaint at pp. 5-50.

Plaintiff's Answer: Admit, although Plaintiff did receive two more spams of the same nature

not complained of herein on 4/13/23, AFTER Zeetogroup was aware of this dispute and had engaged in pre-litigation discussion prior.

3. Plaintiff is a "full-time traveling 'digital nomad,' who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence in or out of the United States." Complaint at p. 2; Affidavit of Abigale M. Farley filed July 7, 2023 ("Aff. of Counsel"), Ex. 1 (Plaintiff's Answer to Interrogatory No. 4 (writing that "as applied to [Plaintiff]," he "is someone who does not have a permanent house or apartment, who travels 'from place to place,' often country-to-country, and explores the world while making a living over the internet (as opposed to going to work in- person [or] in an office, which would [sic] one of the ability to travel the world constantly."))); Ex. 2 (Plaintiff's Reddit Post dated March of 2023) (writing, "[f]or approximately the last two years, I was traveling full-time as a 'digital nomad,' spending 30-60 days in each country, living in an AirBnb, and then moving onto the next country, and the next, and the next. Meanwhile, South Dakota allows anyone to become a resident of the state after spending a mere 24 hours in the state")).

Plaintiff's Answer: Admitted except to the extent that plaintiff's lack of a "permanent house or apartment" or "a permanent residence" could be construed to mean that he ever ceased to be a resident of his home state of [South Dakota] during his temporary worldly travels; further denied to the extent that the cherry-picked quote from plaintiff's Reddit post could be construed to mean that spending 24 hours in South Dakota is the *only* requirement to obtain South Dakota residency through the "Residency Affidavit," which also requires the person swear in the affirmative to the questions "Is South Dakota your state of residence" and "Is South Dakota the State you intend to return to after being absent?" and swear in the negative to the question "Do you maintain 'residence in another state."

4. Plaintiff was not born in the State of South Dakota. Aff. of Counsel, Ex. 1 (Plaintiff's Answer to Interrogatory No. 1).

Plaintiff's Answer: Admit, but denied to the extent one's birth domicile could be relevant for the instant purposes after someone has moved from their state of birth.

5. Plaintiff did not attend college in the State of South Dakota. Aff. of Counsel, Ex. 3 ("About the Founder" captured from skycapsolar.com).

Plaintiff's Answer: Admitted on its Face, but denied to the extent it's relevant. Plaintiff began but did not finish his college education in Colorado, where he was a legal resident and domicile prior to surrendering his Colorado Drivers license, voter registration, and status as a Coloradoan upon fulfilling the terms of the Residency Affidavit.

6. Plaintiff did not maintain employment in the State of South Dakota. Aff. of Counsel, Ex. 1 (Response to Interrogatory No. 4 (writing that he makes "a living over the internet (as opposed to going to work in- person [or] in an office, which would [sic] one of the ability to travel the world constantly.")).

Plaintiff's Answer: Deny. It's an admittedly gray area, but plaintiff's anti-spam work, mainly consisting of the motions practice he engaged in from abroad, could be considered in-state employment because the address on the [generally confidential] 1099's he received from spammers for the settlements he's received include his in-state PMB Mailbox Address at 401 E 8th St, and also because of SDCL § 61-1-26 "Service within and without state included--Base of operations or residence as basis for coverage" at (2), "The service is not localized in any state but some of the service is performed in this state and first, the base of operations, or, if there is no base of operations, then the place from which the service is directed or controlled, is in this state; or second, the base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state." (see language of the aformentioned "Residency Affidavit,") causing plaintiff to swear South Dakota to be his state of residence notwithstanding his travels. See also SDCL 61-1-27. "Service considered within state--Services in more than one state." at (2), "The service is performed both within and without the state, but the service performed without the state is incidental to the individual's service

within the state, such as service that is temporary or transitory in nature or consists of isolated transactions."

7. Plaintiff is the CEO of a business, SkyCap Solar, Inc., which is not registered under South Dakota law. Aff. of Counsel, Ex. 4 (Plaintiff's LinkedIn Profile), Ex. 5 (Wyoming 2022-2023 Annual Reports).

Plaintiff's Answer: Admit. Plaintiff has basically given up on SkyCap Solar and almost didn't renew it, but had to in order to be able to cash a restitution check he received for fraud perpetrated against SkyCap Solar. For most purposes, it is non-existent.

8. Plaintiff preferred to receive mail at an address located in the State of Wyoming. Complaint at p. 1; see also Aff. of Counsel, Ex. 1 (Response to Interrogatory No. 5).

Plaintiff's Answer: Admit in part and Deny in part. I was receiving mail in both places because I was transitioning over to receiving my personal mail at the PMB Address. Receiving mail at the Wyoming mail-forwarding address was easier because I already had mail-forwarding for SkyCap Solar at that address. While stateside I would have Your Best Address ship my mail to my current location. But eventually I added mail-scanning to my Your Best Address subscription, at which point I started exclusively using that address for both legal purposes and for mail. So at the time of filing I'll admit to this fact, but a couple months later and onwards I would deny this fact.

9. Plaintiff did not have a lease to any real property located in the State of South Dakota until January 14, 2023. Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 4 (writing that he "is someone who does not have a permanent house or apartment"))); see also Plaintiff Joshua Lapin's Declaration in Support of his Motion for Partial Summary Judgment ("Plaintiff's Declaration") at ¶¶ 10-11, filed May 1, 2023.

Plaintiff's Answer: Admit, except to the extent the PMB Mailbox qualifies for certain legal purposes. See also the aformentioned Residency Affidavit, confirming that the same *must* be

true in order to qualify for its use.

10. Between March 24, 2021, and January 9, 2023, Plaintiff was not physically present in the State of South Dakota. Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 6).

Plaintiff's Answer: Admit. See Residency Affidavit's question "Is South Dakota the State you intend to return to after being absent?"

11. Plaintiff has never had a deed to any real property located in the State of South Dakota. See Complaint at pp. 1-2; Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 4 (stating that he "is someone who does not have a permanent house or apartment")).

Plaintiff's Answer: Admit. Plaintiff has never had a deed or otherwise owned real property in any U.S. State or Foreign Country heretofore. See also the aformentioned Residency Affidavit question, "Do you maintain 'residence in another state?"

12. Plaintiff did not have a permanent house or apartment in the State of South Dakota until January 9, 2023. See Complaint at pp. 1-2; Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 4 (stating that he "is someone who does not have a permanent house or apartment")).

Plaintiff's Answer: Admit. See Department of Public Safety's January 2023 *Updated* Residency Affidavit's list of questions, providing additional clarification to the validity of the PMB's substitution for the same (highlight added):

State of South Dakota
Residency Affidavit

The purpose of the following affidavit is your request for an exception of the proof of residency requirement for a Driver License and or Identification card.

This form must be accompanied by a valid one-night stay receipt in South Dakota (no more than one year old) from a local RV Park, Campground or Hotel for proof of the temporary address where you are residing. In addition, you must submit a document (no more than one year old) proving your personal mailbox (PMB) service address (receipt from the PMB business or a piece of mail with your PMB address on it).

PLEASE NOTE: South Dakota Driver Licensing records are used as a supplemental list for jury duty selection. Obtaining a South Dakota driver license or non-driver ID card will result in you being required to report for jury duty in South Dakota.

By signing this affidavit, I agree the below statements are true and correct to the best of my knowledge:

1. **I am a South Dakota resident, and I live in a RV/camper/hotel, or I travel full time for work.**
2. **South Dakota is my state of residence, and I will return after being absent.**
3. **I do not stay, live in, or maintain a residence in any another state.**
4. **My personal mailbox service (PMB) is a mail forwarding service, and not a virtual only mail service.**

13. As of December 1, 2022, Plaintiff did not have any "anticipated travel" plans to the State of South Dakota. Aff. of Counsel, Ex. 1 (Plaintiff's Response to Interrogatory No. 6).

Plaintiff's Answer: Deny. While it is true that, as of December 1st 2022, I did not have a time/date I'd return to South Dakota, as I didn't know how much longer I'd be traveling (although I was beginning of getting tired of living out of suitcases, and felt it was near the end), I continued to hold out the intention to return to South Dakota thereafter the full-time travel, in accordance with the aforementioned Residency Affidavit's Question: "Is South Dakota the State you intend to return to after being absent?"

Certificate of Service

This response and all of its aforementioned supporting materials will be served onto Abigaile Farley of Cutler Law Firm LLP through Odyssey pursuant to SDCL §§ 15-6-5(b)(2) when the clerk enters this hand-delivered filing, causing electronic service to be made upon Ms. Farley through Odyssey. It will also be e-mailed to her and *pro hac vice* counsel Jacob Gillick of Morris Law Firm APC.

/s/ Joshua A. Lapin 7/16/23

Joshua A. Lapin
Pro Se plaintiff

J Lapin 7/16/23
Pro Se Plaintiff

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

JOSHUA LAPIN, Plaintiff, vs. ZEETOGROUP, LLC, Defendant.	49CIV22-000725 **AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT ZEETOGROUP'S MOTION FOR SUMMARY JUDGMENT**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

I, Abigale M. Farley, after first being duly sworn upon her oath, deposes and states as follows:

1. I am one of the attorneys for Defendant Zeetogroup, LLC, in the above-entitled action, and I submit this Affidavit in Support of Defendant Zeetogroup's Motion for Summary Judgment.

2. Attached hereto as **Exhibit 1** and incorporated herein by this reference are true and correct copies of the referenced pages from Plaintiff Joshua Lapin's Answers to Defendant Zeetogroup, LLC's Interrogatories, Requests for Production, and Requests for Admissions to Plaintiff (First Set), dated December 1, 2022.

3. Attached hereto as **Exhibit 2** and incorporated herein by this reference is a true and correct copy of a social media text post that was posted on the website Reddit.com by the username "jlapinator" in or around March of 2023.

4. Attached hereto as **Exhibit 3** and incorporated herein by this reference is a true and correct copy of a screenshot taken from the website skycapsolar.com.

5. Attached hereto as **Exhibit 4** and incorporated herein by this reference is a true and correct copy of a screenshot taken of a profile page on LinkedIn for the user "Joshua Lapin."

6. Attached hereto as **Exhibit 5** and incorporated herein by this reference are true and correct copies of the Annual Reports filed in the State of Wyoming for Skycap Solar, LLC, during 2022 and 2023.

7. Attached hereto as **Exhibit 6** and incorporated herein by this reference is a true and correct copy of the Order Dismissing Lapin's Claims Against Defendant Everquote and Denying Lapin's Motion to Reconsider dated February 17, 2023, issued by the Honorable Karen E. Schreier of the United States District Court for the District of South Dakota in the case styled as *Lapin v. Everquote, et. al*, 4:22-cv-04058-KES (D.S.D. April 2022).

8. Attached hereto as **Exhibit 7** and incorporated herein by this reference is a true and correct copy of the Order Denying Lapin's Motion to Reconsider and Dismissing Lapin's Claims Against John Doe Sender at 9, dated May 3, 2023, issued by the Honorable Karen E. Schreier of the United States District Court for the District of South Dakota in the case styled as *Lapin v. Everquote, et. al*, 4:22-cv-04058-KES (D.S.D. April 2022).

Dated this 7th day of July, 2023.

Abigale M. Farley

Abigale M. Farley

Subscribed and sworn to before me
this 7th day of July, 2023.

