No. 05-13687

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

ELEVENTH CIRCUIT

MICHAEL SNOW,

Plaintiff - Appellant,

v.

DIRECTV, INC., et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

JOINT BRIEF OF APPELLEES DIRECTV, INC.; STUMP, STOREY, CALLAHAN, DIETRICH & SPEARS, P.A.; AND YARMUTH WILSDON & CALFO, PLLC

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September 26, 2005

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for Appellees DIRECTV, Inc.; Stump, Storey, Callahan, Dietrich & Spears, P.A.; and Yarmuth Wilsdon & Calfo, PLLC certify that the following is a complete list of the persons and entities who have an interest in the outcome of this case:

Robert S. Apgood, Counsel for Appellant

Lauren E. Bush, Counsel for Appellees

CarpeLaw, Counsel for Appellant

Hon. Sheri Polster Chappell, U.S. Magistrate Judge, U.S. District Court for the Middle District of Florida

Hon. Virginia M. Hernandez Covington, U.S. District Judge, U.S. District Court for the Middle District of Florida

DIRECTV, Inc., Appellee

DIRECTV Enterprises, LLC, Parent Company of DIRECTV, Inc.

DIRECTV Holdings LLC, Parent Company of DIRECTV Enterprises, LLC

The DIRECTV Group, Inc., Parent Company of DIRECTV Holdings LLC

Christian S. Genetski, Counsel for Appellees

Michael Snow, Appellant

The News Corporation Limited

Sonnenschein Nath & Rosenthal, LLP, Counsel for Appellees

Stump, Storey, Callahan, Dietrich & Spears, P.A., Appellee

Yarmuth Wilsdon & Calfo, PLLC, Appellee

Albert A. Zakarian, Counsel for Appellant

Marc J. Zwillinger, Counsel for Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 28-1(b), Appellee DIRECTV, Inc. provides the following statement identifying its parent corporations and any publicly held corporation that owns 10 percent or more of its stock.

DIRECTV, Inc. is a wholly owned subsidiary of DIRECTV Enterprises, LLC, a Delaware limited liability company.

DIRECTV Enterprises, LLC is a wholly owned subsidiary of DIRECTV Holdings, LLC, a Delaware limited liability company.

DIRECTV Holdings, LLC is a wholly owned subsidiary of The DIRECTV Group, Inc., a publicly traded Delaware corporation.

The News Corporation Limited, a publicly traded corporation, owns 34% of The DIRECTV Group, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Although the questions raised related to the interpretation of the Stored Communications Act are issues of first impression in this Court, the Appellees believe that oral argument is not essential to the determination of the issues on appeal. The plain language of the Stored Communications Act, as well as the clear bar imposed by 18 U.S.C. § 2511(g)(1), should provide sufficient basis for affirming the district court's judgment on the basis of the written submissions.

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JURISDICTIONAL STATEMENT

This case arises under the Stored Communications Act, 18 U.S.C. §§ 2701 *et seq*. The district court had jurisdiction over this civil action pursuant to 28 U.S.C. § 1331. Snow appeals from a final decision of the district court, and therefore this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court properly held that the Stored Communications Act, ("SCA" or "the Act") 18 U.S.C. §§ 2701 *et seq.*, does not apply to postings permanently posted on a publicly-accessible Internet bulletin board.

2. Whether the district court properly held that neither Florida's long-arm statute nor due process permitted the exercise of personal jurisdiction over Yarmuth, Wilsdon and Calfo, PLLC, ("Yarmuth") a nonresident law firm with no offices in Florida, no attorneys licensed to practice law in Florida, and minimal revenues generated in Florida, where the firm had no contact with Florida in connection with the conduct alleged in the complaint but has periodically represented clients in matters occurring within the state of Florida.

STATEMENT OF THE CASE

I. Nature Of The Case.

Plaintiff Michael Snow, a previous defendant in an anti-piracy action brought by DIRECTV, initiated this case against DIRECTV and two of its outside

counsel, Yarmuth and Stump, Storey, Callahan, Dietrich & Spears, P.A. (collectively, "Appellees"), alleging breaches of the Stored Communications Act, 18 U.S.C. §§ 2701 *et seq*. This lawsuit was the latest development in a series of threats, non-meritorious filings, and sanctionable conduct that has characterized Snow's sworn "campaign to fight the evil devil DIRECTV,"[1] which began sometime after he was sued by DIRECTV.[2] Unwilling to participate in the civil discovery process in his prior litigation with DIRECTV, Snow resorted to bribery, offering a DIRECTV employee $2,500 to release confidential information to him.[3] This conduct led to a sanction of $600, imposed by Magistrate Judge Chappell, on May 19, 2004.[4] Ultimately, despite Snow's repeated improper conduct,[5] DIRECTV dismissed the underlying case against Snow without prejudice and, as part of that dismissal, agreed to forego the recovery of sanctions.

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[1] In his deposition in the prior action, Mr. Snow was asked whether he was employed; he responded "Excuse me, actually I'm employed. I am in a campaign to fight the evil devil DIRECTV." (Doc. 32 - Ex. A - Pg. 32.)

[2] To date, Snow has threatened to sue DIRECTV and certain individual lawyers for "malicious prosecution" (Doc. 32 - Ex. A - Pg. 33), copyright infringement (Doc. 32 - Ex. A - Pg. 34), "frivolous lawsuits and false accusations" (Doc. 32 - Ex. A - Pg. 35), extortion (Doc. 32 - Ex. A - Pg. 36, 40), and other unspecified claims. (Doc. 32 - Ex. A - Pg. 37-38.) He has also testified to assisting thousands of other individuals involved in litigation with DIRECTV. (Doc. 32 - Ex. A - Pg. 39.)

[3] *See* Doc. 32 - Ex. B - Pg. 42.

[4] Doc. 32 - Ex. B - Pg. 46.

[5] Doc. 32 - Ex. B - Pg. 44. ("This is the third time the Court has found it necessary to address Snow's abuse of the judicial system.").

At some point during his litigation with DIRECTV, Snow launched an Internet forum site, which provided access to anyone on the Internet who wanted to visit. Although Snow now claims that the website was "private," the only steps Snow took to secure the "privacy" of his website was to post a message indicating that the website was off-limits to representatives, agents, suppliers or relatives of "'DIRECTV, Dish Network, RIAA or any other Corporation seeking to sue individuals for alleged pirate acts.'" (Doc. 1 - Pg. 5.) After one or more representatives of DIRECTV visited the publicly-accessible website, Snow filed suit against the Appellees based on an invented cause of action he labeled "e-trespass."[6] In his complaint, Snow alleged that Appellees committed an "e-trespass" by visiting his publicly-accessible website. In trying to make his "e-trespass" claim fit the elements necessary to make out a violation of law, Snow has

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[6] The true gist of Snow's claim is a cause of action known as Trespass to Chattels. Courts addressing such claims in the computer context, however, have consistently held that a plaintiff must show some physical damage to the computer or interference with its use, resulting from the violation of the terms of use. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522, at *4 (C.D. Cal. Aug. 10, 2000), *aff'd*., 2 Fed. Appx. 741 (9th Cir. 2001); Restatement (Second) of Torts § 218(e) (1965). Barred from bringing a claim under this doctrine, Snow invoked a novel theory first proposed in a student law review article. W.M. Motooka, *Can the Eye be Guilty of a Trespass? Protecting Noncommercial Restricted Websites after Konop v. Hawaiian Airlines* 37 U.C. Davis L. Rev. 869, 870, 892 (2004). Even the author of that article, however, acknowledged that the SCA, as written, does not create a cause of action for the kind of "e-trespass" that Snow alleges here. *See id*. at 884-91. As a result, she proposed an amendment to the SCA to give statutory effect to the terms of use for public, non-commercial websites. *Id*. at 892.

improperly invoked the SCA, which is designed to punish hackers who break into Internet Service Provider networks to steal private emails.

Snow's claim for violations of the SCA fail in at least two key respects. First, material permanently posted on a website is not material in "electronic storage" for purposes of the SCA. Second, Snow's claim is based on the Appellees' access to a publicly-accessible website. Visiting a website configured to allow public access can never amount to a violation of the SCA, regardless of what terms of use are posted on the website. Furthermore, Snow's claim against Yarmuth also fails because Yarmuth was not subject to personal jurisdiction in Florida.

II. Factual Background

A. Snow's Website

On October 20, 2004, Snow filed the instant action against Appellees. In his complaint, Snow alleged that Appellees had committed an "e-trespass" against him by accessing his website, www.stop-corporate-extortion.com ("Snow's Website" or "the SCE Website") in violation of 18 U.S.C. § 2701.[7]

Snow's Website was described in his complaint as a "non-commercial private support group Web site," first launched in October of 2003.[8] It was hosted on the internet by a "web-hosting" company called globat.com ("Globat").[9] As such, Snow's Website was maintained on computer web servers at facilities

[7] Doc. 1 - Pg. 2, 5, 14.
[8] Doc. 1 - Pg. 4.
[9] Doc. 1 - Pg. 6.

maintained by Globat, and not at Snow's residence.[10] Snow does not allege in his complaint a violation of Globat's terms and conditions, nor a circumvention of any technical access restrictions imposed by Globat in his complaint.

