Appellate Court No. H021961

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

MATTHEW PAVLOVICH, Petitioner. vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA, Respondent. DVD COPY CONTROL ASSOCIATION, INC., Real Party in Interest.	Supreme Court No. _____ Trial Judge: Hon. William J. Elfving Santa Clara County Superior Court Trial Court Case No. CV 786804

PETITION FOR REVIEW AFTER DECISION BY COURT OF APPEAL, SIXTH APPELLATE DISTRICT

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I.

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

MATTHEW PAVLOVICH, defendant and petitioner, respectfully petitions for review following the decision of the Court of Appeal, Sixth Appellate District, (per Hon. Eugene M. Premo, Acting P.J.), filed on October 11, 2000.

II.

ISSUES PRESENTED FOR REVIEW

1) Whether jurisdiction is available in California under the *Calder* effects test, based exclusively on Internet effects, where there is no evidence of "express aiming" directed at a particular, known, California party.

2) Whether California may exercise jurisdiction over a defendant on the basis that: The defendant knew or should have known that his

acts would have an effect on industries generally reputed to exist in California ("general industry effects"), where no other California contacts exist.

A. SUMMARY OF REASONS FOR REVIEW

The *Calder* effects test has provided State Courts with a framework within which to develop jurisdictional jurisprudence. However, as recent California Court decisions have noted, it has also created ever-increasing confusion over the precise definition of the "express aiming" requirement and of the boundaries of the *Calder* test in general.

The ambiguities in the *Calder* test have led to confusion and seemingly divergent opinions in numerous Internet jurisdiction cases. Indeed, here the Sixth Appellate district found jurisdiction based solely upon Internet publication of information while the Second Appellate district found no such jurisdiction on strikingly similar facts (*Jewish Defense Organization Inc. v. Superior Court* (1999) 72 Cal.App.3d 1427). Divergent opinions are also found in the Federal Courts which have dealt

with the same issues[1].

The ambiguity regarding the existence of Internet-based jurisdiction has arisen in this case, and will continue to arise as the additional non-resident defendants (totaling at least 17 named individual non-resident defendants and an unknown additional number of identified and unidentified doe defendants) are served. Additionally, this issue will continually arise in the slew of other Internet cases currently winding through the courts as individuals and companies endeavor to settle Internet related disputes.

If Courts undertake an expansive reading of the "express aiming" requirement and the *Calder* test in general, both Internet and non-Internet cases will rapidly increase throughout California. New cases will continually be filed based upon the holding that only forum related

[1] Compare the Internet jurisdiction cases of *Panavision International L.P. v. Toepen* (9th Cir 1998) 141 F.3d 1316 and *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F.3d 414. Although no known Supreme Court decision has so held, the distinctions between these cases would appear to turn based on the ill-defined "express aiming" requirement.

"general industry effects" must be present to sustain jurisdiction. This will create a burden on both the court system and non-resident defendants.

Because of the wide net cast by the plaintiffs in this case and because of the controversial subject matter of the case, mainstream and industry-specific press have followed this case closely. As such, the public posture of this case will necessarily shape the manner in which industry and individuals make future decisions regarding their interaction on the Internet – either chilling on-line speech and commerce, or permitting it to continue to expand. It is imperative that this Court seize the opportunity to review this matter and clarify this important area of cyber-jurisdictional jurisprudence.

III.

STATEMENT OF THE CASE

This is an Internet re-publication case wherein Petitioner, is alleged to have been involved in the web site re-publication of information alleged to have contained Real Party in Interest's trade secrets. The original development and publication of the information is alleged to have

originated from one or more residents of foreign countries who posted the information on the Internet.

A. PROCEDURAL FACTS

Petitioner, MATTHEW PAVLOVICH (hereafter PAVLOVICH) is a defendant in the underlying action and is a party beneficially interested herein. Respondent is the Superior Court of Santa Clara County[2] (hereafter Respondent). Real party in interest, DVD Copy Control Association Inc. (Hereinafter, Real Party or DVD CCA) is the plaintiff in the action hereinafter described and is a party beneficially interested in this proceeding.