Marilyn E. Roberts

Notary Public – South Dakota
My Commission Expires: 6-6-2029

[SEAL]

MARILYN E. ROBERTS
NOTARY PUBLIC
SOUTH DAKOTA

CERTIFICATE OF SERVICE

I, Abigale M. Farley, do hereby certify that on this 7th day of July, 2023, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system. A true and correct copy of the same was mailed via First Class Mail, postage prepaid to the following:

Joshua Lapin
401 E 8th Street STE 214 PMB 7452
Sioux Falls, SD 57103

Additionally, a courtesy copy was sent via electronic mail to the following:

Joshua Lapin
thehebrewhammerjosh@gmail.com

/s/ Abigale M. Farley
Attorney for Defendant Zeetogroup, LLC

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

SOUTH DAKOTA CIRCUIT COURT

2ND JUDICIAL CIRCUIT (MINNEHAHA COUNTY)

Joshua Lapin Plaintiff, vs. Zeetogroup LLC "John Doe Sender" dba BuzzBarrelReview.com, dzlosurverys.com, emails-jobsdelivered.com, Entirelybelieve.com, JobsDeliver.com, expectcarecare.com, JobSharkNL.com, NationalShopperSurvey.com, NationalSurveysOnline.com, exigentmediagroup.com, enrichedtechnologies.com, ConsumerDigitalSurvey.com, drivingmarketinggroup.com, surveyandgetpaid.com, turnmyheadmediagroup.com,thebestcreditcheck.com, thefreetree.co, dlzoffers.com, nationaldigitalsurvey.com, dealzingo.com,PO Box 4668 #85919. New York, NY 10163-4668, PO Box 10188-85919 Newark, New Jersey Defendant	Case No.: 49CIV22-000725 **PLAINTIFF JOSHUA LAPIN'S ANSWERS TO DEFENDANT ZEETOGROUP LLC'S "INTERROGATORIES, REQUESTS FOR PRODUCTION, AND REQUESTS FOR ADMISSIONS TO PLAINTIFF (FIRST SET)"**

Plaintiff Joshua Lapin, hereinafter ("Plaintiff") or ("Lapin"), for its answer to Defendant Zeetogroup's "Interrogatories, Requests For Production, and Requests For Admissions To Plaintiff (First Set)," states as follows:

EXHIBIT 1

Interrogatories

INTERROGATORY NO. 1. State the name and capacity of each person answering these Interrogatories as or on behalf of Plaintiff, including the following:

a. Your full legal name and any other names by which you have been or are presently known;

b. Your date and place of birth; and

c. Your present residential address, giving the street address, city, and state.

Answer: Joshua Lapin is the sole person answering these Interrogatories in his capacity as the pro se plaintiff in this action. I am unrepresented in this action.

A: Joshua Albert Lapin (only name by which I have ever been and/or am presently known)

B: I was born [redacted]. On this date, I was delivered at Saint Jude Hospital in Fullerton, California 101 E Valencia Mesa Dr, Fullerton, CA 92835.

C: My present residential address is 401 E 8th St STE 214 PMB 7452, Sioux Falls SD 57103.

INTERROGATORY NO. 2. Identify any and all aliases you have gone by from January 1, 2015, to present.

Answer: I do not go by any aliases. Sometimes people use the nickname "Josh," which is short for "Joshua." Also, sometimes I use the name "The Hebrew Hammer" in connection with my unsolicited commercial email litigation, but never as a replacement or substitute or otherwise in the place of my real name Joshua Lapin. As explained repeatedly to counsel, it is a name my teammates used call me in high school wrestling (I was the only Jewish person on the team.) Upon counsel's dislike and apparent offense taken to this name, I've offered to refrain from using "The Hebrew Hammer" in our interactions and even to switch email addresses to one that does not contain "The Hebrew Hammer." Counsel never responded to my offer, but continues to bother me about this name.

INTERROGATORY NO. 3. Identify any and all persons who currently refer to you as "the Hebrew Hammer."

Answer: No one except for Jacob Gillick (for reasons unknown) and sometimes myself.

INTERROGATORY NO. 4. Describe in detail the what the meaning of term "digital nomad" is as applied to yourself as alleged in paragraph two of Plaintiff's Complaint.

Answer: A digital nomad (in my own words, and as applied to myself, as requested by Defendant Zeetogroup) is someone who does not have a permanent house or apartment, who travels "from place to place,"
often country-to-country, and explores the world while making a living over the internet (as opposed to going to work in- person in an office, which would one of the ability to travel the world constantly).

INTERROGATORY NO. 5. Identify and describe in detail any and all mailing addresses used by you, your business(es), on your behalf, or which may otherwise be associated with you from January 1, 2015, to present.

Answer:

I object to this interrogatory on the basis that "January 1 2015 – Present" is
not reasonably limited as to time and is overly broad. I further object to the extent Zeetogroup seeks the mailing addresses of my "business(es)", to the extent those businesses exist, because they are not parties to this suit, are not relevant to this suit, and their mailing address(es) are not related to this dispute, nor is such information reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, I answer this interrogatory to the extent it seeks this information from June 1 2021 – Present insofar as it seeks information from Plaintiff.

I was receiving my mail at two addresses 30 N Gould St STE 3229 Sheridan WY 82801, and my residential address 401 E 8th St STE 214 PMB 7452 Sioux Falls SD 57103.

INTERROGATORY NO. 6. Describe in detail each location you have resided in for 14 or more days beginning January 1, 2015, to present, including the following:

EXHIBIT 1

a. The address of the location resided;

b. The inclusive dates of your visit;

c. The length of stay; and

d. The purpose of your visit.

Answer: Plaintiff objects to this interrogatory as it is overly broad as to time, unduly burdensome, irrelevant to the dispute, and not reasonably calculated to lead to the discoverability of admissible evidence. Subject to and without waiving the foregoing objections, and in the interest of participating in discovery in good-faith, I provide the following information regarding my travels from the date I obtained my South Dakota drivers license (March 5th 2021), earlier than any time material to this dispute, all the way up until present date:

Rapid City, South Dakota, United States: February 23rd 2021 – March 23rd 2021 (establishing South Dakota residency under their 'residency affidavit' program for those who travel and do not maintain residence in another state)

Minneapolis, Minnesota, United States: March 23rd – April 23rd 2021 (nomadic adventures continued)

Honolulu, Hawaii, United States: April 23rd – May 24th 2021 (nomadic adventures continued)

Las Vegas, Nevada, United States May 24th 2021 – June 19th 2021 (nomadic adventures continued)

El Poblado, Medellin, Colombia June 20th – July 20st 2021 (nomadic adventures continued)

Fort Collins, Colorado, United States July 20th – July 29th 2021 (visiting family)

Cherry Hill, New Jersey, United States July 29th 2021 – August 27th 2021 (visiting family)

Ishpeming, Michigan, United States, August 27th - August 30th 2021 (visiting family)

Brea, California, United States (helping a family member who broke their leg, stepping in to help my family as this person recovers) from August 30th- September 26th 2021.

Tallinn, Estonia September 26th 2021 – October 26th 2021 (nomadic adventures continued)

Zagreb, Croatia October 26th 2021 – November 26th 2021 (nomadic adventures continued)

Dubai, United Arab Emirates November 26th – December 24th 2021(nomadic adventures continued)

Fatih, Istanbul, Turkey December 24th 2021 – Jan 23rd 2022 (nomadic adventures continued)

Tbilisi, Georgia January 24th 2022 – March 12th 2022 (the country, not US) (nomadic adventures

continued)

Makati, Manilla, The Phillipines March 13th – April 12th 2022 (nomadic adventures continued)

Canguu, Bali, Indonesia April 13th 2022 – May 13th 2022 (nomadic adventures continued)

Bangkok, Thailand May 13th - June 12th 2022(nomadic adventures continued)

Toronto, Ontario, Canada June 13th 2022 – July 29th 2022 (nomadic adventures continued, and also because it was close to Cherry Hill New Jersey where I was then-going to visiting approximately 6 weeks after arriving in

Toronto)

Cherry Hill, New Jersey, United States July 29th - August 16 2022 (visiting family)

San Jose, Costa Rica August 17th 2022 – September 17th (nomadic adventures continued)

Copacabana, Rio de Janeiro, Brazil September 17th – Present (as of the time of writing) (nomadic adventures continued)

Anticipated travel (as of the time of writing): Dec 1 2022– unknown date Singapore

INTERROGATORY NO. 7. Please state the name and address of each public, private, or vocational school, college, or university that you have attended during your life, giving the inclusive dates of attendance and the date of the last grade completed. As to each school you attended, state whether you received a degree or diploma and, if so, the area of study in which it was awarded or granted.

Answer: I object to this interrogatory in that it is completely irrelevant.

INTERROGATORY NO. 8. Please list in chronological order all jobs, vocations, trades, professions, or businesses in which you have engaged or been employed in the last ten years, giving the name and address of your employer, the inclusive dates of employment, your position or title, your employment duties, and why you terminated such employment.

Answer: I object to this interrogatory because it is completely irrelevant.

INTERROGATORY NO. 9. Identify and describe in detail any and all forms of income received by you beginning January 1, 2021, to present date.

Answer: I object to this interrogatory in that it is completely irrelevant.

INTERROGATORY NO. 10. Identify and describe in detail any and all e-mail addresses used by you, your business(es), on your behalf, or which may otherwise be associated with you from January 1, 2015, to present.

Answer: I object to this interrogatory on the basis that "January 1 2015 – Present" is not reasonably limited as to time and is overly broad. I further object to the extent Zeetogroup seeks the email addresses of my "business(es)", to the extent those businesses exist, because they are not parties to this suit, are not relevant to this suit, and their email address(es) are not related to this dispute, nor is such information reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, I answer this interrogatory to the extent it seeks a list of all of plaintiff's past and current email addresses up to present date:

solarwind71@gmail.com
thehebrewhammerjosh@gmail.com
ketosoup97@gmail.com
joshua.lapin@aol.com
personaljoshua069@gmail.com
jlap@skycapsolar.com
aglowboy1997@hotmail.com

INTERROGATORY NO. 11. Identify and describe in detail any and all instances where you or anyone on your behalf has agreed to receive electronic marketing material beginning January 1, 2015, to present, including the following: a. The name, address, and phone number of the entity to which consent was given; b. Any contact information provided, including e-mail or other mailing addresses; and c. The date in which consent was given.

Answer: I object to this interrogatory on the basis that "January 1 2015 – Present" is not reasonably limited as to time, is overly broad to the extent it seeks instances where plaintiff "consented to receive electronic marketing material"from entities other than than the ("Advertiser") and/or ("Initiator") of the messages subject of this dispute, as defined in SDCL 37-24-41, is not reasonably calculated as to lead to the discovery of admissible evidence, nor is reasonably limited to entities that participated in the instant "electronic marketing material" subject to the complaint.

Answer: I object as 'covey intimidation' is overly broad and undefined.

Certificate of Service

A true and correct copy of this discovery response will be served upon to Zeetogroup's counsel by email in lieu of paper followup as stipulated in advance.

/s/ Joshua A. Lapin
Joshua A Lapin
Pro Se Plaintiff 12/01/22 (in Central Standard Time)

_____
Signature

EXHIBIT 1

r/AMA
by jlapinator 1 mo. ago

I Made Nearly $200,000 Suing Email Spammers! AMA [Take 3]

Admittedly, I made this Ama two nights ago but then fell asleep until 5am the next morning, only to wake to disappointed folks who asked questions which were not answered, and the mods cancelled the Ama, presumably because I wasn't answering questions pursuant to Rule 1. The following day I reposted, merely minutes before reddit crashed for many hours, and as such, the AMA was seen by almost No one. Therefore, "The third times a charm"

For approximately the last two years, I was traveling full-time as a "digital nomad," spending 30-60 days in each country, living in an AirBnb, and then moving onto the next country, and the next, and the next. Meanwhile, South Dakota allows anyone to become a resident of the state after spending a mere 24 hours in the state: https://www.keloland.com/keloland-com-original/spend-one-night-here-and-you-can-be-a-south-dakota-resident/. Many digital nomads, full time RV-ers, and other nomads are drawn to South Dakota's residency for this reason: travel the country/world while paying no state-level income tax!