The SCE Website was accessible to the public through the internet at www.stop-corporate-extortion.com. The SCE Website's homepage, "the very first Web page that a person views when visiting the SCE Website,"[11] informed the public that the site was created "'in response to questionable legal action from many Corporations [including DIRECTV] against the Free Citizens of the United States of America.'"[12] The homepage warned visitors that "'if [they] are … DIRECTV, DishNetwork, RIAA, or any other Corporation seeking to sue individuals for alleged pirate acts, [they] are not welcome here and are expressly forbidden to view or enter this site.'"[13]

The SCE Website served as a forum where visitors could publish information regarding issues "in large part, related to suits by DIRECTV against persons accused of stealing its satellite television signals."[14] Snow did not allege that the SCE Website allowed users to exchange private emails, nor that Defendants ever gained access to any such private messages. In fact, Snow never

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[10] Doc. 1 - Pg. 6-7.
[11] Doc. 1 - Pg. 4.
[12] *Id.*
[13] Doc. 1 - Pg. 5.
[14] *Id.*

alleged that his website was a facility through which an electronic communications service is provided.

According to Snow, in order to access the SCE Website's "chat forums," a visitor had to create a password[15] and agree to the site's terms and conditions by "'affirm[ing] that [he or she is] not associated with DIRECTV in any manner, including but not limited to; holder of any class of stock from the parent company or any subsidiary thereof, employee, legal representative, investigator, supplier or any relative of the aforementioned.'"[16] Once a password was created and the visitor accepted the site's terms and conditions by clicking an "I Agree" button, that user could proceed to the site's forum pages, without any further technical restriction.[17] According to the complaint, the SCE Website does not have any code-based or other technological restrictions or security measures to control access. Obtaining a username and password neither required payment nor Snow's prior authorization. Nor was access limited to a discrete group of identified persons: access was given to everyone who sought it. The only purported limitation on access to Snow's Website is contained in the site's terms and conditions.

Despite claiming that the Appellees' access was "surreptitious," Snow does not allege that any of the Appellees hacked into the SCE Website by breaking a

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[15] *Id.*
[16] Doc. 1 - Pg. 6.
[17] *Id.*

password, or by using someone else's password. Instead, he alleges that Appellees lacked authorization to view the SCE Website because they misrepresented their association with DIRECTV. Snow does not allege any injury or disruption to the SCE Website resulting from the allegedly unauthorized access.

B. Yarmuth's Minimal Contacts with the State of Florida

1. Yarmuth's Acts in Connection with the SCE Website

Snow alleged in his complaint that Defendant Yarmuth committed "e-trespass" on five occasions in June, 2004 by visiting the SCE Website. (Doc. 1 - Pg. 14.) Though Yarmuth denied that it "exceeded its authorization" to access the SCE website, Yarmuth acknowledged that its legal assistant, Michael Houck, from his computer in Yarmuth's Seattle office, visited the SCE Website, which was stored on servers located in California, in early June 2004. (Doc. 30 - Ex. F - Pg. 41-42.) The district court found as a matter of fact that the website visits at issue occurred when Yarmuth entered the SCE website in California from Yarmuth's Seattle, Washington offices. (Doc. 46 - Pg. 3.)

2. Yarmuth's Florida Contacts

Yarmuth is a Washington law firm with its sole office and principal place of business in Seattle, Washington. (Doc. 30 - Ex. D - Pg. 34.) Unlike Defendants DIRECTV and Stump, Storey, Callahan, Dietrich & Spears, P.A. ("Stump"), Yarmuth has had only minimal business contacts with the state of Florida, and none in connection with the matters alleged in the present case. In finding that

Yarmuth lacked systematic and continuous contacts with Florida, the district court found that Yarmuth's business contacts with the State were limited to "several contacts between Yarmuth and the individual clients within the state of Florida over the last ten years." (Doc. 46 - Pg. 4.) The district court further noted that Yarmuth "has no office in Florida, owns no property in Florida, does not solicit clients or business in Florida, and [that] none of its counsel are licensed to practice law in the state of Florida." (*Id.*)

In addition to the district court's findings, the record also demonstrates that Yarmuth has never maintained any assets or physical presence in Florida, and that Yarmuth has generated substantially less than one percent of its total revenue from its representation of its Florida clients or of DIRECTV in Florida cases. (Doc. 30 - Ex. D - Pg. 35 -36.) In fact, Yarmuth's business activities in Florida throughout the firm's ten-year history have been limited to representing four Florida-based clients in specific cases either pending in Washington courts or related exclusively to events taking place in Washington, and, as Snow emphasizes throughout his brief, representing DIRECTV in a small number of litigations in Florida. (Doc. 30 - Ex. D - Pg. 34-35.) In these DIRECTV cases, Yarmuth partner Scott Wilsdon and/or two of his associates have been admitted to the respective Florida courts *pro hac vice*, and have represented DIRECTV in conjunction with local Florida counsel in each case. (*Id.*) In 2001 and 2002, Yarmuth also conducted pre-litigation settlement negotiations on DIRECTV's behalf with an unknown number of

suspected pirates who were residents of Florida, but was not present in Florida for any of these negotiations. (Doc 30 - Ex. D - Pg. 35.)

III. Procedural Background.

Snow filed his complaint on October 20, 2004, alleging violations of the SCA against all of the Appellees. On December 17, 2004, the Appellees filed a joint motion to dismiss Snow's complaint for failure to state a cause of action upon which relief can be granted, and a memorandum in support of the motion.[18] In its joint motion to dismiss, the Appellees explained that the public message board posts displayed on Snow's Website were not communications "in electronic storage" as required by the SCA. The Appellees further asserted that any visit to Snow's Website was not "without authorization" or "in excess of authorization" under the SCA, because the website was publicly-accessible and because Snow's Terms of Service were insufficient to convert any visits by appellees into unauthorized access. On the same day, Defendant Yarmuth filed a motion to dismiss for lack of personal jurisdiction and accompanying memorandum of law.

On January 17, 2005, Snow filed his opposition to Yarmuth's individual motion to dismiss for lack of personal jurisdiction, but failed to respond to the joint motion to dismiss for failure to state a claim. On January 19, 2005, the district

[18] Yarmuth joined in this motion at the district court in the event the court determined it was subject to personal jurisdiction in Florida. (*See* Doc. 27 - Pg. 1.)

court ordered Snow to file a response to the joint motion, which Snow did on January 31, 2005. The Appellees were granted leave to file a reply.

On March 9, 2005, the district court referred the motions to a magistrate judge for report and recommendation. On April 26, 2005, Magistrate Judge Sheri Polster Chappell issued a Report and Recommendation ("R&R") recommending that Snow's complaint be dismissed in its entirety.[19] Magistrate Judge Chappell reasoned that "[t]he plain language of the defining statute is clear that 'electronic storage' only refers to temporary and intermediate storage."[20] Because Snow did not allege that the posts on his website were being stored while awaiting transfer to a final destination, Magistrate Judge Chappell explained, the information on his site was not a "stored communication" as defined by the SCA. (Doc. 51 - Pg. 5.) Because Magistrate Judge Chappell concluded that the posts on Snow's Website were not in "electronic storage," she did not reach the question of whether the Appellees acted "without authorization" in accessing Snow's publicly-accessible website. (Doc. 51 - Pg. 4-5.)

On April 26, 2005, Magistrate Judge Chappell issued a second R&R on Yarmuth's motion to dismiss for lack of personal jurisdiction, finding that Snow

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[19] Magistrate Judge Chappell's initial R&R contained a minor typographical error. On May 9, 2005, Magistrate Judge Chappell issued an amended R&R to correct this typographical error. The substance of her R&R remained the same.

[20] Doc. 51 - Pg. 4.

failed to establish that Yarmuth had sufficient minimum contacts with the state of Florida to satisfy the Florida long-arm statute.

On May 27, 2005, the district court adopted both R&Rs, and judgment was entered on May 31, 2005. Snow appealed the district court's ruling on June 24, 2005. Pursuant to this Circuit's "One Attorney, One Brief" rule,[21] this brief contains the Appellees' joint arguments to affirm the district court's dismissal of Snow's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), as well as Yarmuth's argument to affirm the dismissal of claims against it under Federal Rule of Civil Procedure 12(b)(2).

IV. Standard of Review.

This Court reviews the district court's dismissal of a complaint for failure to state a claim and for lack of personal jurisdiction *de novo*. *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000); *Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1268 (11th Cir. 2002). This Court reviews the district court's findings of facts that underlie the dismissals for "clear error." *Hond. Aircraft Registry, Ltd. v. Gov't of Hond.*, 129 F.3d 543, 546 (11th Cir. 1997).

[21] U.S. Court of Appeals for the Eleventh Circuit, Internal Operating Procedures relating to Fed. R. App. P. 28 and 11th Cir. R. 28-1 through 28-4, no. 2.

SUMMARY OF ARGUMENT

The district court properly dismissed Snow's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). First, the contents of Snow's Website could not be in "electronic storage."[22] As defined in the SCA, "electronic storage" is "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). As described in his complaint, Snow's Website provided a public bulletin board where visitors could publish information about their dealings with DIRECTV or other corporate entities. The storage of these postings was not "temporary," "intermediate" or "incidental to the electronic transmission thereof." Nor was such storage "for purposes of backup protection." Instead, like notes tacked to a community bulletin board, these forum posts constitute published electronic content not entitled to special protection under the SCA. Because the material published on Snow's Website was not in "electronic storage," the district court was correct in dismissing his complaint.

[22] The Appellees present their joint argument regarding the inapplicability of the SCA prior to Yarmuth's argument relating to personal jurisdiction because the SCA argument impacts all Appellees, and affirmance of the district court's decision under the SCA would obviate the need to consider issues of personal jurisdiction with regard to Yarmuth.