On December 27, 1999, Real Party in Interest, DVD CCA, filed in Respondent Court against this Petitioner, as defendant, a complaint numbered CV786804 alleging a single cause of action - misappropriation of trade secrets (Civ.Code §3426 *et seq.*). The trade secret misappropriation cause of action is based on the allegation that Petitioner republished information that is alleged to have been misappropriated by a third party or parties and repeatedly republished throughout the Internet. Petitioner

is one of some 521 named and Doe defendants who have been sued for allegedly republishing this information on the Internet – many of whom are non-residents. Numerous other publishers of the same information have not been sued. Plaintiff and real party in interest is a not-for-profit trade association whose sole purpose is to license the information known as the Content Scrambling System or CSS.

[2]Superior Court Case No. CV786804

Real party in interest alleges that portions of its CSS Technology were was misappropriated by a third party and partially incorporated into a new technology called DeCSS. Real party in interest alleges that after the third party creator of DeCSS posted DeCSS on the Internet, Petitioner and other defendants discovered the information posted on the Internet, and themselves further republished the information on various other Internet web sites[3].

Petitioner made no general appearance in Respondent Court. Rather, on June 6, 2000, Petitioner appeared specially in Respondent Court (pursuant to the provisions of §418.10 of the Code of Civil Procedure) by filing a motion to quash service of summons on the grounds that the Respondent Court lacked jurisdiction over the person of defendant[4] and petitioner. Following a stipulated jurisdictional deposition and document production, on August 18, 2000, Real Party in Interest filed its opposition

[3]References to the separately bound Appendix of Exhibits, filed concurrently with petitioner's petition for writ of mandate in the Appellate Court will be denoted as "APP"; See complaint included as exhibit A of the separately bound appendix of exhibits filed with the Appellate Court.

[4] A true and correct copy of Petitioner's Proof of Service, Notice of Motion, Points and Authorities in Support of Motion, Declaration of Allonn E. Levy in support of Motion, and Declaration of Matthew Pavlovich in Support of Motion to Quash Service of Process is included as Exhibit B of the separately bound appendix of exhibits filed with the Appellate Court.

papers to Petitioner's motion[5]. On August 22, 2000, Petitioner herein filed his reply papers in response to DVD CCA's opposition[6].

[5] A true and correct copy of Real Party in Interest's opposing papers, which include Points and Authorities in Opposition to Motion to Quash Service and the Declaration of Jonathan S. Shapiro in Opposition to Motion to Quash Service, is included as Exhibit C of the separately bound appendix of exhibits filed with the Appellate Court.

[6] A true and correct copy of Petitioner's Reply Brief in Support of Motion, Reply declaration of Allonn E. Levy in Support of Motion, and Objections to Evidence Submitted by Plaintiff is included as Exhibit D of the separately bound appendix of exhibits filed with the Appellate Court.

A hearing was held by Respondent Court on August 29, 2000 at approximately 9:00 a.m. in Department two of the Santa Clara County Superior Court. An order denying Petitioner's motion to quash service of summons for lack of jurisdiction was served by mail on all parties on August 30, 2000[7] (pursuant to Cal.Rule of Court 28(e)6, a true and correct copy of the Trial Court's decision is appended as exhibit "A" to this petition, hereinafter "exhibit A").. A petition for Writ of Mandate and appendix of exhibits were timely filed with the Sixth District Court of Appeal on September 11, 2000. The Court of Appeal issued its decision denying the petition for writ of mandate on October 11, 2000 (pursuant to Cal.Rule of Court 28(e)6, a true and correct copy of the Appellate Court's decision is appended as exhibit "B" to this petition, hereinafter "exhibit B").

[7] A true and correct copy of the court's order is included as Exhibit E of A true and correct copy of Petitioner's Reply Brief in Support of Motion, Reply declaration of Allonn E. Levy in Support of Motion, and Objections to Evidence Submitted by Plaintiff is included as Exhibit D

B. JURISDICTIONAL FACTS

This is an information re-publication case wherein the plaintiff, DVD CCA, seeks to enjoin Petitioner PAVLOVICH and some 521 other defendants from republishing a piece of computer code identified as DeCSS. When implemented by a user, DeCSS can enable consumers to play lawfully purchased DVDs without the use of a software DVD player licensed by real party DVD CCA. DVD CCA operates solely as the licensor of the Content Scrambling System or "CSS" technology. DeCSS is particularly useful for users of open-source computer operating systems since such systems do not currently offer DVD players licensed by DVD CCA. An example of such an open-source computer operating system is the popular Linux operating system.