When I started being a digital nomad, I was completely broke, riddled in charged-off credit cards and a failed solar power sales business that I dropped out of college to start. At the beginning of this journey, I barely had enough money to get from one destination to the next, and lived in really cheap hostels. Then I discovered that many state's have anti-spam laws that allow you to sue those who sent (or caused to be sent) unlawful commercial emails to you, often with high statutory damages per spam email. I did some research and found that South Dakota has one, which it apparently copied-and-pasted word-by-word and letter-by-letter from California. It allows its residents to collect high statutory liquidated damages of $1000 for each email in [material] breach of the section. With all my spam emails in my several email addresses, I got to work, taught myself law from the ground-on-up, started filing spam suits all over the United States, generally in jurisdictions where the spamers live and/or are incorporated (had to do with due process restrictions on personal jurisdiction over non-resident defendants), and would represent myself pro-se, competing directly against the experienced, savy,slimy attorneys who represent the often-wealthy spammers themselves.

I'm Jewish, and in high school wrestling they used to call me "The Hebrew Hammer," so in my spam litigations, as the "digital marketing" industry in the United States quickly learned of their new rival, I decided to give myself an alias as "The Hebrew Hammer," and that's how the "spammers" know me today. I try to ensure that opposing council stays entertained throughout the case by sending them memes alongside my across-the-isle correspondance; I want them to get the full Hebrew Hammer experience; I try to blend my inherent trolling sarcasm with being the most sophisticated and knowledgeable pro se litigant they have ever faced, rendering me a worthy opponent against their entire law firm(s).

EXHIBIT 2

+ Add a Comment

Nucky76 • 1 mo. ago

How do you track the sender? Are you only able to sue US based spammers?

1 Reply Share ...

jlapinator • 1 mo. ago

et seq), impose liabilities on ("Advertisers"), which is defined by both statutes as "a person or entity that advertises through the use of commercial e-mail advertisements." While I cannot give legal advise as a non-attorney, and you're advised to consult with one before you "try this at home," I along with others understand this to mean that the company whose own products and services are being promoted in the spam can be held strictly liable for spams which were sent by a third party. see *Hypertouch, Inc. v. Valueclick*, Inc., 191 Cal.App.4th 1209 (Cal. Ct. App. 2011) and *Greenberg v. Digital Media Solutions*, LLC, 65 Cal.App.5th 909 (Cal. Ct. App. 2021). It's usually obvious who the ("advertiser") is, and therefore they can be held strictly liable for the spam, even if the sender is never uncovered.

As for tracking down the sender, federal and state governments recognized decades ago the methods by which senders conceal their identity. The Federal Anti-Spam Law, which regular individuals like you and I cannot sue under, identifies the problem, "Many senders of unsolicited commercial electronic mail purposefully disguise the source of such mail." 15 U.S.C. 7701-7713, Sec. 2(7), and " senders of commercial electronic mail should not mislead recipients as to the source or content of such mail." The California Anti-Spam law is even more specific, "There is a need to regulate the advertisers who use spam, as well as the actual spammers, because the actual spammers can be difficult to track down due to some return addresses that show up on the display as "unknown" and many others being obvious fakes and they are often located offshore." § 17529(j)

The first step is the publicly available WHOIS data of the sending domain. If its filled with incomplete or misleading information, you can try to see if the ("advertiser") lists its marketing partners on its website and then try to work backwards from there. The other option is to sue the advertiser and name the sender as "John Doe Spammer," since you do not know there identity, and then use the tools of discovery to compell the advertiser to reveal the sender of the spam (through interrogatories, aka forced written questions,) and to demand a true and correct copy of the advertisers contract(s) with the sender(s), (through requests for production).

If the spam was sent through a third-party marketing platform, then I usually will send a demand letter to that marketing platform, asking them to reveal the identity of the sender, and to preserve records of the senders use of the platform. While they usually (so far always) refuse to reveal the name of the sender, they are a great future-witness whom you can subpoena or depose, so long as your case survives the motions to dismiss stage. (although in many state courts you can engage in discovery immediately upon filing the complaint.)

1 Reply Share ...

jlapinator · 1 mo. ago

Great Question! I'm writing a HUGE reply right now, but I wanted to confirm receipt and let you know I'll have something for you real soon

1 Reply Share ...

fazalmajid · 1 mo. ago

How do you collect on your awards? Most spammers are criminals, after all, who are unlikely to comply unless forced to do so under threat of imprisonment, and they are often good at covering-up their tracks.

Great question. I defer to my lengthy response to above about how it's usually "advertisers", not "senders", that I end up going after. The Advertiser is usually a well-known brand with millions (billions) in assets across many states. They also retain quality counsel, and are well-aware of the extensive litigation costs of fighting the case. Often, we come to agreeable terms of a confidential settlement, and therefore they willingly wire the "settlement funds" to my offshore bank account.

Therefore, even if the actual spammer is never identified, your best bet under the CA/SD spam laws is to pursue the Advertiser. There's actually a couple of wacky cases (whose conclusions I disagree with) which found that under the CA anti spam law, that ONLY the Advertiser is liable, and that the sender is NOT liable under the law. See Blanchard v. Fluent LLC, No. 17-cv-04497-MMC (N.D. Cal. Sep. 13, 2018), and Bank, v. Hydra Grp. LLC, 10-CV-1770 (JG) (E.D.N.Y. Sep. 24, 2010).

2 Reply Share ...

3 more replies

Fycussss · 1 mo. ago

How much money are you making?

1 Reply Share ...

jlapinator · 1 mo. ago

So far like 100K /year. Although I'm hoping that's gonna explode

2 Reply Share ...

More posts you may like

Related AMA Meta/Reddit

r/AMA · 4 days ago

NSFW

I am a 28 year old male and my job is a body removal technician for the Coroner's Office (Crime Scenes, Hospital, Hospice) AMA! (NSFW!!!)

748 upvotes · 319 comments

r/AMA · 1 day ago

NSFW

573 upvotes · 197 comments

r/AMA · 2 days ago

I've worked in casino surveillance for 17 years. AMA

530 upvotes · 528 comments

r/AMA · 3 days ago

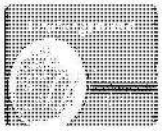
NSFW

I spent this New Year at Russian psychiatric hospital and it was nasty. AMA

500 upvotes · 96 comments

r/AMA · 5 days ago

I have solved hundreds of cold cases myself from home. I've located hundreds of missing people, and I identified many unidentified people. I...



481 upvotes · 161 comments

r/AMA · 6 days ago

In response to an AMA about couples swinging - I said it would end badly for the couple because I was involved in the "lifestyle" and it cost me my marriage and the...

415 upvotes · 214 comments

r/AMA · 7 days ago

NSFW

I got a testicular implant 24 hours ago AMA

330 upvotes · 271 comments

r/AMA · 5 days ago

(M29) I'm a athletic guy who is a chubby chaser. AMA

209 upvotes · 253 comments

r/AMA · 1 day ago

NSFW

[58] I have donated sperm and helped 2 couples and 3 single females conceive children.

205 upvotes · 79 comments

EXHIBIT 2

NSFW

I'm a 22M who works in mental health and suicide prevention AMA

194 upvotes · 142 comments

r/AMA · 6 days ago

I'm a 40 year old virgin - AMA.

178 upvotes · 228 comments

r/AMA · 3 days ago

I am a recovering addict! I have got 8 months and 17 days clean today! AMA

141 upvotes · 67 comments

r/AMA · 5 days ago

I live in a remote village in arctic AMA

132 upvotes · 118 comments

r/AMA · 1 day ago

Best friend ended his own life and Girlfriend broke up with me in the past 3 days. Ama

129 upvotes · 98 comments

r/AMA · 5 days ago

NSFW

I am a recovered porn addict (clean 10 years) turned therapist. AMA

124 upvotes · 89 comments

r/AMA · 6 days ago

NSFW

My wife and I are swingers (early 30s). AMA.

111 upvotes · 126 comments

r/AMA · 6 days ago

I've spent $4k Give or Take On Guinea Pigs Over The Last 2 Weeks, AMA

107 upvotes · 86 comments

50 upvotes · 44 comments

r/AMA · 3 days ago

I'm a former Disney Cruise Line crew member. AMA

49 upvotes · 182 comments

r/AMA · 5 days ago

I'm a former child actor who was on Nickelodeon. AMA.

34 upvotes · 57 comments

r/AMA · 3 days ago

I am a 29M Virgin, who has never been on a date or has been in a relationship. AMA

31 upvotes · 85 comments

r/AMA · 2 days ago

I've spent over 300k on prostitutes. AMA.

28 upvotes · 167 comments

r/AMA · 2 days ago

I was imprisoned in the notorious evin prison in Iran which is famous for torturing and holding political prisoners AMA

20 upvotes · 19 comments

r/AMA · 7 days ago

I (32f) had bariatric surgery in 2018. I have since lost 150 lbs, and maintain for 4 years. I was being treated for diabetes, but surgery corrected that as well. It has changed my...

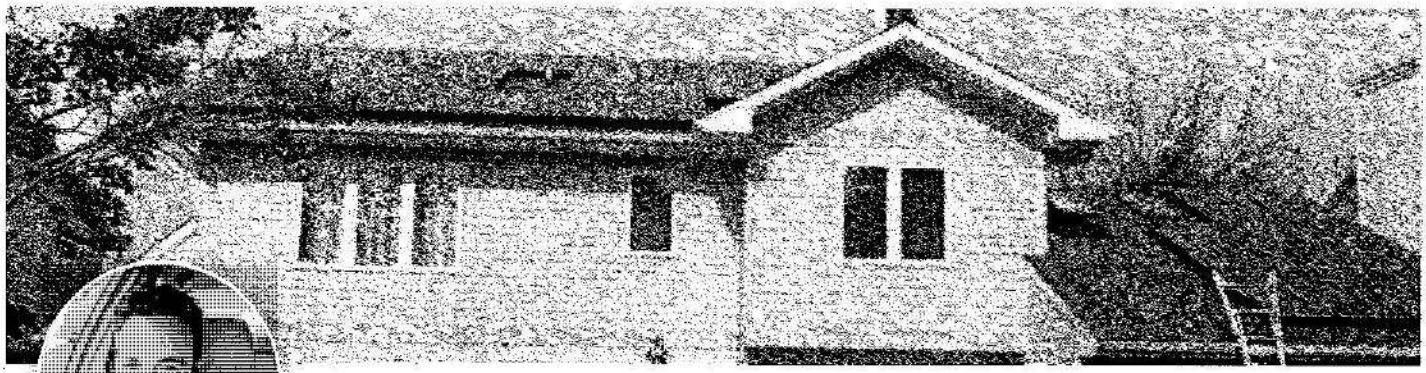
20 upvotes · 5 comments

r/AMA · 6 days ago

I was born blind, AMA.

19 upvotes · 58 comments

EXHIBIT 3



Joshua Lapin

CEO at SkyCap Solar. Talented Solar Salespeople across America: You deserve more commission ($/kW)! Contact Me.