Second, the dismissal of Snow's complaint would also have been proper because the Electronic Communications Privacy Act ("ECPA"), of which the SCA is a part, excludes claims based on access to communications in systems that are configured to be accessible to the general public. As acknowledged in Snow's complaint, Snow's Website was configured to permit anyone who registered for a username and password to use it. (Doc. 1 - Pg. 5-6.) Because the entire universe of internet users were authorized to visit Snow's Website, Snow cannot bring a claim under the SCA based on unauthorized access by Appellees. Such claims are specifically prohibited by 18 U.S.C. § 2511(2)(g), which provides that:

> It shall not be unlawful under this chapter [the Wiretap Act] or chapter 121 of this title [18 U.S.C. §§ 2701-2707] for any person—
>
> (i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public . . . .

18 U.S.C. § 2511(2)(g).

Snow argues that despite configuring his website to be publicly accessible, he has the absolute right to condition admission based on any mercurial edict he issues, thereby making the violation of any terms a criminal act. But Snow's terms of use cannot convert a publicly-accessible website into private space protected by the SCA. Furthermore, his proposed exclusion of DIRECTV is void on public policy grounds. Accordingly, Appellees were not acting without authorization, or

in excess of authorization even if they visited the website in violation of Snow's directive that it was off-limits to them.

Third, the district court's dismissal of Yarmuth for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) should likewise be affirmed. The district court properly concluded that Yarmuth committed no acts within Florida giving rise to specific personal jurisdiction, and lacked the systematic and continuous contacts with Florida necessary to confer general jurisdiction under the Florida long-arm statute. As to specific personal jurisdiction, the district court properly recognized that the affidavits proffered by Yarmuth conclusively established that the conduct giving rise to this action occurred exclusively outside of Florida. Yarmuth's only allegedly unlawful acts were website visits from Yarmuth computers in Washington to the SCE website, which was stored on servers located in California. Thus, Yarmuth committed no tortious acts within the state of Florida. Snow cannot manufacture personal injury in Florida by virtue of his own physical presence there when the harm he asserts sounds in "trespass," and any property damage incurred by the trespass necessarily was suffered in California. Snow's additional assertion that specific jurisdiction may be asserted over Yarmuth based on an alleged conspiracy tying Yarmuth to the Florida actions of Stump or DIRECTV falls woefully short of the colorable, factually-supported showing required to establish jurisdiction on the basis of a conspiracy.

Snow's arguments that Yarmuth is subject to general personal jurisdiction are equally unavailing. Under the facts found by the district court, Yarmuth's contacts are the sporadic sort consistently held insufficient to hail out-of-state corporations into foreign courts. Rather than address the facts relied on by the district court, or the relevant case law supporting dismissal, Snow instead mischaracterizes and exaggerates the extent of Yarmuth's involvement in demand letters sent to Florida residents and cases filed in Florida on behalf of DIRECTV, assertions the district court rejected as mere speculation and suspicion. As the district court correctly recognized, however, Snow's speculation is irrelevant given the undisputed facts upon which the court based its decision. Specifically, the "systematic and continuous" contacts test for general jurisdiction is not satisfied where an out-of-state law firm has no physical presence, no licensed attorneys, no solicitation of business, and minimal revenues generated in the forum state. The district court's conclusion that Yarmuth's participation in a small number of unrelated Florida cases was insufficient to confer jurisdiction was proper and should be affirmed.

Accordingly, the judgment of the district court should be affirmed.

ARGUMENT

I. The District Court Properly Dismissed the Complaint on the Grounds that the Materials on Snow's Website Were Not Communications "In Electronic Storage."

A. The Court Properly Rejected Snow's Conclusory Allegation that the Materials on His Website Were in Electronic Storage.

The district court was correct in dismissing Snow's complaint because the nature of communications described in Snow's complaint do not meet the statutory definition of "electronic storage," as defined in the SCA. The SCA makes it illegal to access a facility through which an electronic communication service is provided without authorization or in excess of authorization, and thereby obtain access to a communication while it is in electronic storage. 18 U.S.C. § 2701(a). The SCA also provides a civil cause of action under 18 U.S.C. § 2707. The district court dismissed Snow's complaint because the materials on Snow's Website were not in electronic storage.[23]

On appeal, Snow claims that the district court erred because it ignored paragraph thirty of his complaint, which alleged that "the SCE Web site contained electronic communications that were being transmitted between SCE authorized

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[23] The court could have also dismissed the complaint because Snow's Website is not a facility through which an electronic communications service is provided. *See In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 307 (E.D.N.Y. 2005) (holding that a company that maintains a website permitting the transmission of electronic communications between itself and its customers is not an electronic communications service provider). The Appellees noted this issue in their original memorandum in support of their motion to dismiss. (*See* Doc. 32 - Pg. 9.)

users and SNOW, and also in electronic storage."[24] From this allegation, Snow concludes that it is clear that the postings on his website "were in transit and electronic storage."[25] But the mere incantation of the words "electronic storage" in paragraph thirty of his complaint cannot save the complaint from dismissal. This Court has made clear that "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002), *cert. denied*, 540 U.S. 872 (2003); *see also Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) ("conclusory allegations and unwarranted deductions of fact are not admitted as true").[26]

Because "electronic storage" is a legal concept expressly defined by Congress in 18 U.S.C. § 2710(17), it was proper for the district court to determine, as a matter of law, whether the contents of Snow's Website described in the complaint were in "electronic storage." The question of whether a communication meets the definitions contained in the ECPA is a legal question, not a factual issue. *In re Doubleclick, Inc. Privacy Litig.*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001); *see also JetBlue*, 379 F. Supp. 2d at 307 (holding that Jet Blue's Passenger Reservation

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[24] Appellant's Br. at 15.
[25] *Id.*
[26] This Court accepts as binding precedent all Fifth Circuit decisions rendered prior to September 30, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Systems did not constitute an "electronic communication service" within the meaning of the ECPA as a matter of law).

B. The Materials on Snow's Website Do Not Meet the Plain Language Definition of Electronic Storage Under the SCA.

The definition of electronic storage is unambiguous and precludes application of the SCA to Snow's Website. The Supreme Court has mandated that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *see also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (stating that the general rule of statutory interpretation is that the court must first look to the language of the statute and assume that its plain meaning "accurately expresses the legislative purpose"). Thus, a court's "inquiry must cease if the statutory language is unambiguous 'and the statutory scheme is coherent and consistent.'" *Robinson*, 519 U.S. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)); *see also Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) ("When the import of the words Congress has used is clear . . . [the Court] need not resort to legislative history, and . . . certainly should not do so to undermine the plain meaning of the statutory language.").

Because the clear and unambiguous language of the SCA demonstrates that the public posts on Snow's Website were not in "electronic storage," as that term is

defined in 18 U.S.C. § 2510(17), and because this conclusion is consistent with the overall scheme of the SCA, which seeks to protect private communications, this Court may end its analysis with the statutory text. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. . . . The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotations and citations omitted).

"Electronic storage" is defined as "(A) any *temporary, intermediate* storage of a wire or electronic communication *incidental* to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17) (emphasis added). According to the plain language of the SCA, therefore, to have survived a motion to dismiss, Snow needed to have pled facts that support a conclusion that the materials on his website were stored *temporarily* on an *intermediate* basis pending their delivery to the recipient ("pre-transmission storage"), or were the backups of such material ("backup storage"). This he was unable to do, because his website did not serve as an intermediary for transporting communications from a sender to a specified recipient. Instead, it provided a community bulletin board for information designed to be permanently published to the entire Internet. Such information is not in either pre-transmission storage or backup storage, and therefore is not covered by the SCA.

1. The forum posts residing on Snow's Website are not being stored "incidental to transmission."

As first recognized by the Fifth Circuit in *Steve Jackson Games* and subsequently accepted by the Ninth Circuit and several district courts, 18 U.S.C. § 2510(17)(A), defining electronic storage as "temporary, intermediate storage… incidental to the electronic transmission," applies only to "messages not yet delivered to their intended recipient." *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 461-62 (5th Cir. 1994); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir.), *cert. denied*, 125 S. Ct. 48 (2004); *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623, 635-36 (E.D. Pa. 2001) (messages in post-transmission storage were outside scope of § 2701), *aff'd in part, vacated in part on other grounds*, 352 F.3d 107 (3rd Cir. 2003); *In re Toys R Us, Inc. Privacy Litig.*, MDL No. M-00-1381 MMC, 2001 U.S. Dist. LEXIS 16947, at *10-11 (N.D. Cal. Oct. 9, 2001)(same).