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of the separately bound appendix of exhibits filed with the Appellate Court.

Plaintiff argues that it is entitled to restrain the defendants right to republish this speech[8] by alleging the code itself includes misappropriated trade secrets. DVD CCA speculates that a Norwegian individual named Jon Johansen authored DeCSS by reverse engineering CSS after clicking a software agreement[9] prohibiting such reverse-engineering. DVD CCA further alleges that Mr. Johansen then posted the DeCSS code on the Internet, world wide. Petitioner herein, and others, are alleged to have subsequently found DeCSS on the Internet and republished it (see APP[10]. pp.2-21; Complaint at p.13:17-27; p.17:24-28). DVD CCA brought this action to enjoin Petitioner and the remaining 500 defendants from continuing[11] to republish the DeCSS information (Exhibit A at APP.p.20; Complaint at p.19).

1. Situs and Identification of Parties

Real Party in Interest, Plaintiff, DVD CCA is a Delaware corporation with offices located in Morgan Hill, California, and is the licensing entity for the technology known as CSS (APP.p.4; Complaint at p.3:12-17).

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[8]The parties have not disputed the fact that the computer code DeCSS is speech for purposes of First Amendment analysis.

[9]DVD CCA has provided no direct evidence that Mr. Johansen entered this agreement, or that he violated such an agreement. Instead, DVD CCA simply avers that such agreements are usually agreed to.

[10]"APP" stands for the Appendix to Exhibits filed in the Appellate Court. For the Court's convenience, all references to exhibits will include both the APP page number, followed by the original document reference. For example APP pp.2-21; Complaint pp.1-20.

[11]As indicated below, the evidence demonstrates that Petitioner did not actually own or operate the LiVid web site that allegedly republished the DeCSS code. The LiVid web site that allegedly contained DeCSS was voluntarily taken down (see APP.p.67; Declaration of PAVLOVICH at 2:13-27).

Petitioner, Defendant, PAVLOVICH is an out-of-state resident served by U.S. mail while a student in Indiana and currently residing in Texas (APP.pp.66-68; Declaration of PAVLOVICH at pp.1-3).

2. Factual Summary

Petitioner's involvement in this case is limited to his role as an alleged republisher of the DeCSS code while enrolled as a full-time student at the University in Indiana (APP.p.66-68; Declaration of PAVLOVICH 2:1-5; 2:8-27). Plaintiff has alleged that Petitioner PAVLOVICH is responsible for the posting[12] of DeCSS on the "www.livid.on.openprojects.net" web site (APP.p.6; Complaint at p.5:13-16).

In reality, PAVLOVICH did not own or operate any site that published DeCSS, however he did concede for purposes of the motion to quash that he had input[13] on such a web site (APP.p.67; Declaration of PAVLOVICH at 2:17-27) operated by others. Since Petitioner had nothing

[12]The evidence shows he does not own or operate any such site, though PAVLOVICH did have input into a web site operated by the LiVid group. See APP.p.67; Declaration of PAVLOVICH at 2:17-27.

[13]The open project which allegedly posted DeCSS was a loose association of people, whom PAVLOVICH does not personally know (APP.p.170-171;exhibit A at pp.17-18), nor does he know where those individuals are domiciled (APP.p.172;exhibit A at pp.19:19-21), nor who hosts the LiVid list (APP.pp.173-174;exhibit A at 21-22). The goal of the LiVid group was to create better support for video playback (APP.p.175;exhibit A at 23:10-15), not to harm any party in California.

to do with the creation of DeCSS, any liability on the part of PAVLOVICH stems solely from his discovery of a piece of code (DeCSS) on the Internet, and having input on a web site that allegedly republished that code.