Fort Collins, Colorado, United States

6K followers · 500+ connections

Join to view profile

SkyCap Solar

Colorado State University

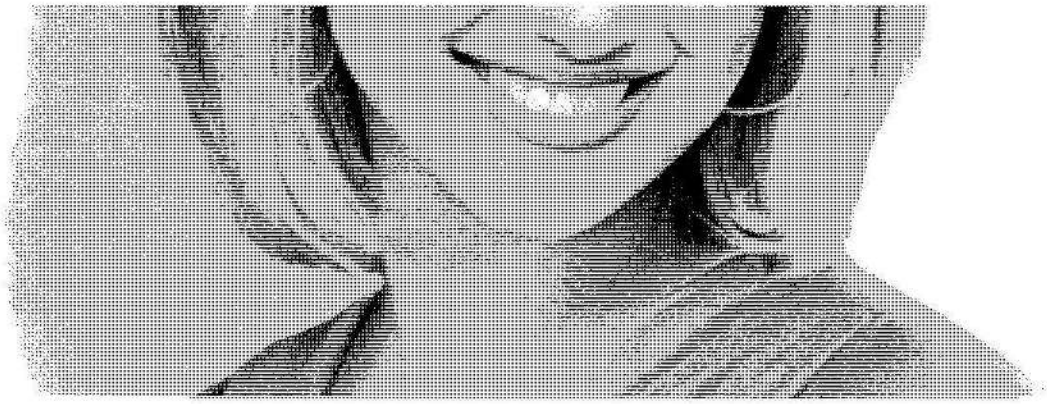
About

Founder of SkyCap Solar, can put solar panels on roofs in 30+ states and growing. Let me show you how much money solar power can save you! Believer in the American Dream.

Articles by Joshua

Activity

Age is just a number, you live by your heart! 💝 Stay awesome
Liked by Joshua Lapin



please Rate my pencil sketch Work
Liked by Joshua Lapin

So true! Follow
Liked by Joshua Lapin

Join now to see all activity

Experience

Aug 2018 - Present · 4 years 9 months

Fort Collins, Colorado Area

SkyCap Solar can help people switch to solar power in all 50 states through it's partnerships with reputable, well-reviewed contractors around the United States. High Quality, Competitive Prices, and the willingness to help customers in every square inch of the United States of America.

Solar Energy Consultant

Peak View Solar

Dec 2017 - Jun 2018 · 7 months

Fort Collins, Colorado Area

Solar Advocate

EcoMark Solar

Mar 2017 - Dec 2017 · 10 months

Fort Collins, Colorado Area

Door-to-door appointment setting, persuading people to get a solar power quote from one of the experts at Ecomark Solar. Towards the end of my time there, I was praised for having "the highest efficiency in the company."

Education

Colorado State University

Political Science

2017 - 2018

2015 - 2016

More activity by Joshua

The journey has commenced and I'm super excited. I did not sleep soundly last night because I was afraid I would over sleep and be late for class...
Liked by Joshua Lapin

Good reminder for me today, agreed ?
Liked by Joshua Lapin

Solar Installer (EPC/Redline Agreement) in Upstate NY? Got one for you.
Posted by Joshua Lapin

Supporting others should always be encouraged. Just as you want people supporting you and your endeavors, others want the same. No one's journey to...
Liked by Joshua Lapin

I passed the New York Bar! When I told my grandma I was going to law school she started calling me her "granddoctah"! I told her she couldn't call...
Liked by Joshua Lapin

Populism
Posted by Joshua Lapin

Let love fuel your work and goals. Watch this... It's such a beautiful example.
Liked by Joshua Lapin

Titan Solar Power . Best company in the world. Proud to rep this brand! I believe in everything they do! Officially a state record holder. And headed...
Liked by Joshua Lapin

Liked by Joshua Lapin

May your plates be full and your pies be warmed in an electric oven powered by clean, affordable solar power! We wish you the best and hope you take...

Liked by Joshua Lapin

My teeth are too big for my mouth, been that way since 4th grade. My hair is fake, lost most of it at 15. I am pro-Trump even though Biden said...

Liked by Joshua Lapin

May someone please teach me how to make excellent facebook ads for solar lead generation on a Zoom Meeting? I will pay you for your time.

Posted by Joshua Lapin

View Joshua's full profile

Contact Joshua directly

Join to view full profile

People also viewed

Thomas Richardson
Business Development Officer at Solar Experts
Fort Myers, FL

David Goodstein
Solar Appointments Available – Jump Start Your Business Now
Port St Lucie, FL

Charlie Niederman
--
Orange County, CA

Grace Caldwell
President at Independent Power
Minden, NV

Bunny Lambert
Residential & Small Business Consultant
Milwaukee, WI

ARE Solar
Owner at ARE Solar
Boulder, CO

Andrew Pongyoo
Senior loan advisor
San Diego County, CA

Sergio Quintana
CEO na Solar Center SC
Santa Catarina, Brazil

Deb Yachinich
Supervisor Business Finance Operations
Greater Chicago Area

Bartlett, IL

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Joshua Lapin
retired at none
Las Vegas, NV

Joshua Lapin
Associate Director, Program Management at Walden Biosciences
Greater Boston

Joshua Lapin
Sr Photonics Layout Engineer
San Francisco Bay Area

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Controlling the Sale

SketchUp: Shadow Studies

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Joshua's public profile badge

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Joshua Lapin
CEO at SkyCap Solar. Talented Solar Salespeople across America: You deserve more commission ($/kW)! Contact Me.

CEO at SkyCap Solar

Colorado State University

View profile

View profile badges

2021 Limited Liability Company Annual Report

Due on or Before:	December 1, 2021
ID:	2020-000967445
State of Formation:	Wyoming
License Tax Paid:	$60.00
AR Number:	07018581

For Office Use Only

Wyoming Secretary of State
Herschler Bldg East, Ste.100 & 101, Cheyenne, WY 82002-0020
307-777-7311
https://wyobiz.wyo.gov/Business/AnnualReport.aspx

SkyCap Solar LLC

1: Mailing Address

30 N Gould St Ste 3229
Sheridan, WY 82801

2: Principal Office Address

30 N Gould St Ste 3229
Sheridan, WY 82801

Phone: (970) 795-8439
Email: jlap@skycapsolar.com

Current Registered Agent:

Registered Agents Inc.
30 N Gould St Ste R
Sheridan, WY 82801

• Please review the current Registered Agent information and, if it needs to be changed or updated, complete the appropriate form available from the Secretary of State's website at https://sos.wyo.gov

I hereby certify under the penalty of perjury that the information I am submitting is true and correct to the best of my knowledge.

Joshua Albert Lapin	Joshua Albert Lapin	January 9, 2022
Signature	Printed Name	Date

The fee is $60 or two-tenths of one mill on the dollar ($.0002), whichever is greater.

Instructions:

1. Complete the required worksheet;
2. Sign and date this form; and
3. Return both the form and worksheet to the Secretary of State at the address provided above.

EXHIBIT 5

2022 Limited Liability Company Annual Report

Due on or Before:	December 1, 2022
ID:	2020-000967445
State of Formation:	Wyoming
License Tax Paid:	$60.00
AR Number:	08220600

For Office Use Only

Wyoming Secretary of State
Herschler Bldg East, Ste.100 & 101, Cheyenne, WY 82002-0020
307-777-7311
https://wyobiz.wyo.gov/Business/AnnualReport.aspx

SkyCap Solar LLC

1: Mailing Address

30 N Gould St Ste 3229
Sheridan, WY 82801

2: Principal Office Address

30 N Gould St Ste 3229
Sheridan, WY 82801

Phone: (970) 795-8439
Email: jlap@skycapsolar.com

Current Registered Agent:

Registered Agents Inc
30 N Gould St Ste R
Sheridan, WY 82801

• Please review the current Registered Agent information and, if it needs to be changed or updated, complete the appropriate form available from the Secretary of State's website at https://sos.wyo.gov

I hereby certify under the penalty of perjury that the information I am submitting is true and correct to the best of my knowledge.

Joshua Albert Lapin	Joshua Albert Lapin	February 24, 2023
Signature	Printed Name	Date

The fee is $60 or two-tenths of one mill on the dollar ($.0002), whichever is greater.

Instructions:

1. Complete the required worksheet;
2. Sign and date this form; and
3. Return both the form and worksheet to the Secretary of State at the address provided above.

EXHIBIT 5

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

JOSHUA A LAPIN Plaintiff, vs. EVERQUOTE INC, a/k/a EverQuote, and JOHN DOE SENDER, d/b/a BuzzBarrelReview.com, d/b/a dzlosurverys.com, d/b/a emailsjobsdelivered.com, d/b/a Entirelybelieve.com, d/b/a JobsDeliver.com, d/b/a expectcarecare.com, d/b/a JobSharkNL.com, d/b/a NationalShopperSurvey.com, d/b/a NationalSurveysOnline.com, d/b/a exigentmediagroup.com, d/b/a enrichedtechnologies.com, d/b/a ConsumerDigitalSurvey.com, d/b/a drivingmarketinggroup.com, d/b/a surveyandgetpaid.com, d/b/a tummyheadmediagroup.com, d/b/a thebestcreditcheck.com, d/b/a thefreetree.co, d/b/a dlzoffers.com, d/b/a nationaldigitalsurvey.com, d/b/a dealzingo.com, d/b/a rumorfox.com, Defendants.	4:22-CV-04058-KES ORDER DISMISSING LAPIN'S CLAIMS AGAINST DEFENDANT EVERQUOTE AND DENYING LAPIN'S MOTION TO RECONSIDER

Pending before the court is defendant EverQuote's motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) and failure to state a claim under Rule 12(b)(6). Docket 13. EverQuote also argues a federal statute preempts, plaintiff, Joshua A Lapin's, state-law claims. Docket 14 at 2-3. Lapin resists these arguments. Docket 19. Lapin also moves the

EXHIBIT 6

court to reconsider its previous order denying him the ability to file documents electronically. *See* Docket 11; Docket 18.

FACTUAL BACKGROUND

Lapin alleges the following:

Lapin is a full-time traveling "digital nomad" who moves from place to place, generally internationally, in 30-day cycles, without a permanent residence in or out of the United States. *See* Docket 1 ¶ 2. Lapin received 108 commercial emails advertising auto insurance. *See id.* ¶¶ 5-7. Lapin alleges defendant "John Doe Sender" sent some of these emails to Lapin but does not know the identity of the other senders of the emails. *See id.* ¶¶ 9, 29. Lapin acknowledges EverQuote did not send these emails, but alleges EverQuote is the advertiser featured in them. *Id* ¶ 28.

EverQuote has its principal place of business in Massachusetts and is incorporated in Delaware. *Id.* ¶ 3. EverQuote "is in the business of generating [auto] insurance leads for [auto] insurance companies. *Id.* It is registered to do business in the State of South Dakota and has a registered agent in South Dakota. *See id.* ¶ 40, 45. On its website, it advertises South Dakota specific auto insurance, detailing the state's requirements. *See id.* ¶ 40

Lapin alleges 108 claims against John Doe Sender and EverQuote for various violations of SDCL § 37-24-47. For example, Lapin alleges some of the emails have a third-party domain name without the third-party's permission. Docket 1 ¶ 28. Lapin also alleges that some of the emails' header information is misleading or false because some of the emails have untraceable domain

EXHIBIT 6

names and some of the "to" field in the emails incorrectly indicate Lapin's email. *Id.* ¶ 29. He further alleges the "from" fields of the emails he received improperly failed to identify EverQuote as the advertiser of the emails and failed to identify the senders of the emails. *Id.* ¶ 30. Based on these alleged violations, Lapin seeks the statutory liquidated damages amount of $1,000 per email, as well as reasonable costs associated with filing and maintaining this action and for service of process. *See* Docket 1 ¶ 37; SDCL § 37-24-48.