In considering the precise issue of whether information designed to be stored indefinitely can qualify as communications in "electronic storage," the district court, like the court in *Doubleclick*, held that the definition of electronic storage is targeted only at "communications temporarily stored by electronic communications services incident to their transmission — for example, when an email service stores a message until the addressee downloads it." *Doubleclick*, 154 F. Supp. 2d at 512. The district court arrived at this conclusion by looking at the

plain language of the definition of electronic storage, noting that "[t]emporary is defined as used, serving or enjoyed for a limited time." ((Doc. 51 - Pg. 5) (citing *The American Heritage Dictionary of the English Language*, 1848 (Anne H. Soukhanov, ed., 3d. ed. 1996)).) Similarly, "[i]ntermediate is defined as in the middle position or state." ((*Id*.) (citing *The American Heritage Dictionary of the English Language*, 942 (Anne H. Soukhanov, ed. 3d ed. 1996)).)[27]

Thus, under the plain language of 18 U.S.C. § 2510(17)(A), the messages published to Snow's forum website clearly fall outside the first definition of electronic storage, covering pre-transmission storage. Unlike an email message awaiting retrieval by the specific intended recipient, the transmission of messages to Snow's Website is complete upon their posting. Once the postings have appeared on Snow's Website, they have reached their final destination, and Snow's Website is not storing any messages *temporarily*, nor is it acting as an *intermediary* between the sender and the recipient. If Snow's Website were deemed to be in electronic storage, the words "temporary" and intermediate" would be meaningless

[27] The *Doubleclick* court similarly examined the dictionary definitions of the words "temporary" and "intermediate" in reaching its conclusion that electronic cookies (small data files placed by website on the computers of visitors) were not in electronic storage. That court noted that "Webster's Dictionary defines 'temporary' as 'lasting for a limited time,' and 'intermediate' as being or occurring at the middle place. . . ." *Doubleclick*, 154 F. Supp. 2d at 512) (citing *Webster's Third New International Dictionary*, 2353, 1180 (1993)).

and all published online material would be considered to be in electronic storage, so long as not every person in the world has yet viewed it.[28]

2. *The copies of the forum posts residing on Snow's Website are not being held for purposes of backup protection.*

To qualify as communications in electronic storage under subsection (B) of § 2510(17), the forum posts would have to be "storage of such communication by an electronic communication service for purposes of backup protection." 18 U.S.C. § 2510(17)(B). From a plain reading of the statute, however, it is clear that subsection (B) refers only to additional backup copies of messages that, at least at some point in time, qualified under subsection (A).[29]

Specifically, subsection (A) limits its application to storage of "communication incidental to the electronic transmission thereof." *See* 18 U.S.C. § 2510(17)(A). Subsection (B) then references storage "for purposes of backup protection of *such* communication." *See id.* § 2510(17)(B) (emphasis added). By limiting its reach not to electronic communications generally but to *such* communication, the statute makes clear that the "backup" language refers only to

[28] Contrary to Snow's assertion, the decision in *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003), does not dictate a contrary result. The court in *Konop* simply accepted that the messages on Konop's website were in electronic storage because neither party contested the issue. *Konop*, 302 F.3d at 879.

[29] *See Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* at 86-87 (2d ed. 2002), available at http:\\www.cybercrime.gov/s&smanual2002.pdf.

backups of the communications described in the antecedent subsection, namely, those in temporary, intermediate storage incidental to transmission.

Although there are two strands of caselaw defining the scope of what constitutes storage for purposes of backup protection, neither strand is broad enough to cover Snow's Website. In *Fraser v. Nationwide Mut. Ins. Co.*, the district court held that post-transmission storage of an email does not constitute temporary storage or "backup" because once the process of transmission to the intended recipient has been completed, a stored copy is simply like any other remotely stored computer file and should be treated like U.S. mail that has been opened and stored in a file cabinet, not specifically protected by 18 U.S.C. § 2701. *See* 135 F. Supp. 2d at 635-38.[30] The *Fraser* decision squares with the goal of the SCA to reserve the highest protection for those copies of messages akin to sealed letters carried by the U.S. Post Office prior to final delivery and the tearing of the envelope by the intended recipient.[31] Accordingly, under the *Fraser* view, an ISP's backup of its own system could include messages in electronic storage if certain messages had not yet been delivered at the time the backup was made.

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[30] On appeal, the Third Circuit found this aspect of the decision questionable, and affirmed this aspect of the holding based on a different exception in the SCA. *See Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003)

[31] *See* S. Rep. 99-541, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3559, discussed at p.25, *infra*.; *see also* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1216-17 (2004).

The Court of Appeals for the Ninth Circuit adopted a slightly more expansive view of the meaning of "backup" copies under subsection (B). In *Theofel v. Farey-Jones*, the court rejected *Fraser's* reading of "backup" as too narrow, and instead read subsection (B) to include copies of private email messages retained on an ISP's server after delivery to the recipient.[32] 359 F.3d at 1075-77. The court explained when such a message should be deemed stored for "purposes of backup protection":

> An obvious purpose for storing a message on an ISP's server after delivery is to provide a *second copy* of the message in the event that the user needs to download it again—if, for example, the message is accidentally erased from the user's own computer. The ISP copy functions as a 'backup' for the user.

Id. at 1075 (emphasis added).

Under the *Theofel* court's reading, if an ISP is holding previously-delivered messages as backup copies, then its copy may be considered in electronic storage. The decision in *Theofel* is also consistent with the decision in *Quon v. Arch*

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[32] The *Theofel* court rejected *Fraser's* reading because it believed it rendered subsection (B) redundant because any backup of a subsection (A) communication would also qualify under subsection (A) itself. But a leading commentator has explained that the *Theofel* court neglected to recognize that subsection (B) was designed to serve a significant, independent purpose. Specifically, the backup provision serves to prevent the government from circumventing the SCA's stringent privacy protections for unretrieved emails by attempting to access backup copies held by the ISP. ISPs regularly generate backup copies of their servers in the event of a server crash or other problem and store these copies for long periods of time. Section 2510(17)(B) provides that backup copies of unopened e-mails are afforded the same protection as the original copy. Without this provision, copies of unopened e-mails saved by ISPs would be unprotected. *See* Kerr, *User's Guide*, *supra* note 31, at 1217 n.61.

Wireless Operating Co., in which the court held that backup copies of text messages sent privately between two police officers were in electronic storage. *Quon v. Arch Wireless Operating Co*, 309 F. Supp. 2d 1204, 1209 (C.D. Cal. 2004).

Although *Theofel* expands the scope of backup storage, such expansion is not broad enough to aid Snow. Both *Theofel* and *Arch Wireless* involve private person-to-person messages that were at one time temporarily stored by an ISP on a temporary and intermediate basis, as an incidental part of the transmission of the private messages from one person to another. Both holdings are limited to circumstances in which the intermediary ISP retains a *second copy* of a private message after the original has been delivered to an individual recipient. *See Arch Wireless*, 309 F. Supp. 2d at 1208 ("[t]he plain meaning of the phrase 'backup protection' encompasses creating duplicate copies of the electronic message in the event of post-transmission loss or unavailability, as well as a loss during transmission."); *see also Theofel* 359 F.3d at 1075 ("[a]n obvious purpose for storing a message on an ISP's server after delivery is to provide a *second copy* of the message in the event that the user needs to download — if, for example, the message *is accidentally erased* from the *user's own computer*") (emphasis added).

In *Snow's* case, the forum posts are not private communications between two email accounts, where the recipient may access the message, download it to his hard drive, and the ISP also maintains a backup copy for possible later

retrieval. Once the posts are transmitted to Snow's Website, the permanent copy of the post resides on the website for all to see — there is no cause for a *second* or *backup* copy, and indeed Snow does not allege that one is kept. Thus, the copy on Snow's Website is the *only* copy. Accordingly, the message posts published to Snow's Website do not qualify as "backup storage" under the reasoning of either *Fraser* or *Theofel*.

II. Snow's Claims Under the Stored Communications Act Are Barred By The Plain Language of ECPA Because His Website Was Configured to Be Accessible to the General Public.

Setting aside the definition of "electronic storage," Snow's claims under the SCA are barred because his website was configured to be accessible to the general public.[33] As described in the complaint, plaintiff placed no code-based or other technological restrictions on registration to access his forums. Access did not require payment, nor Snow's prior authorization. Instead, the website was universally accessible, provided that the user of the website made a representation that he was not associated with DIRECTV in any manner (Doc. 1 - Pg. 5-6.)

Congress designed the SCA to protect only private communications, and not communications that are configured to be readily accessible to the general public.

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[33] Although the district court did not go beyond the issue of the definition of "electronic storage," to reach the issue of whether the public configuration of Snow's Website barred an action under the SCA or precluded a finding that the Defendants acted "without authorization," "this court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court." *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992).

To make clear that the SCA does not apply to communications that are accessible to the public, Congress passed 18 U.S.C. § 2511(2)(g), which provides that:

> [i]t shall not be unlawful under this chapter or chapter 121 of this title [18 U.S.C. §§ 2701 - 2707] for any person—
>
> (i) to intercept or **access** an electronic communication made through an electronic communication system that is configured so that such electronic communication **is readily accessible to the general public**…. "

18 U.S.C. § 2511(2)(g).

This statutory provision clearly bars Snow's claim because any member of the general public could create a user name and password and access Snow's Website.[34] A key distinction between this case and *Konop* is that whereas Snow made his website available to the world, attempting to limit access only through his terms of use, Konop configured his website to only allow access by people whose names were on a pre-approved list. *Konop*, 302 F.3d at 872-73. Therefore, Snow did not configure his website to be private.

Because the bar set forth in 18 U.S.C. § 2511(2)(g)(i) is clear and unambiguous, this Court need look no further. However, as described in Section III below, the legislative history and the overall structure of the SCA also

[34] Although Appellees did not cite this provision in their memorandum in support of their motion to dismiss, Appellees made this precise argument below, asserting that the SCA does not protect communications contained on a publicly-accessible website. (*See*, *e.g*. Doc. 32 Pg. 19-20.) Accordingly, despite not being reached by the district court, this argument is proper grounds for affirming the judgment. *United States v. Land, Winston County*, 163 F.3d 1295, 1302 (11th Cir. 1998).

demonstrate that Congress intended to protect only those electronic communications that are configured to be private.

III. The Overall Legislative Scheme of the SCA Demonstrates that Snow's Website is Not Intended to be Covered by the SCA.

The district court's decision that Snow's Website is not protected by the SCA is consistent with the overall statutory scheme of the SCA and well-supported by legislative history. In fact, the legislative history of the ECPA specifically supports the district court's conclusion that the materials on Snow's Website are not in electronic storage and demonstrates that website bulletin boards configured in the same manner as Snow's Website were intended to be excluded from the protections of the SCA.