The LiVid group which allegedly published the DeCSS code was a loose association of volunteers who were involved in Linux open-source projects involving various forms of video playback[14]. PAVLOVICH testified that the LiVid project was run by volunteers, with no formal organization, and that PAVLOVICH did nothing on the project for long periods of time (APP.p.180; Deposition of PAVLOVICH at 52:2-11). The evidence presented demonstrates that the DeCSS code was not utilized in the LiVid DVD player (APP.p.182; Deposition of PAVLOVICH at 57:9-13), and PAVLOVICH played no part in the development of DeCSS (APP.p.181; Deposition of PAVLOVICH at 56:23-25). DVD CCA has provided no evidence to show that either LiVid or PAVLOVICH intentionally directed activities towards a California party[15].

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[14](See Petitioner's Reply Papers attached as Exhibit D to the separately bound Appendix of Exhibits, hereinafter Exhibit D at APP.pp174-175; Deposition of PAVLOVICH at pp.22-23).

[15]Real Party did provide two unauthenticated documents that it alleges are attributable to

Petitioner (see DVD CCA's opposition papers attached as Exhibit C to the separately bound Appendix of Exhibits, hereinafter Exhibit C, at APP.p.111-114; Declaration of Shapiro at exhibit C). Petitioner filed objections to this evidence pursuant to Evidence code §§350, 412, 702, 800 and 1520-1523, (See Exhibit D at APP.pp.157-158; Objections to Evidence at pp.1-2). Without waiving said objections, Petitioner contends that far from showing any intentional act, the e-mails show Petitioner's disagreement with DVD CCA's contentions (Exhibit C at APP.p.114; Declaration of Shapiro at exhibit C). The documents also show that at some point prior to the surfacing of DeCSS on the web (on October 25, 1999 according to DVD CCA; see Exhibit A at APP.p.14; Complaint at 13:17-22), Petitioner quoted someone else's incorrect hearsay statement that Reverse engineering is illegal in most places (Exhibit C, at APP.p.112; Declaration of Shapiro at exhibit C). Additionally, the October 1, 1999 e-mail regarding reverse-engineering clearly states it relates to software drivers and not to any part of CSS or DeCSS.

Petitioner PAVLOVICH has no connection with California. PAVLOVICH does not reside in California and does not have any regular clients or work in California (APP.pp67-68; Declaration of PAVLOVICH at pp.2-3). Furthermore, PAVLOVICH has never: solicited business in California; designated a registered agent for service of process in California; maintained a place of business in California; maintained a telephone listing in California; maintained a bank account in California; or even visited California for any business purpose (APP.p.68; Declaration of PAVLOVICH at 3:2-7). The web site DVD CCA attributes to PAVLOVICH was a "passive" web-site that did not involve the interactive exchange of information with users, did not solicit or engage in business activities, and did not solicit contact with California residents (APP.pp.67; Declaration of PAVLOVICH at 2:18-27). Further, Petitioner did not know of DVD CCA's existence, much less its situs in California, prior to the filing of this lawsuit and has never done business with DVD CCA (APP.p.68; Declaration of PAVLOVICH at 3:7-9). Petitioner neither directed nor "expressly aimed" any activity or contact towards California, much less any activity or contact specifically related to the trade secret cause of action that is the

subject of this suit (APP.pp.66-68; Declaration of PAVLOVICH at pp.1-3; Exhibit D, at APP.pp.168-169,178, 179, 180, 185; Deposition of PAVLOVICH at pp.11-12, 44:4-12, 48:22-25, 52:2-11, 91:22-25).

Real Party in Interest does not contest the fact that PAVLOVICH has had no contact with California or the fact that he did not know the identity of the only plaintiff in this case (See Opposition to Petition for Writ of Mandate, hereinafter "OPP," generally and at pp.11-12). DVD CCA argues that the lack of express aiming directed at DVD CCA is irrelevant to the jurisdictional analysis (OPP at p.12) and that jurisdiction may be found solely based upon effects on the computer and movie industries which are reputed to exist in California (OPP at p.11-13).

IV.