DISCUSSION

The court first considers whether it has personal jurisdiction over EverQuote, because without personal jurisdiction, the court lacks authority over the defendant. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999)("[J]urisdiction generally must precede merits in dispositional order[.]"); *Kangas v. Kieffer*, 495 Fed.App'x. 749, 750 (8th Cir. 2012) ("A court may not resolve a case on its merits unless the court has jurisdiction over both the claims and the parties in suit.").

I. Personal Jurisdiction

"To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must plead 'sufficient facts to support a reasonable inference that the defendant[ ] can be subjected to jurisdiction within the state.' " *Creative Calling Sols., Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 979 (8th Cir. 2015) (quoting *K–V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 591–92 (8th Cir. 2011) (alteration in original)). The plaintiff bears the burden to prove the court has personal jurisdiction. *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 820

EXHIBIT 6

(8th Cir. 2014). The court must view the evidence in the light most favorable to the plaintiff and resolve factual conflicts in the plaintiff's favor. *Id.*

"A federal court may assume jurisdiction over a defendant in a diversity action if the forum State's long-arm statute permits the exercise of personal jurisdiction and that exercise is consistent with the Due Process Clause of the Fourteenth Amendment." *Creative Calling*, 799 F.3d at 979. South Dakota's long-arm statute confers jurisdiction to the fullest extent allowed by the Due Process Clause, and thus the court need only determine whether the assertion of personal jurisdiction comports with due process under the Fourteenth Amendment. *See* SDCL § 15-7-2(14); *see also Larson Mfg. Co. of S.D. v. Conn. Greenstar, Inc.*, 929 F. Supp. 2d 924, 926 (D.S.D. 2013) (citing *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 915 (8th Cir. 1994)).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from exercising personal jurisdiction over a nonresident defendant unless that defendant has "minimum contacts" with the state such that maintaining the lawsuit "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). The court must consider five factors to evaluate whether a defendant's actions sufficiently support personal jurisdiction:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relationship of those contacts with the cause of action; (4) [South Dakota]'s interest in providing a forum for its

> residents; and (5) the convenience or inconvenience to the parties.

Myers v. Casino Queen, Inc., 689 F.3d 904, 911 (8th Cir. 2012). The third factor distinguishes between specific and general jurisdiction. *Johnson v. Arden*, 614 F.3d 785, 794 (8th Cir. 2010).

The first three factors carry significant weight, while the final two are less important. *See Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074 (8th Cir. 2004). The court should not mechanically apply the test, as this determination "is not readily amenable to rigid rules that can be applied across the entire spectrum of cases." *Viasystems, Inc., v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011) (quoting *Anderson v. Dassault Aviation*, 361 F.3d 449, 452 (8th Cir. 2004) (internal quotations omitted)).

Here, Lapin admits that there is no general personal jurisdiction, so the court need only determine whether the court can exercise specific jurisdiction over EverQuote. *See* Docket 19 at 2. For a court to exercise specific jurisdiction over the defendant, there must be a relationship between the forum, cause of action, and the defendant. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The defendant must purposefully direct its activities towards the forum state. *See Walden v. Fiore*, 571 U.S. 277, 285 (2014).

Lapin argues that the court has jurisdiction over EverQuote based on the stream of commerce theory. *See* Docket 19 at 4-5. The Eighth Circuit has explained that "[p]ersonal jurisdiction may be found where a seller uses a distribution network to deliver its products into the stream of commerce with

the expectation that the products will be purchased by consumers in the forum state." *Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003). The stream of commerce analysis does not replace the five-factor test, but instead is "an overlay through which the five factors, or constitutional due process, may be viewed." *Estate of Moore v. Carroll*, 159 F.Supp. 3d 1002, 1012-13 (D.S.D. 2016) (collecting Eighth Circuit cases).

Before further discussing the stream of commerce doctrine, the court will address whether this doctrine is applicable to the instant case. Lapin's cause of action is not a products liability case. *See* Docket 1. Instead, Lapin claims violations of a state law that imposes certain requirements on commercial e-mail advertisements. *See* SDCL § 37-24-47. Lapin argues that EverQuote is an advertiser under § 37-24-41(1), and that EverQuote placed its e-mail advertisements with various senders (John Doe or "various unknown senders") who then sent them in violation of § 37-24-47. Docket 1 ¶¶ 29, 35. Essentially, he argues that EverQuote is like a manufacturer who places its product with a distributor, who then distributes the product.

At first glance, the stream of commerce analogy seems inept here, because according to Lapin, the actual advertisement that EverQuote placed in the stream of commerce is not itself the "defective product." In other words, under Lapin's theory, the bodies of the emails do not themselves violate SDCL § 37-24-47, but rather the *way* the senders sent the advertisements to him forms the basis for liability. *See* Docket 1 ¶¶ 29, 35 (describing the violations as rooted in the misleading "To" and "From" domains of the emails sent by

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either Doe or various unknown senders). Thus, applying the stream of commerce doctrine to this situation may appear akin to applying it to a case where the plaintiff sues a defendant manufacturer of a product, not because the product was defective per se, but because its seller misled the plaintiff regarding the product's price. Indeed, "[c]ourts typically do not extend the stream of commerce theory beyond the products liability context or beyond a dispute pertaining to the actual product." *Guinness Import Co. v. Mark VII Distribs., Inc.*, 971 F.Supp. 401, 409 (D. Minn. 1997), *aff'd*, 153 F.3d 607 (8th Cir. 1998).

But here, under South Dakota law, an advertiser is liable for its email advertisements. *See* SDCL §§ 37-24-41, 37-24-47. Under SDCL § 37-24-41(a), South Dakota defines "advertiser" as "a person or entity that advertises through the use of commercial e-mail advertisements[.]" Under SDCL § 37-24-47, the law sets forth the circumstances in which commercial e-mail advertisements are prohibited, and states, "[n]o person may *advertise* in a commercial e-email advertisement either sent from South Dakota or sent to a South Dakota electronic mail address under any of the [listed] circumstances[.]" Considering these provisions together, because the law expressly contemplates an advertiser as a person or entity who advertises through commercial e-mails and because the prohibition of certain e-mail advertisements applies to any person who "advertise[s] in a commercial e-mail advertisement," it follows that South Dakota has deemed the advertiser liable

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for its commercial e-mails, even if the advertiser is not the one who sent the emails.

It may be true that this case does not look like the traditional case to which courts typically apply the stream of commerce analysis. *See Guinness*, 971 F.Supp. at 409. But the Eighth Circuit has repeatedly explained that courts should not mechanically apply personal jurisdiction tests, nor can the analysis be rigid. *See, e.g.*, *Viasystems*, 646 F.3d at 596; *Pangaea, Inc., v. Flying Burrito LLC*, 647 F.3d 741, 746 n.4 (8th Cir. 2011); *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983) (noting that the five factors "do not provide 'a slide rule by which fundamental fairness can be ascertained with mathematical precision.' " (quoting *Toro Co. v. Ballas Liquidating Co.*, 572 F.2d 1267, 1270 (8th Cir. 1978)). 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.

The court now turns to this theory of personal jurisdiction. In *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980), the Supreme

Court held that the mere fact that a defendant can foresee the potential for a plaintiff suffering an injury in the forum state is insufficient to establish personal jurisdiction. There, the Court found that an Oklahoma court could not exercise personal jurisdiction over a New York-based automobile retailer and its wholesale distributor when the defendants' only connection to Oklahoma was "the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma." *Id.* at 287, 295. The Court concluded that the relevant inquiry is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

Following *Worldwide Volkswagen*, the Supreme Court again addressed the stream of commerce doctrine in *Asahi Metal Ind. Co., Ltd. v. Superior Court of California, Solano Cty.*, 480 U.S. 102 (1987). The court found that a California state court did not have personal jurisdiction over a Japanese manufacturer, but the Court was "sharply divided" about the applicability of the stream of commerce theory. Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1067.4 (4th ed. 2022). In Justice O'Connor's opinion joined by three other justices, she opined that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State[,]" but rather some "[a]dditional conduct" indicating "an intent or purpose to serve the market in the forum State" was also necessary. *See Asahi*, 480 U.S. at 112. This "additional conduct" may

include "an intent or purpose to serve the market in the forum State" such as "designing the product for the market in the forum State[.]" *Id.*

Justice Brennan's concurrence, joined by three others, ultimately agreed with Justice O'Connor in finding that a California state court lacked personal jurisdiction over the Japanese manufacturer, but did not agree with Justice O'Connor's stream of commerce discussion. *See id.* at 116-17, 121. Justice Brennan argued that "[a]s long as a participant . . . is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise[,]" and thus Justice Brennan rejected the idea that there must be a showing of additional conduct. *See id.*

Finally, Justice Stevens wrote a concurrence in which he argued the stream of commerce discussion was unnecessary to decide the case, and that the court should consider "the volume, the value, and the hazardous character" of the product in question. *See id.* at 121-22. Thus, Justice Stevens did not join either Justice O'Connor's or Justice Brennan's view on the correct approach to a stream of commerce analysis.

Most recently in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), the Supreme Court again failed to present a clear majority view on how to approach a stream of commerce analysis. In *Nicastro*, the plaintiff sued a British manufacturer in New Jersey after the plaintiff injured himself using the manufacturer's metal-shearing machine. *See id.* at 878 (Kennedy, J. plurality). The British manufacturer had attended annual trade conventions in the United States, but it had never attended one in New Jersey. *Id.* Justice Kennedy,

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writing for a four-member plurality, found that although the manufacturer "directed marketing and sales efforts at the United States[,]" it had not "purposefully directed" conduct at New Jersey. *See id.* at 886. Justice Kennedy characterized personal jurisdiction as a function of the "power of a sovereign" to resolve disputes and enter judgments, and thus opined that "[t]he principal inquiry . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign." *See id.* at 882. Thus, Justice Kennedy opined that New Jersey lacked personal jurisdiction over the case. *Id.* at 887.

Justice Breyer, joined by Justice Alito, agreed that the New Jersey court lacked personal jurisdiction, but rejected Justice Kennedy's approach as being too rigid in light of modern-day advances in the economy. *See id.* at 887, 890 (Breyer, J. concurring). Justice Breyer instead focused on the fact that the record showed no regular course of sales in New Jersey, and that there was not "something more" than just the mere foreseeability of the product ending up in New Jersey, such as "special state-related design, advertising, advice, marketing, or anything else." *See id.* at 888-89.

Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented, and argued New Jersey did have personal jurisdiction over the manufacturer because the manufacturer had purposefully targeted the entire United States market, and thus New Jersey was not a random place of adjudication, but rather "a result of the U.S. connections and distribution system that [the manufacturer] deliberately arranged." *See id.* at 893, 898 (Ginsburg, J. dissenting). Justice Ginsburg concluded that because its actions targeted the

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United States, it purposefully availed itself to the United States and thus it would be fair to subject it to personal jurisdiction in New Jersey. *See id.* at 905. After reviewing these cases, the court notes that at least a majority of justices have agreed—twice—that knowledge that a product placed in the stream of commerce could end up in a forum state plus "something else" is sufficient to confer on the forum state court personal jurisdiction. *See Asahi*, 480 U.S. at 112, 116-17, 121; *Nicastro*, 564 U.S. at 888-890, 898, 905.

Here, Lapin's submissions show that EverQuote specifically markets "Cheap Car Insurance in South Dakota" and provides specific auto insurance requirements in South Dakota. *See* Docket 1 ¶ 40. Additionally, Lapin alleges, and EverQuote implicitly concedes, that EverQuote is registered to do business in South Dakota and maintains a registered agent in South Dakota. *See* Docket 1 ¶¶ 40, 45; Docket 21 at 10-11 (contesting only the *significance* of EverQuote having a registered agent in South Dakota). EverQuote had every reason to believe its email advertisements would end up in South Dakota, because it purposefully marketed its product on its website for South Dakota specific car insurance and registered itself as a business in South Dakota. Because it purposefully availed itself to do business in South Dakota, the court finds EverQuote has minimum contacts with South Dakota under a stream of commerce analysis.