The SCA establishes a clear hierarchy of privacy protection for electronic communications in the possession of third-party service providers, with information held in "electronic storage" at the top. In recognition of the special status afforded person-to-person communications exchanged via private customer email accounts, this limited class of communications is afforded much greater protection than, for example, customer information, messages shared via a community bulletin board, or data that is stored with a third party outsourcer.

Accordingly, the SCA creates criminal liability under § 2701 for anyone accessing communications in "electronic storage" without authorization, and the SCA also prohibits ISPs from disclosing such communications to the government

unless the government first obtains a search warrant. *See* 18 U.S.C. §§ 2702(a), 2703(a). Conversely, the contents of other electronic files that are not in "electronic storage" are also protected under ECPA by provisions dictating when the ISP may voluntarily disclose such files,[35] and what type of process the government needs to use in order to obtain copies.[36] But there is no provision of ECPA making it illegal for a private party to access materials that are *not* in electronic storage.

The special protections afforded to materials in "electronic storage" have never been extended beyond private communications stored by a third-party ISP on behalf of its individual subscribers.[37] Indeed, the SCA's legislative history makes clear that Congress passed the SCA specifically to resolve ambiguities about privacy protection for private email communications. The Senate Report noted that "[a] letter sent by first class mail is afforded a high level of protection against unauthorized opening by a combination of constitutional provisions, case law, and U.S. Postal Service statutes and regulations . . . [b]ut there are no comparable

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[35] *See* 18 U.S.C. § 2702(a)(2); *see also* H.R. Rep. 99-647, at 65 (1986) (noting that when a subscriber has opened and read a message, and then left it in storage, Section 2702(a)(2) applies and such messages are not in electronic storage).

[36] *See* 18 U.S.C. § 2703(b).

[37] Reading "electronic storage" more broadly would result in a significant expansion of criminal liability, because civil liability under § 2707 is coextensive with criminal liability under § 2701. This result is contrary to the canon of statutory interpretation disfavoring a broad reading of a criminal statute. *See Jones v. United States*, 529 U.S. 848, 858 (2000). It would also have a profound effect on law enforcement. *See* Note 41, *infra*, and accompanying text.

Federal statutory standards to protect the privacy and security of communications transmitted by new noncommon carrier communications services or new forms of telecommunications and computer technology." S. Rep. 99-541, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3559. The Act is designed to "protect privacy interests in personal and proprietary information, while protecting the Government's legitimate law enforcement needs," *Id.* at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557, and thus prohibits providers from "knowingly divulging the contents of any electronic communication while in electronic storage by that service to any person other than the addressee or the intended recipient." *Id*. at 37, *reprinted in*, 1986 U.S.C.C.A.N. 3555, 3591.

In *Steve Jackson Games*, one of the earliest SCA decisions, the Fifth Circuit Court of Appeals recognized this same distinction between private emails and public forum posts. In that case, the defendant operated a bulletin board service that offered users both the ability to publish content to the entire community visiting the board, and to private individual email accounts. The Court began its analysis of the SCA's application by noting that "[c]entral to the issue before us, the BBS also offered customers the ability to send and receive private E-mail," which supported its ultimate holding that copies of those messages stored on the operator's servers pending retrieval by those individual account holders were in electronic storage. *Steve Jackson Games v. United States Secret Service*, 36 F.3d 457, 458 (5th Cir. 1994).

Similarly, the House Report accompanying the SCA specifically addressed the fact that the statute is not meant to protect content on electronic bulletin boards (like Snow's) that allow access by public users merely with passwords they assign to themselves:

> Some communication systems offer a mixture of services some, such as bulletin boards, which may be readily accessible to the general public, while others — such as electronic mail — may be intended to be confidential. Such a system typically has two or more distinct levels of security. **A user may be able to access electronic bulletin boards and the like merely with a password he assigns to himself**, while access to such features as electronic mail ordinarily entails a higher level of security (i.e., the mail must be addressed to the user to be accessible specifically). **Section 2701 would apply differently to the different services. Those wire or electronic communications which the service provider attempts to keep confidential would be protected, while the statute would impose no liability for access to features configured to be readily accessible to the general public.**

H.R. Rep. No. 99-647, at 63 (1986) (emphasis added).[38]

Here, Snow has not alleged that appellees accessed any private email accounts. Instead, the postings Snow seeks to protect fall well on the other side of the line drawn by the SCA. The web posts on Snow's site are published for any visitor to read. These messages are therefore not protected by the SCA. *See* S. Rep. No. 99-541, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3589. ("This provision [of the SCA] addresses the growing problem of unauthorized persons deliberately gaining access to . . . electronic or wire communications that are not intended to be available to the public.").

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[38] *See also Konop*, 302 F.3d 868 at 875.

Congress did not intend for the SCA to be the "e-trespass" statute that Snow wishes it were. As a leading commentator on computer crime issues has explained: "there are many problems of Internet privacy that the SCA does not address. The SCA is not a catch-all statute designed to protect the privacy of stored Internet communications; instead it is narrowly tailored to provide a set of Fourth Amendment-like protections for computer networks."[39] By creating a publicly-accessible website, like those of many individual bloggers, the New York Times, and scores of online entities, Snow qualifies as a "publisher"[40] of Internet content, but this status does not entitle him to the protections of the SCA that are designed for a limited category of private communications.

The absurdity of Snow's invocation of the SCA under these circumstances is also demonstrated by considering the effect of his analysis upon law enforcement. Under the SCA, communications that are in "electronic storage" cannot be obtained by the government without a search warrant,[41] whereas the contents of communications maintained online by a remote computing service can be provided

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[39] Kerr, *User's Guide*, *supra* note 31, at 1214; *United States v. Steiger*, 318 F.3d 1039, 1049 (11th Cir.) (SCA does not apply to hacking into personal computers to retrieve information stored therein), *cert. denied*, 538 U.S. 1051 (2003).
[40] *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (America Online is a publisher with regard to messages posted on its online forums); *ACLU v. Reno*, 217 F.3d 162, 169, (3rd Cir. 2000) (noting that "[t]he World Wide Web is a publishing forum consisting of millions of individual 'Web sites'… [and] is the best known method of communicating information online") (internal citations omitted), *cert. granted*, 532 U.S. 1037 (2001), *vacated*, 535 U.S. 564 (2002), *cert. granted*, 540 U.S. 944 (2003), *aff'd*, 542 U.S. 656 (2004).
[41] *See* 18 U.S.C. § 2703(a).

to the government upon receipt of a subpoena. *See* 18 U.S.C. § 2703(b)(1)(B)(i). If the posts on Snow's Website are protected by the SCA, the government would be prohibited from obtaining such contents without a search warrant, notwithstanding the fact that anyone who is not a DIRECTV representative is expressly authorized to come in and view the content.

Moreover, a holding that a publicly configured website can be made private for purposes of the SCA merely through a term of use has tremendously unsettling implications for criminal law. As Professor Kerr noted in his article "CyberCrime's Scope," under such an interpretation of the SCA, "[a] computer owner could set up a public web page, announce that 'no one is allowed to visit my web page,' and then refer for prosecution anyone who clicks on the site out of curiosity."[42] This is not, and cannot be, the law. As a result, given the alleged configuration of Snow's Website, the appellees could not have accessed the website without authorization, or exceeded their authorization, as a matter of law.

In an attempt to counter the logical and straightforward interpretation of the SCA, Snow quotes from the general legislative history of ECPA, of which the SCA is a part.[43] However, the legislative history he cites refers not to the SCA, but to the ECPA generally, and therefore relates to statutory provisions not at issue in this case. For example, Snow cites a variety of comments discussing the breadth of

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[42] Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. Rev. 1596, 1650-51 (2003).
[43] Appellant's Br. at 19-23.

communications to be subsumed within the ECPA.[44] Appellees do not dispute that the ECPA protects a broad array of electronic communications in a variety of ways, including by defining categories of communications that ISPs cannot disclose voluntarily and setting forth the rules for government access to ISP records. But the definition of electronic storage is, and is intended to be, considerably narrower than the definition of electronic communications.[45]

Snow's citation to Senator Leahy's description of the SCA is similarly unavailing. Senator Leahy explained that Congress intended to protect stored communications because "[i]t does little good to prohibit the unauthorized interception of information while it is being transmitted, if similar protection is not afforded to the information *while it is being stored for later forwarding*." ((Appellant's Br. at 21) (quoting 132 Cong. Rec. 14441 (statement of Sen. Leahy)) (emphasis added).) Again, the posts on Snow's Website were *not* being stored for later forwarding. The posts had reached their final destination and were on display on his website's bulletin board for all to read. Therefore the posts were not protected by the SCA, and the district court properly dismissed Snow's complaint.

IV. Appellees' Conduct Was Not "Without Authorization" or "In Excess of Authorization" under the SCA.

Even absent the clear exception in 18 U.S.C. § 2511(2)(g)(i), any alleged viewing of Snow's Website should be deemed to be authorized for purposes of the

[44] *See id.* at 19-20.
[45] *Compare* 18 U.S.C. § 2510(12) *with* 18 U.S.C. § 2510(17).

SCA for two reasons. First, Snow authorized the appellees to visit his website, even if such authorization was based on a misrepresentation of identity. Second, Snow's terms of use are void as against public policy.