ARGUMENT

A. COMPELLING REASONS EXIST FOR THIS COURT TO GRANT THE PETITION FOR REVIEW

Pursuant to Cal. Rule of Court 29, this Court is empowered to review appellate decisions under specified, narrow, circumstances. These

unusual circumstances are evident in the instant case.

This case presents important questions of law in one of the most critical areas of State law – that of jurisdictional jurisprudence. At a base level, jurisdictional issues arise in every single case, so it is rare to uncover unresolved questions within this area of law. However, with the widespread acceptance of the Internet, Courts are facing different situations than those previously seen, giving rise to new questions of law that are destined to recur as Internet cases become more prevalent.

In the landmark case of *Calder v. Jones,* 465 U.S. 783 (1984), the Supreme Court held that jurisdiction may be found, within the confines of due process, where certain intentional acts are "expressly aimed", and cause foreseeable harm in the forum state. Subsequent Courts have noted that due process provisions and *Calder* require "something more" than simply foreseeable effects in the forum state (*Panavision Int'l, L.P. v. Toeppen*, (9th Cir. 1998) 141 F.3d 1316, 1322, but have not defined what the "something more" is and have not defined the boundaries of "express aiming."

Although itself not an Internet case, the *Calder* case was an

information re-publication case. As such, the *Calder* test has, in varying degrees, become the primary basis for jurisdictional analysis in Internet cases. The importance of the *Calder* test in Internet cases arises out of the high-speed, transient, nature of information on the Internet and the effects brought about by that information. In applying the *Calder* holding to the Internet arena, the boundaries of the *Calder* effects test itself, as well as the specific "express aiming" requirement cry out for definition and clarification. Without such definition, California Courts and litigants will continue to struggle with jurisdictional questions resulting in a lack of uniformity among similar Court cases and in confusion by industry participants.

Settling the important questions of law raised in this petition will necessarily assist California Courts and parties in evaluating the elementary issue of jurisdiction which arises in many cases and in nearly all high technology and Internet based cases. The precedent set by this Court would not only apply to the 17 named non-resident defendants already included in this case, but it will also apply to the numerous other Internet and non-Internet cases winding through California Courts and

relying on the "effects test" as a basis for jurisdiction.

In the new global economy, questions about the boundaries of the "effects test" as applied in California frequently arise. As industry and individuals assess their levels of risk and resulting ability to do business and otherwise interact on the Internet, participants will look to this Court to answer these recurring legal questions regarding how far the "effects test" reaches in California. Thus, the resolution of these jurisdictional issues is not only pivotal to the resolution of Internet litigation, but also is important to industry participants who will adjust their daily interactions based on the outcome of this case.

California Courts have struggled with the boundaries of the "effects test" for some time. In a recent decision, the Ninth Circuit candidly noted the confusion among the courts:

> Subsequent cases have struggled somewhat with *Calder's* import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be something more, but have not spelled out what that something more must be. See *Panavision,* 141 F.3d at 1322.
>
> We now conclude that something more is what the Supreme Court described as express aiming at the forum state. See *Calder,* 465 U.S. at 789. Express aiming is a

> concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.

Bancroft & Masters Inc. v. Augusta National Inc. (9th Cir.2000) __ f.3d __, 2000 U.S. App. LEXIS 20917, 2000 C.D.O.S 6941, 2000 D.A.R. 9197 at *10-14 (a courtesy copy of the decision has previously been provided to opposing counsel and is attached hereto as exhibit C for the court's convenience pursuant to Cal.Rule of Court 28(e)5).

The *Bancroft* Court supplied some clarification on the issue of "express aiming" but did not provide actual boundaries demonstrating what facts do not satisfy the "express aiming" requirement.