The Eighth Circuit's decision in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994) supports this conclusion. In *Barone*, the court held that the state of Nebraska could exercise specific personal

jurisdiction over a foreign fireworks manufacturer, when the manufacturer sold its fireworks to local distributors who later sold the fireworks in Nebraska. *See id.* at 611-13, 15. In doing so, the court emphasized that the manufacturer "certainly benefited from the distribution efforts" and that "[m]ore than reasonable foreseeability is at stake here[,]" because the manufacturer "purposefully reaped the benefits of . . . Nebraska's [laws][.]" *See id.* at 613, 15.

Here, EverQuote's position is similar to the foreign fireworks manufacturer in *Barone*: EverQuote placed its advertisements with various senders, knowing (or at the very least EverQuote should have known) that its advertisements would be read in South Dakota. Because EverQuote has specifically tailored its insurance information to South Dakota residents and registered itself to do business in South Dakota, it has "purposefully reaped the benefits of . . . [South Dakota]'s [laws][.]" *See id; see* Docket 1 ¶¶ 40.

EverQuote resists this conclusion for several reasons. First, EverQuote argues that Lapin cannot properly identify the party who sent the commercial e-mails to him. *See* Docket 21 at 8-9. EverQuote points out that Lapin did not name the sender of the emails in his original complaint, nor seek to amend his complaint, and thus the court should "disregard" the new allegations in Lapin's response (Docket 19) about Flex Marketing Group LLC being the real identity of "John Doe." *See* Docket 21.

The court need not consider Lapin's new allegations about Flex Marketing Group LLC, because Lapin's allegations in his original complaint are sufficient for the court after considering all reasonable inferences in favor of

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Lapin. *See Fastpath*, 760 F.3d at 820. This is especially the case given that Lapin filed this case pro se. *See Erickson v.* Pardus, 551 U.S. 89, 94 (2007). Here, Lapin alleged that EverQuote is "in the business of generating [auto] insurance leads for [auto] insurance companies" (alterations in original). Docket 1 at 2. He also alleged that EverQuote was the ultimate advertiser of the commercial emails he received. *Id.* at 175. Although he alleged he does not know the identities of the sender, the court finds 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. Thus, the court rejects EverQuote's first argument that suggests the court must know the identity of the senders of these emails.

EverQuote next cites to a Tenth Circuit decision, *XMission, L.C. v. Fluent LLC*, 955 F.3d 833 (10th Cir. 2020), arguing it is a "strikingly similar case" that requires the court to find allegations that EverQuote targeted South Dakota to fail. Docket 21 at 10. In *XMission*, the defendant, Fluent, was an internet service provider who provided email hosting services. *See* 955 F.3d at 837. The plaintiff alleged that Fluent had sent over 10,000 emails to customers in the forum state, all in violation of the CAN-SPAM Act, 15 U.S.C. §§ 7701 to 7713; 18 U.S.C. § 1037, which is the same federal law EverQuote alleges preempts Lapin's instant case. *See XMission*, 955 F.3d at 837. But unlike here, the court in *XMission* noted that the defendant had never been registered to do business

in the forum state, nor had it "undertaken to market or advertise in [the forum state] or to target or direct any internet marketing directly to [the forum state] residents." *See id.* at 838. Additionally, because Xmission merely sent emails to a national audience rather than advertised in its emails, the court did not engage in a stream of commerce type analysis. *See id.* at 841-50. Thus, *XMission* is distinguishable and does not alter the court's analysis.

The decision in *Toro Co. v. Advanced Sensor Tech., Inc.*, No. 08-248, 2008 WL 2564336 at *3-4 (D. Minn. June 25, 2008) similarly does not alter the court's decision. In *Toro*, the plaintiff, The Toro Company, sued Advanced Sensor Technology, Inc. (AST), for false advertising, deceptive trade practices, consumer fraud, and intentional interference with prospective economic advantage. *See id.* at *1. Toro argued that AST had maintained a website that was accessible to the forum state and sent over 300 emails to individuals in Minnesota as part the defendant's nationwide email distribution list, and thus had sufficient minimum contacts to justify personal jurisdiction. *See id.* at *3. The court rejected this argument, observing that AST had not targeted these emails specifically to Minnesota. *See id.* at *3-4. Furthermore, the court in *Toro* did not discuss anything about AST marketing its products specifically to Minnesota residents. The facts in *Toro* did not readily bring up a stream of commerce analysis, and thus the court did not conduct one. *See id.* at *3-4. Here, unlike in *Toro*, EverQuote specifically marketed its auto insurance to South Dakota residents on its website. It placed its advertisements with senders, hoping and knowing the emails would reach South Dakota residents.

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Furthermore, the court views this case through a stream of commerce lens, distinguishing it from *Toro*. Thus, *Toro* does not aid Everquote in this case.

Having concluded there is sufficient minimum contacts, the court now considers whether Lapin's case "arise[s] out of or relate[s] to" such contacts. *See Myers*, 689 F.3d at 912 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The "arise out of or relate to" requirement is met if "the defendant purposefully directs its activities at the forum state and the litigation 'result[s] from injuries . . . *relating* to [the defendant's] activities [in the forum state].' " *Id.* at 913 (emphasis added) (alt. in original) (quoting *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008)). This requirement is "flexible" based on the totality of circumstances. *See id.; K-V Pharm.*, 648 F.3d at 592-93. It does not require proximate causation between the contacts and the cause of action. *Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 913 (8th Cir. 2014).

Here, Lapin's action is based on e-mail advertisements that EverQuote placed into the stream of commerce and that advertise auto insurance. *See, e.g.*, Docket 1 at 5-40; 42-118.[1] Although the e-mail advertisements do not address South Dakota specific car insurance, EverQuote markets South Dakota car insurance on its website. *See* Docket 1 ¶ 40. Thus, the court finds Lapin's claims to be sufficiently related to EverQuote's contact with South Dakota.

[1] For purposes of clarity, the court cites the page numbers rather than paragraph numbers in this citation because Lapin's complaint inadvertently has two paragraph 6's, 7's, and 8's, and these e-mail advertisements are located in these paragraphs.

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EverQuote argues that the existence of EverQuote's registered agent in South Dakota is insufficiently related to Lapin's instant claims. *See* Docket 21 at 10-11. But this observation does nothing to undermine the inherent connection between EverQuote's targeted advertising on its website for South Dakota specific car insurance and its commercial emails advertising car insurance. And as the Eighth Circuit has observed, the "relating to" prong of specific personal jurisdiction does not require proximate causation, but rather a flexible inquiry based on the totality of the circumstances. *See Myers*, 689 F.3d at 912; *K-V Pharm.*, 648 F.3d at 592-93; *Downing*, 764 F.3d at 913.

In summary, the court concludes that the first three—and most important—factors of the personal jurisdiction test support a finding of personal jurisdiction: the nature and quality of the contacts with the forum state, the quantity of those contacts, and the relationship of those contacts with the cause of action, all counsel in favor of finding personal jurisdiction. *See Myers*, 689 F.3d at 911; *Dever*, 380 F.3d at 1073-74. As discussed above, the stream of commerce theory explains the nature and extent of EverQuote's purposeful availment of South Dakota's market. And the court finds these contacts sufficiently related to Lapin's cause of action in this case.

The court also considers the fourth and fifth factors. The fourth factor requires the court to consider South Dakota's interest in providing a forum for its residents, and the fifth factor requires the court to consider the convenience or inconvenience to the parties. *See Myers*, 689 F.3d at 911. The fourth factor cuts in favor of personal jurisdiction, because South Dakota's laws regulating

commercial e-mails, and specifically providing for private causes of action, show that South Dakota has a legitimate interest in providing a forum for its residents to litigate these claims. *See* SDCL §§ 37-24-47; 37-24-48. The fifth factor does not support a finding of personal jurisdiction, given that neither Lapin nor EverQuote are based out of South Dakota. *See* Docket 1 ¶ 2 (showing Lapin describes himself as a "full-time traveling 'digital nomad[,]' who moves from place to place, generally internationally, in 30-day cycles, without a permanent residence in or out of the United States[.]"); Docket 15 at 2 ("EverQuote is incorporated in the State of Delaware, with a principal place of business in Cambridge, Massachusetts."). But although EverQuote is not based out of South Dakota, it nonetheless is registered to do business in South Dakota and thus the court finds it is not overly burdensome for it to litigate a claim here.

Based on these five factors and the above-discussion, the court concludes that Lapin has made a sufficient showing that the court has personal jurisdiction over EverQuote. The court also finds that exercising personal jurisdiction over EverQuote is fundamentally fair, because as explained above, EverQuote has purposefully availed itself of South Dakota's market by placing e-mail advertisements with various senders, knowing and hoping those emails would reach South Dakota residents, specifically by advertising its car insurance options to South Dakota drivers, and by having a registered agent in South Dakota. *See Burger King*, 471 U.S. at 477-78 (noting personal jurisdiction inquiry requires fairness to out-of-state defendant). Thus,

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the court denies EverQuote's Rule 12(b)(2) motion for lack of personal jurisdiction. The court now evaluates EverQuote's Rule 12(b)(6) motion for failure to state a claim.

II. Failure to State a Claim

EverQuote moves under Federal Rule of Civil Procedure 12(b)(6) for dismissal because Lapin failed to state a claim. Under Rule 12(d) "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. Proc. 12(d); *see also Sorace v. United States*, 788 F.3d 758, 767 (8th Cir. 2015).

Ordinarily, when a district court decides to treat a Rule 12(b)(6) motion as a summary judgement motion, the court must "notify litigants . . . so that the litigants may respond to the issue the court is weighing." *Layton v. United States*, 919 F.2d 1333, 1335 (8th Cir. 1990). But *Van Leeuwen v. U.S. Postal Service*, 628 F.2d 1093, 1095 (8th Cir. 1980), provides an exception to this general rule: when both parties "submit[] outside the pleadings affidavits and exhibits which [the non-moving party] underst[ands] that the District Court accept[s] for consideration," then the district court is not required to give notice to the parties. That is because the parties were "possibly on constructive notice that the court would treat the motion as one for summary judgment." *Simes v. Huckabee*, 354 F.3d 823, 826 n.2 (8th Cir. 2004).

Here, both Lapin and EverQuote attached affidavits for the court to consider when determining whether Lapin failed to state a claim. *See* Docket

16, 17, and 20. Thus, both were on constructive notice that the court will treat it as a motion for summary judgment.[2]

Summary judgment is appropriate if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party can meet its burden by presenting evidence that there is no dispute of material fact or that the nonmoving party has not presented evidence to support an element of its case on which it bears the ultimate burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party must inform the court of the basis for its motion and also identify the portions of the record that show there is no genuine issue in dispute. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

To avoid summary judgment, "[t]he nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). Summary judgment "must be denied if on the record then before it the court determines that there will be sufficient evidence for a jury to return a verdict in favor of the nonmoving party." *Krenik*

[2] The court recognizes Lapin is *pro se* and thus realizes these complicated procedural moves are not as readily understandable to him. As the court will more fully explain, the court does not need to rely on any of EverQuote's affidavits in deciding this issue, and thus only relies on the affidavit and exhibits Lapin submitted in Docket 20.