Snow's claim that the Appellees acted without or in excess of authorization is based solely on his stated restrictions on who was prohibited from accessing his website. As alleged in his complaint, his disclaimer read:

> 'This is a private site and is solely and expressly for the benefit of individuals who have been (and won), are being, or will be sued by any Corporate entity. . . . If you are an employee, supplier, agent or relative of any of the previous noted classifications of DIRECTV, Dish Network, RIAA or any other Corporation seeking to sue individuals for alleged pirate acts, you are not welcome here and are expressly forbidden to view or enter the site.'

(Doc. 1 - Pg. 5.)

The only restriction on access to the website was that a visitor had to click an acknowledgement that he or she was not a representative of DIRECTV:

> 'You acknowledge this is a private web site and exists purely for the benefit of those defending themselves in civil Court. You affirm that you are not associated with DIRECTV in any manner, including but not limited to; holder of any class of stock from the parent company or any subsidiary thereof, employee, legal representative, investigator, supplier or any relative of the aforementioned . . .'

(Doc. 1 - Pg. 6.)

Snow does not allege that any of the Appellees "hacked" into his website by breaking the password, or by using someone else's password. Instead, Snow's

allegation is that by making a misrepresentation as to their association with DIRECTV, appellees' visits were unauthorized.

The term "without authorization" is not defined in the SCA nor in the Computer Fraud and Abuse Act -- the other federal criminal statute covering unauthorized access to computer systems. *See Konop*, 302 F.3d at 880 n.8. However, the general purpose of the SCA was to create a cause of action against computer hackers.[46] As a result, what is clear in the caselaw is that "[w]here a party consents to another's access to its computer network, it cannot claim that such access was unauthorized." *Sherman & Co. v. Salton Maxim Housewares, Inc.*, 94 F. Supp. 2d 817, 821 (E.D. Mich. 2000); 18 U.S.C. § 2701(c)(1) ("Subsection (a) of this section does not apply with respect to conduct authorized– (1) by the person or entity providing a wire or electronic communications service. . . "). According to the allegations in the complaint, Appellees applied for and were granted access to Snow's Website like the rest of the public. (Doc. 1 - Pg. 9-10, 11, 14.) Thus, because Snow had configured his website to be publicly-accessible, any access by the Appellees was authorized, even if the Appellees' alleged use violated a specified term of use. *See* Kerr, *Cybercrime's Scope*, *supra* note 42, at 1649 (2003) ("Breaches of regulation by contract should as a matter of law be held to be insufficient grounds for access to be considered 'without authorization.'")

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[46] Motooka, *supra* note 6, at 890 (2004); H.R. Rep. No. 99-647, at 63 (1986).

In considering the scope of authorization for purposes of SCA cases, some courts have looked to trespass and other claims where criminal and/or tort liability is based on consent in order to determine the legal effect of obtaining consent based on incomplete or inaccurate representations. *See Theofel*, 359 F.3d at 1073 ("[p]ermission to access a stored communication does not constitute valid authorization if it would defeat a trespass claim in analogous circumstances").

Of the real-world trespass cases considering the question of authorization based on misrepresentation, *Desnick v. Amer. Broad. Cos.*, 44 F.3d 1345 (7th Cir. 1995) is the most relevant here. In *Desnick*, the plaintiff doctor and his ophthalmic clinic brought claims for trespass, privacy violations and illegal wiretapping against the American Broadcasting Corporation ("ABC") for sending "test" patients, who were really investigative reporters, into the plaintiff's facility. In rejecting the plaintiff's claims, the court analyzed those circumstances, including trespass and battery cases, in which the law gives legal effect to consent even when consent is procured by misrepresentations.[47] If such misrepresentations were always precluded, the court noted that "a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if

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[47] The *Desnick* court also observed that, "[t]he law's willingness to give effect to consent procured by fraud is not limited to the tort of trespass," but also encompasses battery, and sexual relations. *Desnick*, 44 F.3d. 1345 at 1352; *see* Restatement (Second) of Torts § 892 B, Illustration 9, (1979).

they were false friends who never would have been invited had the host known their true character…." *Desnick*, 44 F.3d at 1351.[48]

In rejecting the plaintiff's claims that the defendants' misrepresentations as to identity created a trespass, the court ruled that the use of test patients did not invade any of the specific interests that the tort of trespass seeks to protect — because the plaintiff was offering his services to the public generally, even if he would not have specifically offered them to members of the public who were testers. Furthermore, the misrepresentation caused no disruption to the office, nor did it invade any space that the Doctor was unwilling to share with the general public. Accordingly, the misrepresentation by the testers did not defeat authorization for either the trespass or the privacy claim.[49]

Similarly, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), a grocery store brought a variety of claims, including trespass, against ABC for sending reporters to take jobs at Food Lion in order to get broadcast material. Citing *Desnick*, the court held that the defendants could not be held guilty of trespass for misrepresentations on their job applications, because such

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[48] *See also Commonwealth v. Proetto*, 771 A.2d 823 ¶¶ 31-32 (Pa. Super. Ct. 2001) (police officer did not receive communications without consent when misrepresenting his identity in an online chat room), *aff'd.*, 575 Pa. 511 (2003).

[49] The court observed that the Doctor's office was not festooned with signs expressly prohibiting the presence of "undercover" testers, but noted that it was not sure such signs would make any difference, especially under Eleventh Circuit jurisprudence. *Desnick*, 44 F.3d at 1353; s*ee United States v. Centennial Builders, Inc*., 747 F.2d 678, 683 (11th Cir. 1984); ("[u]ndercover work is a legitimate method of discovering violations of civil as well as criminal law").

misrepresentations did not nullify defendants' consent to be on Food Lion's premises.[50] *See Food Lion*, 194 F.3d at 517-518; *see also Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 239 Mich. App. 695, 706-709 (2000) (citing with approval, *Desnick* and *Food Lion*).

The holdings of *Desnick*, *Food Lion* and other real-world trespass related cases demonstrate that consent procured based on identity misrepresentations will not generally vitiate consent, where there is no subsequent improper activity by the defendant beyond the scope of the consent provided the defendant. This is also the law in California, where the Globat web hosting facility in this case was located.[51] *See, e.g., Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) ("[i]n a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass").[52] In this case, like *Desnick*, the plaintiff's

[50] The court found that the defendants could be held liable for trespass based only on their breach of duty as employees to Food Lion, which was triggered not by their misrepresentations, but their use of cameras in non-public areas — conduct prohibited by any Food Lion employee.

[51] Because the Globat computers were located in California, California law should be considered as California has the "most significant relationship" to this case. *See* Restatement (Second) of Conflict of Laws § 145(1) (1971).

[52] The distinction between fraud as to the identity and fraud as to what that person intends to do, has been referred to by commentators as the difference between "fraud in the inducement" and "fraud in the factum." As commentators have stated "when a victim agrees to allow the defendant to engage in specific conduct in reliance on a misrepresentation, the consent is based on fraud in the inducement and the consent remains valid despite the misrepresentation. The element 'without consent' or 'without authorization' normally will not be met." *See* Kerr, *Cybercrime's Scope*, *supra* note 42 at 1652-53 (citing Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 1075 (3d ed. 1982)).

website was open to members of the public, and there is no allegation that the Appellees exceeded the authorization provided by Snow to access any materials other than what a member of the public would have been able to view. Failure to adhere to a term of use does not transform the Appellees' alleged access into criminal activity. If it did, ISP customers would be guilty of a crime every time they cursed, threatened, defamed, uploaded infringing content, or in any other way violated an ISP's terms of use.

A. Plaintiff's Effort to Exclude DIRECTV from an Otherwise Publicly Available Website is Void as Against Public Policy.

Neither individuals nor corporations can turn publicly-configured websites into private spaces, and their visitors into criminals, merely by declaring that their otherwise public sites are off-limits to whatever people they find undesirable — the law does not recognize it, and public policy does not allow it.[53] Upholding such restrictions would shield wrongdoers from watchdogs, press, or law enforcement, and could impose an unfair restraint of trade on companies' efforts to protect their valuable goodwill.

A promise or term of agreement is unenforceable on the grounds of public policy if the interest in enforcement is outweighed by a public policy harmed by enforcement. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Davies v.*

[53] Under Snow's theory, corporations could bring civil actions against any competitor, press outlet or public watchdog group, merely by including an express prohibition against access by such groups in their public website's terms of use.

Grossmont Union High Sch. Dist., 930 F.2d 1390, 1396 (9th Cir. 1991). In determining whether enforcement of a term would compromise the public interest, the court must consider "(a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term." Restatement (Second) of Contracts § 178(2) (1981).

No court has directly addressed the issue of whether public policy prohibits the enforcement of contract-based restrictions on access to a publicly configured website to only specifically identified parties. But, in dicta in *EF Cultural Travel BV v. Zefer Corp*., the court acknowledged that the use of explicit statements as the only method of restricting access would evoke public policy concerns. 318 F.3d 58, 62 (1st Cir. 2003) ("[w]hether public policy might in turn limit certain restrictions is a separate issue"). That court understood that the canons of contract and discrimination law may prohibit the type of restriction imposed by plaintiff here. Individuals, associations and companies have a compelling right to view information otherwise publicly displayed to assure that it does not include slander, unlawfully disparaging statements, illegal infringement, or factually untrue assertions that could mislead the general public. Enforcing a term prohibiting DIRECTV from viewing a website designed to foster communication by individuals critical of DIRECTV would be akin to allowing a diet pill website to prohibit access only by FDA regulators, or enforcing a term barring Disney from

visiting a site selling Mickey Mouse t-shirts, and more broadly, would encourage the posting of "no press," "no watchdogs" or "no cops allowed" signs all over the Internet.