Other California Courts have also wrestled with the boundaries of the "effects test" in California[16]. In *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 236, the Court struggled with the confines of *Calder*, eventually noting "It does not follow, however, that the fact that a defendant's actions in some way set into motion events which ultimately injured a California resident, will be enough to confer jurisdiction over that

[16] In yet another example, the Court in *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 909 noted the confusion involved in the "express aiming" requirement and the *Calder* test generally. That Court handled the ambiguities by analyzing the level of intent on the part of the non-resident defendant in "expressly aiming" contact with the resident plaintiff, but did not clarify the boundaries of *Calder*.

defendant on the California courts.[17]" In *Jewish Defense Organization Inc. v. Superior Court* (1999) 72 Cal.App.3d 1427 the Court also provided little analysis in its holding that republication of information on the Internet having an effect in California did not provide jurisdiction[18].

Thus, the lower Court here found that despite the holding in *Bancroft*, express aiming may still be satisfied without the targeting of a specific named party. Additionally, the Appellate Court held that "general industry effects" as defined above are sufficient to satisfy the *Calder* test. The lower Court's decision would seem to stand in contrast to the Internet publication cases of *Bancroft*, *Jewish Defense*, *Cybersell* and to

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[17] Also citing *Wolf v. City of Alexandria* (1990) 217 Cal.App.3d 541; *Kulko v. Superior Court* (1978) 436 U.S. 84, 94-95.

[18] Compare the Internet jurisdiction cases of *Panavision International L.P. v. Toepen*(9th Cir 1998) 141 F.3d 1316 and *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F.3d 414. Although no known Supreme Court decision has so held, the distinctions between these cases would appear to turn based on the ill-defined "express aiming" requirement.

some extent *Panavision*. However, without clarification on the issues outlined in this petition, industry participants, litigants and Courts attempting to analyze the divergent decisions will be stymied in their attempts to predict the legal outcome of a given jurisdictional dispute.

Petitioner contends that if DVD CCA's theories of jurisdiction are permitted to stand, nearly limitless jurisdiction will exist in California. However, without review, the result will be even more damaging as the vast numbers of individuals affected by and following this case will be left with confusion rather than a solid understanding of the pivotal issue of "effects" based jurisdiction.

B. THE EXPRESS AIMING REQUIREMENT IN CALDER OUGHT TO PROPERLY BE READ AS REQUIRING AN INTENTIONAL DIRECTION OF CONSEQUENCES AIMED AT A KNOWN PARTY IN THE FORUM STATE

In its opposition, DVD CCA argues that "Petitioner's claim that he did not know DVD CCA's name or location until commencement of this lawsuit (Petition, p.25) is irrelevant" (OPP at p.12). It is petitioner's contention that the entire foundation for the "effects test" as a basis for jurisdiction that complies with due process <u>is</u> the intentional direction of

harmful activity "expressly aimed" at a particular party within the forum state. Without the purposeful direction of activity intentionally directed at a particular party, the *Calder* test is rendered meaningless in that it would allow for jurisdiction anytime a resident plaintiff is affected by the acts of a non-resident – such a reading would conflict with the Constitutional guarantees of due process.

In analyzing the jurisdictional facts, the *Calder* Court made it clear that in publishing its information, the defendant in *Calder* knew the identity of the plaintiff, knew the plaintiff lived in the forum state and knew that the information it was publishing would likely have an adverse effect on that particular plaintiff (*Calder* at 789-790 and generally). The same is true for the defendant in *Panavision, supra* (relied upon by the trial Court in its order, see APP p.225; Trial Court order at p.1) and those defendants in other "effects test" cases where jurisdiction has been upheld[19].

[19] Should the Court grants review as requested, petitioner will provide full briefing and case citations on this issue.

In the instant case, PAVLOVICH could not have expressly aimed his conduct at DVD CCA (the sole plaintiff in this case). At the time the re-publication of DeCSS occurred, PAVLOVICH was a student at Purdue University and had never heard of DVD CCA. Since petitioner couldn't have targeted DVD CCA, any activity that affected DVD CCA would have been simply fortuitous or random[20].