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47 F.3d at 957. It is precluded if there is a genuine dispute of fact that could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When considering a summary judgment motion, the court views the facts and the inferences drawn from such facts "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

South Dakota law governs Lapin's substantive legal claims, and the court is bound by the decisions of South Dakota's Supreme Court when interpreting South Dakota law. *See Progressive Northern Ins. Co. v. McDonough*, 608 F.3d 388, 390 (8th Cir. 2010). If the South Dakota Supreme Court has not decided an issue, the court must attempt to predict how the South Dakota Supreme Court would resolve the issue. *See id.*

Lapin sues EverQuote in 108 counts under SDCL § 37-24-47 and § 37-24-48. Docket 1. SDCL § 37-24-47 provides:

> No person may advertise in a commercial e-mail advertisement either sent from South Dakota or sent to a South Dakota 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;
>
> (3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a

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> recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

SDCL § 37-24-48 provides a private cause of action for individuals who receive emails that violate SDCL § 37-24-47. EverQuote argues that Lapin cannot succeed in his claims because the statute only applies if the commercial e-mail advertisement was "sent to a South Dakota electronic mail address[,]" and Lapin's email is not a "South Dakota electronic mail address." *See* SDCL § 37-24-47; Docket 14 at 6. South Dakota defines a "South Dakota electronic mail address" as any of following:

> (a) 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;
>
> (b) An e-mail address ordinarily accessed from a computer located in this state; or
>
> (c) An e-mail address furnished to a resident of this state[.]

SDCL § 37-24-41(14). Lapin has submitted no allegations that his e-mail address is furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in South Dakota. *See* Docket 1. Thus, the court finds § 37-24-41(14)(a) does not apply. Lapin also has alleged that he is a "full-time traveling 'digital nomad[,]' who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence in or out of the United States[.]" *See id.* at 2. Thus, the court finds § 37-24-41(14)(b) does not apply either. Lapin's ability to survive summary judgment turns on whether the court finds, construing Lapin's

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allegations in his well-pleaded complaint as true and making any reasonable inferences from those facts in the light most favorable to him, that he can show that § 37-24-41(14)(c) applies—namely, that he is a "resident" of South Dakota.

When interpreting a statute, the South Dakota Supreme Court looks to the statute's plain language and structure. *Magellan Pipeline Co. v. S.D. Dep't of Revenue & Reg.*, 837 N.W.2d 402, 404 (S.D. 2013). The South Dakota legislature has directed that "[w]ords are to be understood in their ordinary sense" unless the statute otherwise defines a word. SDCL § 2-14-1; *see also Scheller v. Faulkton Area Sch. Dist. No. 24-3*, 731 N.W.2d 914, 916 (S.D. 2007).

Here, SDCL § 37-24-41 fails to define "resident" for purposes of determining whether Lapin has a South Dakota electronic mail address. Thus, the court turns to the ordinary sense of the word "resident." SDCL § 2-14-1. Black's Law Dictionary defines "resident" in a few ways. First, it defines a resident as "[s]omeone who lives permanently in a particular place[.]" *Resident*, BLACK'S LAW DICTIONARY (11th ed. 2019). It also defines it as "[s]omeone who has a home in a particular place[,]" and "[s]omeone who is staying in a particular hotel, apartment building, etc." *Id.* Similarly, Merriam-Webster's Collegiate Dictionary defines "resident" as "one who resides in a place." *Resident*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999). In turn, it defines "reside" as "to dwell permanently or continuously." *Reside*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999). Importantly, all of these definitions of "resident" contemplate some form of physical presence.

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The South Dakota Supreme Court has also interpreted "resident" in the context of personal jurisdiction for divorce proceedings to require some form of physical presence, despite the relevant statute failing to define resident. *See, e.g.*, *Parsley v. Parsley*, 734 N.W.2d 813, 818 (S.D. 2007). In *Parsley*, the court had to determine whether the South Dakota trial court had personal jurisdiction over a divorce action. *See id.* The relevant statute, SDCL § 25-4-30, without defining "resident," provided "[t]he plaintiff in an action for divorce or separate maintenance must, at the time the action is commenced, be a resident of this state, or be stationed in this state while a member of the armed services." The South Dakota Supreme Court adopted a the following language about residency: "[I]t follows that the residence must be an actual residence *as distinguished from a temporary abiding place . . . .*" *Parsley*, N734 N.W.2d at 818 (emphasis added). By distinguishing actual residence from a temporary abiding place, the South Dakota Supreme Court made clear that it views residence as being the location where someone lives. The South Dakota Supreme Court affirmed this understanding in *Rush v. Rush*, 866 N.W.2d 556, 561 (S.D. 2015). In both *Parsley* and *Rush*, the court found that the relevant individuals were residents for purposes of SDCL § 25-4-30, and in both cases the individuals had significant physical presence in the state. *See Parsley*, 734 N.W.2d at 818 (individual had lived in home for over three years); *Rush*, 866 N.W.2d at 561 (individual had physically moved to South Dakota and found local employment). These two cases underscore that ordinarily, the term resident refers to where one lives.

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Viewing Lapin's complaint and submissions in the light most favorable to him, the court finds that he is not a South Dakota resident. By his own admission, Lapin is a "full-time traveling 'digital nomad[,]' who moves from place to place, *generally internationally*, in 30 day cycles, without a permanent residence in or out of the United States[.]" *Docket* 1 ¶ 2 (emphasis added). He further admits, "[He] was present *physically outside of the State of South Dakota at most times material*[.]" *Id.* ¶ 38 (emphasis added). Lapin does not have any meaningful physical presence in South Dakota, and thus he is not a South Dakota resident.

Lapin resists this conclusion and instead argues that he is a legal resident of South Dakota, which he argues suffices for purposes of his claims. *See* Docket 19 at 6-9. Lapin first cites the South Dakota Department of Public Safety's Driver's License requirements for full-time travelers, which lists out the steps he had to take to get a South Dakota's driver's license. *Id.* at 7. As part of this requirement, he had to fill out a "Residency Affidavit," which in turn required him to affirm that South Dakota is his state of residence and that he intends on returning to South Dakota after traveling. *See* Docket 20-1 at 1. He then cites SDCL § 12-1-4, a provision that establishes the criteria for determining an individual's residence for voting purposes. It provides: "[a] person who has left home and gone into another state or territory or county of this state for a temporary purpose only has not changed his or her residence." SDCL § 12-1-4. Putting his affidavit together with SDCL § 12-1-4, he reasons that SDCL § 37-24-41(14)(c) applies to him because he declared himself to be a

resident of South Dakota, he plans on returning to South Dakota eventually, he is a legal resident of South Dakota, and he is eligible to vote in South Dakota.

South Dakota law may *treat* Lapin as a South Dakota resident for purposes of allowing Lapin to obtain a South Dakota's Driver's License and to vote. But the statute at issue in this case, § 37-24-41(c), provides no evidence that the South Dakota Legislature wished to import the same loose definition of resident. In fact, the South Dakota Legislature has done the opposite, given its instruction to interpret words "in their ordinary sense" unless it has otherwise defined such words. SDCL § 2-14-1. And because neither SDCL § 37-24-41(14)(c) nor any surrounding provisions define the term resident, and the ordinary sense of the word resident does not include a self-admitted travelling digital nomad who has not physically lived in South Dakota for any significant time, the court rejects Lapin's argument that he is a resident for purposes of his claims.

Lapin also argues that his "domicile" is South Dakota. *See* Docket 19 at 6-9. But the statute does not refer to domicile—it refers to "resident." *See* SDCL § 37-24-41(14)(c). As the South Dakota Supreme Court has explained, "[r]esidence and domicile are not interchangeable concepts." *State ex rel. Jealous of Him v. Mills*, 627 N.W.2d 790, 793 (S.D. 2001). While residence "signifies living in [a] particular locality," domicile means "living in that locality with intent to make it a fixed and permanent home." *See In Re G.R.F.*, 569 N.W.2d 29, 33 n. 4 (S.D. 1997) (quoting Black's Law Dictionary 485 (6th ed.

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1990)). If anything, establishing domicile is more difficult, because not only does an individual have to prove he is living in the relevant location, but such individual must also demonstrate an intent to make it his permanent home. *See id.* Notably, the South Dakota Supreme Court's discussion shows that both the terms residence and domicile require, at a minimum, that the individual *live* in the particular location. *See id.* Lapin does not live in South Dakota. Thus, Lapin's domicile argument fails.

In summary, Lapin does not live in South Dakota or spend any significant amount of time in South Dakota. Under an ordinary sense of the word resident, he cannot show that he is a resident of South Dakota. Lapin cannot show that the emails sent to his email addresses were South Dakota electronic mail addresses, and thus his claims asserting SDCL § 37-24-47 violations fail as a matter of law. There is no genuine dispute of material fact. The court dismisses Lapin's claims against EverQuote.

III. Preemption

EverQuote also argues that the federal CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*, preempts Lapin's South Dakota state-law claims. *See* Docket 14 at 12. Because the court dismisses Lapin's state-law claims against EverQuote, the court need not decide the preemption issue.

IV. Electronic Filing

Finally, Lapin asks this court to reconsider its decision to deny him leave to electronically file documents through CM/ECF. Docket 18. He argues that "sending mail is hard" and details the costs and lack of convenience for him to

send his filings through the mail. *See id.* at 18 at 2-4. He also argues he has less effective time to respond due to the amount of time it takes him to send his filings. *See id.* at 4. Alternatively, should the court deny him leave to file electronically, he seeks leave to file without a wet signature. *See id.* at 4-5.

After considering his motion, the court denies his motion to reconsider and denies his alternative request. While the court recognizes the challenges associated with having to mail filings, those challenges arise from Lapin's life-style decisions rather than circumstances beyond his control. Furthermore, after this order, the court does not anticipate many more filings from the parties.

CONCLUSION

Based on the above, it is ORDERED that EverQuote's motion to dismiss Lapin's claims (Docket 13) is GRANTED. It is further ORDERED that Lapin's motion to reconsider (Docket 18) is DENIED. It is further ORDERED that Lapin identify and serve the sender "John Doe" within 21 days of this order, or else the court will dismiss Lapin's claims against John Doe without prejudice.

DATED February 17, 2023

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JOSHUA A LAPIN Plaintiff, vs. EVERQUOTE INC, a/k/a EverQuote, and JOHN DOE SENDER, d/b/a BuzzBarrelReview.com, d/b/a dzlosurverys.com, d/b/a emailsjobsdelivered.com, d/b/a Entirelybelieve.com, d/b/a JobsDeliver.com, d/b/a expectcarecare.com, d/b/a JobSharkNL.com, d/b/a NationalShopperSurvey.com, d/b/a NationalSurveysOnline.com, d/b/a exigentmediagroup.com, d/b/a enrichedtechnologies.com, d/b/a ConsumerDigitalSurvey.com, d/b/a drivingmarketinggroup.com, d/b/a surveyandgetpaid.com, d/b/a tummyheadmediagroup.com, d/b/a thebestcreditcheck.com, d/b/a thefreetree.co, d/b/a dlzoffers.com, d/b/a nationaldigitalsurvey.com, d/b/a dealzingo.com, d/b/a rumorfox.com, Defendants.	4:22-CV-04058-KES ORDER DENYING LAPIN'S MOTION TO RECONSIDER AND DISMISSING LAPIN'S CLAIMS AGAINST JOHN DOE SENDER

Pending before the court is plaintiff Joshua Lapin's motion for the court to reconsider its order dismissing his claims against defendant EverQuote, Inc., under Federal Rules of Civil Procedure 59(e) and 60(b). Docket 24.