Additionally, a contract or covenant "is unenforceable on grounds of public policy if it is unreasonably in restraint of trade." Restatement (Second) of Contracts § 186(1) (1981). A restriction is unreasonably "in restraint of trade if its performance would limit competition in any business." *Id.* § 186(2). Plaintiff's website forum solicited and displayed negative commentary about DIRECTV. DIRECTV, as does any commercial entity, has a valuable commercial interest in its goodwill with consumers, and protecting its brand. A critical element of a company's ability to protect these assets is knowledge of public perception of the company, and detection and prevention of unlawful statements about the company, or infringing use of company trademarks and other intellectual property. Where a forum is open to the public, it would unfairly restrain DIRECTV's ability to compete in the marketplace if the public had access to information that DIRECTV alone could not view.

When a substantial public interest would be harmed by enforcement — as is the case here — the plaintiff must advance some compelling interest in enforcement. For example, an adult-oriented website may have a compelling interest in restricting access by minors. Therefore, it may be legitimate to refuse access to children under 18 years of age. In the present case, however, Snow does

not have a legitimate interest in restricting access only by persons affiliated with DIRECTV, but otherwise hosting a public forum. Snow could have created a private forum, providing access only to a limited membership. Snow cannot, however, justify hosting a public forum *about* DIRECTV while *solely excluding* DIRECTV. Employing the balancing test enumerated in *Rumery*, and expanded upon in *Davies* and *United States v. Northrop Corporation*, 59 F.3d 953 (9th Cir. 1995), this Court should consider the restriction on access to plaintiff's website void as against public policy.

V. The District Court Properly Found That it Lacked Personal Jurisdiction Over the Yarmuth Firm.

The district court was correct in dismissing Snow's complaint against Yarmuth where Snow failed to allege facts showing tortious action by Yarmuth in Florida or that Yarmuth's general contacts with Florida were sufficiently continuous and systematic to subject it to personal jurisdiction under the Florida long-arm statute. Snow's argument on appeal suffers two primary defects: First, Snow's recitation of "Yarmuth's Law Firm's Florida Connections" (Appellant's Br. at 7-11), is comprised of misrepresentations and conjecture about Yarmuth contacts with Florida that have little or no bearing on the personal jurisdiction analysis, and wholly ignores the factual determinations reached by the district court, which this Court reviews for clear error. Second, Snow fails to cite a single

case establishing that Yarmuth's contacts with Florida, even as he incorrectly casts them on appeal, subject Yarmuth to personal jurisdiction.

As the district court correctly noted (Doc. 46 - Pg. 1-2), the determination of personal jurisdiction over a nonresident defendant generally requires a two-part analysis: First, courts must consider the jurisdictional question under the state long-arm statute. *See Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). If there is no basis for jurisdiction under the state statute, the case must be dismissed. *Id.* If, however, there is a basis for jurisdiction under the state statute, personal jurisdiction will be appropriate only if the defendant had sufficient "minimum contacts" with the forum state to satisfy the federal Due Process Clause. *Id.* ("Only if both prongs of the analysis are satisfied may a ... court exercise personal jurisdiction over a nonresident defendant.").

Snow asserts on appeal that the claims in his complaint arose directly from Yarmuth's contacts with Florida, satisfying specific jurisdiction, and that Yarmuth engaged in systematic and continuous conduct in Florida for purposes of general jurisdiction under both the Florida long-arm statute and the Fourteenth Amendment. (Appellant's Br. at 26-32.) Specifically, Snow contends that the "e-trespass" alleged in the complaint caused injury to Snow in Florida, and that Yarmuth is continuously and systematically conducting business in Florida by representing DIRECTV in an unknown number of cases in Florida, and being

involved in pre-litigation letter writing campaigns to satellite television "pirates," some of whom resided in Florida. (*Id.* at 7-11.) In so arguing, however, Snow fails to acknowledge a number of facts presented in Yarmuth's affidavits in support of its 12(b)(2) motion that the district court correctly deemed salient to the personal jurisdiction analysis, in contrast to Snow's mere "speculation" and "suspicion." (Doc. 46 - Pg. 4-6.)[54]

In dismissing Snow's complaint, the district court concluded first that the alleged "e-trespass" necessarily took place *exclusively* in the states in which Yarmuth committed the allegedly unlawful act, Washington, and in which the SCE Website was located, California. (Doc. 46 - Pg. 3-4.) Second, the district court found that Yarmuth had, in fact, only been involved in "a few cases" on DIRECTV's behalf in Florida, had at best "several contacts" with "clients within the state of Florida over the last ten years," and, most significantly, "has no office in Florida, owns no property in Florida, does not solicit clients or business in Florida, and none of its counsel are licensed to practice law in Florida." (*Id.*) The district court correctly recognized that in similar circumstances, courts have routinely and consistently held that nonresident law firms are not subject to

[54] The district court also rejected Snow's mischaracterization, repeated again by Snow on appeal, of the affidavit of Scott Wilsdon. Snow cites paragraph seven of the affidavit to suggest that Yarmuth has admitted its participation in "[a]lmost two thousand" Florida lawsuits on behalf of DIRECTV over the last three years. (Appellant's Br. at 8.) In truth, paragraph seven of the Wilsdon affidavit states only that "[s]ince the firm's inception, Yarmuth has represented DIRECTV in *three* anti-piracy cases pending in Florida." (Doc. 30 - Ex. D - Pg. 34.)

personal jurisdiction in the forum state. *See generally Hill v. Sidley & Austin*, 762 F. Supp. 931, 935 (S.D. Fla. 1991); *see also Reliance Steel Prods. Co v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 589 (3d Cir. 1982); *Ziarno v. Gardner Carton & Douglas LLP*, No. Civ.A.03-3880, 2004 WL 838131, at *2 (E.D. Pa. Apr. 8, 2004).

A. The District Court Correctly Determined That Florida's Long-Arm Statute Does Not Reach Yarmuth.

Florida's "long-arm" statute permits courts to exercise personal jurisdiction over nonresident defendants only in certain expressly enumerated situations. See Fla. Stat. § 48.193. The statute provides that nonresident corporate defendants are subject to "specific" jurisdiction in Florida for any cause of action arising from the defendant's "[c]ommitting a tortious act within [Florida]" or "[c]ausing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury… [t]he defendant was engaged in solicitation or service activities within the state." *Id.* § 48.193(1)(b), (f)(1). Alternatively, general jurisdiction can be established by a showing that the defendant "engaged in substantial and not isolated activity within this state, …whether or not the [plaintiff's] claim[s] arise from that activity." *Id.* § 48.193(2).

1. Snow's Efforts To Establish Specific Personal Jurisdiction Under The Florida Long-Arm Statute Must Fail.

Snow asserts that Yarmuth is subject to "specific" personal jurisdiction under the Florida long-arm statute on two grounds. First, Snow contends that notwithstanding the district court's finding that Yarmuth's alleged "e-trespass" occurred exclusively in Washington and California, jurisdiction is appropriate in Florida pursuant to Florida Statute section 48.193(f)(1) because Snow suffered "injury" in the state. (Appellant's Br. at 32-33.) As the district court recognized, however, no injury could have occurred within Florida when the very harm alleged, an "e-trespass," was initiated and sustained wholly outside of Florida. (Doc. 46 - Pg. 4.) *See Merkin v. PCA Health Plans of Fla., Inc.*, 855 So. 2d 137, 141 (Fla. 3d Dist. Ct. App. 2003) (tortious acts including a written, oral, or electronic communication are deemed to occur in the forum in which the alleged tortfeasor performed the tortious act and in the forum to which that communication was sent).

Moreover, Florida Statute section 48.193(f)(1) is implicated only where personal injury or property damage is suffered in Florida. *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1033 (11th Cir. 1991) (adopting Florida Supreme Court's holding in *Aetna Life & Cas. Co. v. Therm-O-Disc*, Inc., 511 So. 2d 992 (Fla. 1987) that a purely economic injury — as opposed to either physical injury or property damage — caused to a Florida plaintiff by an out-of-state defendant is

insufficient to confer jurisdiction over the defendant). Snow's "e-trespass" claim plainly asserts an interference with property, but any such interference occurred on Globat's servers in California. Snow's mere presence in Florida bore no connection to the alleged unlawful acts or any resulting harm, and is insufficient standing alone to confer specific jurisdiction.

Second, Snow alleges that Yarmuth "may well be" subject to jurisdiction under a co-conspirator theory by virtue of its alleged conspiracy with DIRECTV and Stump to commit tortious acts within Florida. (Appellant's Br. at 27-28). Snow did not, however, allege a distinct conspiracy claim in his complaint. In fact, Snow offers only the general allegation from his complaint that Yarmuth "conspired to act in concert with DIRECTV and STUMP." ((Appellant's Br. at 27) (citing Doc. 1 - Pg. 3).) Such conclusory, unsupported allegations are legally insufficient to support a personal jurisdiction claim over an out-of-state defendant based on the acts of a co-conspirator. Indeed, the only case on which Snow relies in support of his co-conspirator claim states expressly that "a plaintiff cannot establish a conspiracy, for the purposes of a motion to dismiss [for lack of personal jurisdiction], simply by repeating the allegations contained in the complaint." *Hasenfus v. Secord*, 797 F. Supp. 958, 962 (S.D. Fla. 1989) (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 319 F. Supp. 1256 (S.D.N.Y. 1970) (ruling that a plaintiff opposing a 12(b)(2) motion on co-conspirator grounds must make "a factual showing of conspiracy" to comply with the requirements of due

process)). Instead, the plaintiff "must at least make out a colorable, factually supported claim of the conspiracy's existence." *Hasenfus*, 797 F.Supp. at 962. Snow has not offered any such evidentiary support for his co-conspirator claim and, accordingly, that claim must fail.