It is well settled that in order to comply with due process, any exercise of jurisdiction must satisfy minimum contacts, fair play and substantial justice (*Burger King v. Rudzewicz* (1985) 471 U.S. 462, 472, 476-478). the "express aiming" requirement ought to properly be read as requiring actual direction of activity aimed at a named party in order to fulfill the foreseeability and purposeful availment elements of due process (*Id*). Unless an individual actually directs conduct at a known entity, he or she cannot be said to truly be undertaking intentional conduct, expressly aimed at California known to have a potentially devastating impact upon a party in California (see *Calder* at 789-790). To hold otherwise renders the "express aiming" requirement abstruse, indefinite, speculative, and

[20] It is well settled that "random, fortuitous or attendant contacts" will not support personal jurisdiction (*Burger King v. Rudzewicz*, (1985) 471 U.S. 462, 475-476, 485).

essentially meaningless.

C0 CALIFORNIA OUGHT NOT EXERCISE JURISDICTION BASED SOLELY UPON THE EXISTENCE OF ALLEGED EFFECTS FELT BY INDUSTRIES REPUTED TO EXIST IN CALIFORNIA

Real Party in Interest argues that jurisdiction is available because "Petitioner both knew and should have known that the effect of his conduct would be to harm . . . California enterprises" (OPP at p.12). Petitioner denotes this general knowledge of an effect on a particular industry or industries reputed to exist in California as "general industry effects." Petitioner contends that neither *Calder*, nor its progeny was envisioned as permitting such "general industry effects" as a basis for jurisdiction consistent with due process guarantees. Were such a reading of the *Calder* test permitted to stand, the result would be a dramatic increase in jurisdiction encompassing all cases with subject matters that touch upon industries reputed to exist in the forum state.

The *Calder* "effects test" is one of many tests for personal jurisdiction. It is a particular form of "purposeful availment" required in all specific jurisdiction cases. As such, the requirements of the test must

comply with traditional Due Process safeguards.

The constitutional cornerstone of due process analysis is "whether the defendant purposefully established 'minimum contacts' in the forum" (*Burger King* at 474). "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum . . .are such that he should reasonably anticipate being haled into court there." (*Id*; *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 295). "It is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum . . ., thus invoking the benefits and protections of its laws" (*Id* at 475).

There is no true purposeful availment, nor foreseeability, where the defendant simply knows that his or her actions will have an effect on a particular industry reputed to exist in the forum state. In such a situation, there has been no express direction of action at a particular entity and the individual cannot be charged with anticipating that he or she has created a sufficiently strong connection with the forum state that will support being haled into court there. Unlike the situation in *Calder* and *Panavision*

where the defendant specifically targeted an individual party (the plaintiff) and expressly aimed activities that would harm that individual, "general industry effects" do not satisfy the traditional due process analysis.

No known case has upheld jurisdiction based upon the existence of "general industry effects." In *Cybersell v. Cybersell* (9th Cir. 1997) 130 F.3d 414, the defendant surely was aware that its Internet conduct could have an effect on any number of industries. However, as that Court noted "[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide – but, without more, it is not an act purposefully directed toward the forum state" (*Id* at 418, 420). Additionally, it is well settled that in assessing specific jurisdiction, "the plaintiff must present facts demonstrating that the conduct of the defendant related to the pleaded causes is such as to constitute constitutionally cognizable "minimum contacts'" (*Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 228). A defendant's conduct generally directed at an industry (as opposed to at a named party) cannot be said to be a true "contact" related to the cause of action unless the industry as a whole is suing. Simply conducting activities that touch upon the subject

matter of an industry reputed to exist in California does not rise to the level of purposefully directing acts with an intention or expectation that a California party will necessarily be affected (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 909). Nor can such activity rise to the level of deliberately availing oneself of the benefits and protections of the forum state (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 447-448).

Holding that mere knowledge of an industry presence in a particular forum provides jurisdiction for any dispute touching upon that industry's subject matter would offend Due Process and lead to an obliteration of traditional jurisdictional requirements. For these reasons and those to be presented when this issue is fully briefed, This Court should review the Appellate Court's decision and preclude the use of "general industry effects" as a basis for jurisdiction in California.

V

CONCLUSION

Petitioner respectfully requests that this Court exercise its discretion and grant review of these important legal issues, alternatively, owing to the Court's active calendar, Petitioner would request that the Court grant review and retransfer jurisdiction to the court of appeal for reconsideration and for such other relief as the Court may deem appropriate.

DATED: September 11, 2000

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