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DISCUSSION

I. Federal Rules of Civil Procedure 59(e) and 60(b)

Federal Rule of Civil Procedure 59(e) authorizes alteration or amendment of a judgment after its entry. Rule 60(b) provides litigants a vehicle to seek relief from a non-final order on six different grounds. Fed. R. Civ. P. 60(b). The parties disagree on whether Lapin's motion should be construed under Rule 59(e) or Rule 60(b). *See* Docket 30 at 10; Docket 28 at 3. The court finds it unnecessary to resolve the matter though because the standards under which the court evaluates such motions are materially the same in this context.

Rule 59(e) motions "serve the limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.' " *United States v. Metro St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.' " *Id.* (quoting *Hagerman*, 839 F.2d at 414).

Similarly, as relevant here, Rule 60(b) provides that the court may relieve a party from an order for "newly discovered evidence" and for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(2) & (4). "Rule 60(b) provides for 'extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." *In re Levaquin Prod. Liab. Litig.*, 739 F.3d 401, 404 (8th Cir. 2014) (citations omitted). Exceptional circumstances are ones that deny a moving party a "fair opportunity to litigate his claim" and have

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prevented a moving party "from receiving adequate redress." *See Harley v. Zoesch*, 413 F.3d 866, 871 (8th Cir. 2005). A motion to reconsider "is not a vehicle to identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." *Julianello v. K-V Pharmaceutical Co.*, 791 F.3d 915, 923 (8th Cir. 2015).

In summary, the court has wide discretion in deciding both a Rule 59(e) and 60(b) motion. *See Metro. St.* Louis, 440 F.3d at 933; Jones *v. Swanson*, 512 F.3d 1045, 1049 (8th Cir. 2008).

Lapin makes several arguments in support of his motion for reconsideration. First, he resists the court's conclusion that he had any meaningful physical presence in South Dakota, pointing to the 30 days he spent in South Dakota in an AirBnb and opening a mailbox, obtaining a driver's license, and registering to vote. *See* Docket 24 at 3. But the court already considered and rejected these arguments. *See* Docket 23 at 25-27. Although the court did not explicitly acknowledge Lapin's 30-day AirBnb stay despite him attaching AirBnb receipts in a response resisting EverQuote's motion to dismiss, the court reviewed this submission and recognized that he had obtained a Driver's License and registered to vote. *See id.* at 26; Docket 20-1 at 5. Thus, the court rejects Lapin's first argument.

Second, Lapin further alleges that he has returned to Sioux Falls as of January 2023. *See* Docket 24 at 2-3. But a party may not create a new fact in order to secure relief under a "newly discovered" evidence ground. *See Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 498 (8th Cir. 2001) (finding newly created IRS

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report that did not exist at the time of trial to not constitute newly discovered evidence); *see also Hyde v. Franklin Am. Mortgage Co.*, 4:18-CV-04113, 2021 WL 1864032, *1-2 (D.S.D. May 10, 2021) (finding that plaintiff's disputes filed with credit report agencies following summary judgement order to not be newly discovered evidence). Here, Lapin's new address and place of residence was the result of his own doing that occurred after EverQuote filed its motion to dismiss Lapin's claims against it, and thus his new address cannot constitute newly discovered evidence.

Furthermore, even if the court considered Lapin's new address in deciding the merits of his underlying claims, Lapin's new address does not alter the court's analysis. Lapin sued EverQuote in 108 counts under SDCL § 37-24-47 and § 37-24-48. Docket 1. As discussed in the court's previous order, SDCL § 37-24-48 provides a private cause of action for individuals who receive emails that violate SDCL § 37-24-47. SDCL § 37-24-47 provides:

> No person may advertise in a commercial e-mail advertisement either sent from South Dakota or sent to a South Dakota 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;
> >
> > (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.

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South Dakota defines a "South Dakota electronic mail address" as any of following:

> (a) 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;
>
> (b) An e-mail address ordinarily accessed from a computer located in this state; or
>
> (c) An e-mail address furnished to a resident of this state[.]

SDCL § 37-24-41(14). Lapin's only chance of qualifying for relief under SDCL §§ 37-24-47 and 37-24-48 was if he fell under SDCL § 37-24-41(14). That is, if he was a "resident" of South Dakota.

The relevant time period for determining when someone is a resident for purposes of § 37-24-41(14) is determined by the language of SDCL § 37-24-47. Under SDCL § 37-24-47, "[n]o person may advertise in a commercial e-mail advertisement . . . sent to a South Dakota electronic mail address . . ." SDCL § 37-24-47. Substituting the only applicable category in this case of "electronic mail address" under SDCL § 37-24-41(14) into the language of § 37-24-47, the statute would read: "[n]o person may advertise in a commercial e-mail advertisement . . . sent to ['[a]n email address furnished to a resident of this state.'] " *See* SDCL §§ 37-24-47, 37-24-41(14). The phrase "sent to" means that the relevant time in which to determine whether the recipient is a resident of South Dakota is at the time the email was sent. And that makes sense: adopting Lapin's argument would allow any current resident of South Dakota

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to theoretically resurrect emails it received several years ago back when such individual resided in a different state, all because the individual currently lives in South Dakota. Without making any determination, the court observes this would pose a serious Due Process notice issue because it would potentially impose liability on a sender of an email to a recipient who was not a resident of South Dakota at the time the email was sent but later moved to South Dakota. *Cf. Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) (discussing Due Process concerns of fair notice and noting "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.]"). The court declines to adopt such an interpretation. *Cf. State v.* Page, 709 N.W.2d 739, 763 (S.D. 2006) (recognizing that "where a statute can be construed so as not to violate the constitution, we will adopt such a construction.") (citation omitted). The relevant time for determining when an individual was a resident for purposes of SDCL § 37-24-47 is at the time the emails were sent.

Here, all of Lapin's 108 counts stem from the emails he received in the spring and summer of 2021, while Lapin was a full time traveling digital nomad and well before he moved back to Sioux Falls in January 2023. *See* Docket 1 at 3, 5-40, 42-118; Docket 24 at 2-3 (indicating Lapin "returned home to Sioux Falls January 9th, 2023" after "[t]raveling for the past one year and nine months"); Docket 1 at 2 (describing himself as a "full-time traveling 'digital nomad', who moves from place to place, generally internationally, in 30 day cycles, without a permanent residence in or out of the United States[.]").

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Indeed, in July of 2022, Lapin reiterated his status as being a full-time traveler and digital nomad when asking the court to reconsider its order declining to grant leave for him to file electronically. *See* Docket 18 at 2. At the time the Lapin's complained of emails were sent, he was not a resident of South Dakota. His move to Sioux Falls in January 2023 does nothing to alter that. Thus, the court rejects Lapin's second argument.

Next, Lapin argues that the correct interpretation of the term "resident" in SDCL § 37-24-41(14) should be determined by various other South Dakota statutes. *See* Docket 24 at 4-7, 14-16. Lapin also challenges the court's finding that the 30 days he spent in South Dakota prior to becoming a traveling nomad was insufficient to establish his residency for purposes of SDCL § 37-24-41(14). *See id.* at 7-9. Specifically, he argues the court's finding is an unconstitutional durational residency requirement, equal protection violation, and burden on his right to travel. *See id.* Lapin further argues that the court misconstrued the South Dakota Supreme Court decisions in *Parsley v. Parsley*, 734 N.W.2d 813, 818 (S.D. 2007) and *Rush v. Rush*, 866 N.W.2d 556, 561 (S.D. 2015). *See id.* at 9-14. Finally, Lapin analogizes his case to Eighth Circuit cases dealing with a soldier's domicile. *See id.* at 16-17 (citing *Eckerberg v. Inter-State Studio & Publ'g Co.*, 860 F.3d 1079 (8th Cir. 2017) and *Ellis v. Southeast Const. Co.*, 260 F.2d 280 (8th Cir. 1958)). But Lapin could have made all these arguments at the time the court decided the original motion.[1] Because Lapin

[1] Although Lapin technically could not have addressed his arguments about the two South Dakota Supreme Court cases that the court relied on its

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failed to do so, the court will not entertain his arguments. *See Julianello v. K-V Pharmaceutical Co.*, 791 F.3d at 923; *Metro St. Louis Sewer Dist.*, 440 F.3d 930, 933.

In summary, Lapin's motion to reconsider does not present any exceptional circumstances that warrant the court's reconsideration because there is no evidence that shows Lapin was denied a full and fair opportunity to litigate the issues. *See Harley*, 413 F.3d at 871. Thus, the court denies his motion to reconsider. *See Metro St. Louis Sewer Dist.*, 440 F.3d 930, 933; *In re Levaquin Prod. Liab. Litig.*, 739 F.3d at 404.[2]

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previous order, the underlying issue (how to define the term resident under SDCL § 37-24-41(14)) was the same. Thus, the court declines to consider this argument because Lapin had a full and fair opportunity to raise all relevant arguments regarding the proper interpretation of the term resident. *See Harley*, 413 F.3d at 871.

[2] Lapin argues that because EverQuote filed its response to his reconsideration motion late, the court must strike it. *See* Docket 30 at 2-3. Lapin filed his motion to reconsider on March 17, 2023. *See* Docket 24. Under the District of South Dakota Local Rule 7.1(B), EverQuote had 21 days to respond, i.e. until April 7, 2023. EverQuote served its response on April 7, 2023. *See* Docket 27. On April 11, EverQuote filed a notice of filing error and filed an identical response to the one filed on April 7. *See* Docket 28. After comparing the two responses, the court cannot identify any substantive changes to the documents. Furthermore, Lapin does not allege any prejudice from the April 11 response filed just four days after the timely April 7 response. *See* Docket 30 at 2-3. Even if EverQuote's April 11 response is untimely, it appears to be late because of an inadvertent filing error that resulted in no substantive changes. Thus, the court will not strike the response because Lapin was not prejudiced. *See Christians v. Young*, 4:20-CV-04083, 2023 WL 2687260, at *1-2 (D.S.D. Mar. 29, 2023) ("Because the filing error had no impact on [Plaintiff's] ability to respond, his motion to dismiss [Defendant's] motion for summary judgement as untimely . . . is denied."); *see also Rafferty v. Keypoint Gov. Solutions, Inc.*, 4:16-CV-00210, 2020 WL 70838952, at *9 (D. Idaho Nov. 30, 2020) ("There is no reason to penalize [Defendant] for an inadvertent filing error that did not

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CONCLUSION

Based on the above, it is ORDERED that Lapin's motion to reconsider (Docket 24) is DENIED. It is FURTHER ORDERED that Lapin's claims against sender "John Doe" are dismissed without prejudice, because Lapin failed to identify and serve the sender within 21 days of the court's February 17, 2023 order (Docket 23), as ordered to do so. *See* Docket 23.[3]

DATED May 3, 2023

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

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impact [Plaintiff's] ability to respond to [Defendant's] Motion for Summary Judgement[.]").

[3] Lapin argues that he has served John Doe (who he alleges to be Flex Marketing Group LLC) by emailing "the order" to its attorneys. *See* Docket 30 at 11. But under Federal Rule of Civil Procedure 4(c), "[a] summons must be served with a copy of the complaint." *See* Fed. R. Civ. P. 4(c). A summons in a civil action must include items, such as the name of the court and the parties, the time within which the defendant must appear and defend and a signature of the clerk's office. *See* Fed. R. Civ. P. 4(a)(1). Without proper service of process, the court lacks personal jurisdiction. *See Omni Capital Intern., Ltd. v. Rudolph Woff & Co., Ltd.*, 484 U.S. 97, 104 (1987). Although a defendant may waive service, Lapin admits that Flex has never waived its right to be served. *See* Docket 30 at 10. Thus, Lapin failed to properly serve a summons or a copy of his complaint on Flex, as is required for the court to exercise personal jurisdiction over Flex. *See Omni Capital Intern.*, 484 U.S. at 104.

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