2. Yarmuth's Sporadic Contacts With Florida Law Do Not Permit The Exercise Of "General" Personal Jurisdiction Over Yarmuth Under Florida's Long-Arm Statute.

Snow's argument that Yarmuth is subject to personal jurisdiction under Florida Statute section 48.193(2) rests essentially on his contention that "attorneys from Yarmuth appeared *Pro Hac Vice* within Florida and practiced law within the Florida legal system on several occasions." (Appellant's at 27.) Section 48.193(2) is a "general jurisdiction" statute requiring that the defendant be shown to be engaged in "'continuous and systematic general business contacts'" with Florida. *Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So. 2d 716, 720 (Fla. 4th Dist. Ct. App. 1998) (quoting *Am. Overseas Marine Corp. v. Patterson*, 632 So. 2d 1124, 1128 (Fla. 1st Dist. Ct. App. 1994)). Accordingly, "[s]poradic activities or visits" will not suffice to establish personal jurisdiction. *Price v. Point Marine, Inc.*, 610 So. 2d 1339, 1341 (Fla. 1st Dist. Ct. App. 1992).

Snow fails to cite any authority supporting his conclusion that Yarmuth's limited participation in a select number of Florida cases amounts to a systematic

and continuous presence in the state.[55] *Id.* In fact, the determinative factors in deciding whether a nonresident corporation has sufficient generalized contacts with Florida to satisfy the state long-arm statute are whether the defendant 1) maintains a physical presence in Florida; and 2) derives a significant portion of its revenues from its Florida contacts. *See, e.g.*, *Milberg Factors, Inc. v. Greenbaum*, 585 So. 2d 1089, 1091 (Fla. 3d Dist. Ct. App. 1991) (holding that New York financial institution was not subject to personal jurisdiction in Florida where firm had contracts with five Florida clients over ten years and those clients represented less than two percent of defendant's revenues, even where defendant filed numerous UCC financing statements in Florida and obtained multiple judgments there); *Powercerv Techs. Corp. v. Ovid Techs., Inc.*, 993 F. Supp. 1467, 1470 (M.D. Fla.

[55] Indeed, the three published cases Snow cites relate exclusively to analyses of "specific" personal jurisdiction — where the defendant's contacts with Florida gave rise to plaintiff's claims. (Appellant's Br. at 36) (citing *Windels, Marx, Davies & Ives v. Solitron Devices*, 510 So. 2d 1177, 1178-79 (Fla. 4th Dist. Ct. App. 1992); *Rogers & Wells v. Winston*, 662 So. 2d 1303, 1304 (Fla. 4th Dist. Ct. App. 1995); *McMullen v. European Adoption Consultants, Inc.*, 109 F. Supp. 2d 417, 420 (W.D. Pa. 2000)). A fourth, unpublished decision, on which Snow primarily relies, subjected defendants to "general" personal jurisdiction, but only upon a finding that the defendants 1) had "represent[ed] Plaintiff individually and in real estate and business transactions in Florida;" 2) "[were] officer[s] of several companies principally located in Florida;" 3) "regularly met in Florida with Plaintiff, Plaintiff's clients and business associates" in Florida; 4) had a substantial number of Florida clients with which defendants often met in Florida; and 5) committed "malpractice, breach of fiduciary duty, fraud, and constructive fraud" *while in Florida representing the plaintiff*. *See Kelly v. Nelson, Mullins, Riley & Scarborough, L.L.P.*, No. 8:01CV1176-T-27MAP, 2002 WL 598427, at *5 (M.D. Fla. Mar. 20, 2002) (emphasis added). The facts in the instant case bear little resemblance to those in *Kelly*.

1998) (ruling that nonresident corporation was not subject to personal jurisdiction in Florida notwithstanding its maintenance of Florida customers from which it derived substantial income where defendant had no employees, officers, or property in Florida); *Ranger Nationwide, Inc. v. Cook*, 519 So. 2d 1087, 1089 (Fla. 3d Dist. Ct. App. 1988) (finding personal jurisdiction inappropriate under Florida long-arm statute where defendant's ongoing activities consisted of several isolated trucking trips into Florida and use of Florida's highways, contributing less than one percent of revenues); *Structural Panels, Inc. v. Texas Aluminum Indus.*, 814 F. Supp. 1058, 1066 (M.D. Fla. 1993) (finding defendant's Florida sales, constituting a small percentage of its overall sales of a product unrelated to plaintiff's suit, insufficient to confer general jurisdiction under section 48.193(2)).

Under the governing standard, the exercise of personal jurisdiction over Yarmuth is clearly improper. Yarmuth maintains no physical presence in Florida, has no attorneys licensed to practice in the state, solicits no business in the state, and has derived substantially less than one percent of its overall revenues from Florida clients or from its representation of DIRECTV in Florida. (Doc. 30 - Ex. D - Pg. 35-36.) Moreover, throughout the firm's ten-year history, Yarmuth's contacts with Florida have been limited to its representation of four Florida-based clients (each in disputes in Washington), representation of DIRECTV in a handful of Florida matters, and engagement in pre-litigation settlement efforts with an unknown number of suspected pirates. (Doc. 30 - Ex. D - Pg. 34-35.) Under these

facts, the district court properly determined that "[t]he mere fact that other lawsuits have been filed against people who reside in Florida by DIRECTV with Yarmuth as counsel is insufficient" to confer personal jurisdiction. ((Doc. 46 - Pg. 4-5) (citing *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000)) (a corporation's filing of lawsuits against other account debtors in Florida unrelated to the underlying action was insufficient to create jurisdiction under Fla. Stat. 48.193(2)).)[56] Accordingly, the district court's dismissal should be affirmed.[57]

B. Yarmuth's Sporadic Contacts With Florida Are Insufficient To Subject It To Personal Jurisdiction Consistent With Due Process.

Because it found the Florida long-arm statute did not confer jurisdiction over Yarmuth, the district court did not reach the question of whether jurisdiction could

[56] Florida courts have also recognized the general jurisdiction prong of the Florida long-arm statute as the functional equivalent to the Fourteenth Amendment's due process "continuous and systematic" requirement. *Woods v. Nova Cos. Belize Ltd.*, 739 So. 2d 617, 620 (Fla. 4th Dist. Ct. App. 1999).

[57] Although Snow did not raise as a specific grounds for appeal the district court's refusal to permit him jurisdictional discovery, he nonetheless argues that further discovery as to Yarmuth's representation of DIRECTV in Florida may have allowed him to build a case for jurisdiction. (Appellant's Br. at 24). The district court's refusal to permit jurisdictional discovery may only be reviewed for abuse of discretion. *Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 443 (5th Cir. 1979). Here, the district court was within its discretion in denying discovery where it granted Yarmuth's 12(b)(2) motion based on the firm's lack of physical presence in Florida, minimal revenues generated in Florida, and lack of solicitation of Florida clients, not on the number of matters in which Yarmuth represented DIRECTV (the subject on which Snow sought discovery). *See id.* at 447 (denying discovery where it "could not have added any significant facts" to the question of jurisdiction).

be exercised consistent with due process. (Doc. 46 - Pg. 6.) Nonetheless, the exercise of jurisdiction over Yarmuth would also need to pass Constitutional muster. But, Yarmuth's sporadic contacts with Florida as described herein fall well short of those needed to satisfy due process. *See Consol. Dev. Corp.*, 216 F.3d at 1292; *Hill*, 762 F. Supp. at 932-35 (defendant law firm with offices in eight states, the District of Columbia, and three foreign countries lacked sufficient minimum contacts with Florida to support the exercise of personal jurisdiction where it occasionally performed legal services in Florida but had "no office, telephone listing, mailing address, business agent, bank account, property or assets in Florida, and did not solicit business in Florida."); *see also Reliance Steel Prods. Co.*, 675 F.2d at 589 (ruling advertisement into forum and receipt of forum-state clients from unsolicited referrals did not establish a "significant business relationship" between firm and forum state); *First Trust Nat'l Ass'n v. Jones, Walker, Wacechter, Poitevent, Carrere & Denegre*, 996 F. Supp. 585, 589 (S.D. Miss. 1998) (finding no "systematic and continuous" contacts despite occasional representation of forum residents and that some lawyers were members of state bar, because firm had no offices, property or agent in forum-state, was not qualified to do business there, and did not advertise or solicit there); *Ziarno*, 2004 WL 838131 at *2 (finding no personal jurisdiction over law firm even though attorneys represented clients in forum-state courts); *Hart v. Skadden, Arps, Slate, Meagher & Flom*, No. 1:90cv00437, 1991 WL 355061, at *2 (M.D.N.C. Aug. 5,

1991) (dismissing firm despite representation of forum-state clients in forum-state courts because firm did not maintain offices in forum state, no employees or firm partners lived or owned property there, and firm did not solicit business in forum state).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Snow's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Snow cannot state a claim under the SCA, as well as the dismissal of Snow's complaint against Yarmuth pursuant to Federal Rule of Civil Procedure 12(b)(2) because the district court did not have personal jurisdiction over Yarmuth.

Respectfully submitted,

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September 26, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I certify that this brief contains no more than 14,000 words. Based on the word count of the word processing system used to prepare this Brief, the word count, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), is 13,869.

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced font that includes serifs using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2005, I caused one true and correct copy of the foregoing Brief of Appellees to be served, via First Class mail, postage prepaid, upon the following:

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