

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-60907-CIV-MORENO/TURNOFF

FEDERAL TRADE COMMISSION, and  
STATE OF FLORIDA,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants and Relief Defendants

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**RELIEF DEFENDANT JAMES MARCUS' MOTION AND MEMORANDUM  
TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND MOTION AND  
MEMORANDUM TO QUASH PROCESS**

Relief Defendant JAMES MARCUS, by and through his undersigned counsel, files his Motion To Dismiss For Lack of Personal Jurisdiction pursuant to Rule 12 (b) (2) FRCP, and Motion To Quash Process pursuant to Rule 12 (b) (5) FRCP and states:

1. Suit was filed in this matter against multiple defendants for violation of Section 5(a) of the FTC Act, the FTC's Telemarketing Sales Rule, and the Florida Deceptive and Unfair Trade Practices Act.

2. The Complaint was amended to add additional Defendants, and this Defendant, a resident of the State of California, was added as an alleged Relief Defendant. The allegations against him are that he received assets from other Defendants traceable to the alleged improper actions of those Defendants.

3. The Amended Complaint was not personally served on the Defendant. Instead, the process server left the folded over Summons and Amended Complaint at the Defendant's door. No person was at home at the time service was attempted. An Affidavit of the Defendant which states that service was attempted in this manner is attached hereto and incorporated herein as Exhibit "A."

4. Pursuant to the relevant portions of Rule 4 FRCP, service of process may be made as follows:

**e) Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

5. The leaving of a Summons and the Amended Complaint on the doorstep of an unoccupied dwelling does not comport with the above-cited provisions of the Rule. Neither does it comport with California law for service of process, which requires that:

**§ 415.10**

A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery. The date upon which personal delivery is made shall be entered on or affixed to the face of the copy of the summons at the time of its delivery... However, service of a summons without such date shall be valid and effective.

**§ 415.20**

If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

6. The failure of proper service in this matter deprives the Court of personal jurisdiction over this Defendant.

7. Personal jurisdiction is also lacking in that there are insufficient allegations made in the Amended Complaint to subject this non-resident Defendant to the personal jurisdiction of the Court.

8. Here, jurisdiction is not claimed based on a statute which directs service of process rules relating to this Relief Defendant. Thus, Rule 4(e) of the Federal Rules of Civil Procedure requires reference to the Florida long-arm statute in order to determine the existence of personal jurisdiction. § 48.193 Florida Statutes

(2017) provides in relevant part<sup>1</sup>:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself ... to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state...

9. When a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents.” Jet Charter Serv., Inc. v. Koeck, 907 F.2d 1110, 1112 (11<sup>th</sup> Cir.1990), cert. denied, 499 U.S. 937, 111 S.Ct. 1390, 113 L.Ed.2d 447 (1991).

10. This Relief Defendant’s Affidavit states that he resides in the State of California, has resided there continuously since 2010, that he does no work in the State of Florida, and that he has not done any work in the State of Florida since at least the time that he began residing in California, as set forth above. In the Affidavit, this Relief Defendant states that he has no connection to the State of Florida, does not reside in that state and does no work there. The Affidavit of the Defendant is attached hereto and incorporated herein as Exhibit “A.”

#### **MEMORANDUM OF LAW**

Although the Amended Complaint sought injunctive relief pursuant to 15 USC 53 (c) against the main Defendants in this matter, it does not seek such relief

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<sup>1</sup> The only long arm allegation of the Amended Complaint is that this Defendant “transacts or has transacted business in this district.”

against this Relief Defendant. Thus, the provision that process may be made by leaving a copy of such process at the residence ... of such person is not applicable to this Relief Defendant. Process against this Relief Defendant should be governed by Rule 4 FRCP.

“Service of process is a jurisdictional requirement: a court lacks jurisdiction over the person of a defendant when that defendant has not been served.” Pardazi v. Cullman Med. Ctr., 896 F.2d 1313, 1317 (11th Cir.1990). The leaving of the Summons and Amended Complaint at the doorstep, does not satisfy the requirements of Rule 4.

Additionally, the attempted service of process by leaving the Summons on the doorstep of an unoccupied dwelling does not comply with California law (where service was attempted and where this Defendant lives). See, §§ 415.10, 415.20 California Civil Code Of Procedure, referenced above.

Notwithstanding the issue regarding the actual service of process in this case, there is insufficient basis for personal jurisdiction over this Relief Defendant. The Amended Complaint concedes that he is a resident of California, and the Affidavit filed in this matter makes clear that he does and has done no work in the State, notwithstanding the allegation of the Amended Complaint that he transacts or has transacted business in this district.

The Court should undertake a two-part analysis. First it must be determined whether the Florida long-arm statute provides a basis for personal jurisdiction. If so, it must be determined whether sufficient minimum contacts exist between the defendants and the forum state so as to satisfy “traditional notions of fair play and

substantial justice” under the Due Process Clause of the Fourteenth Amendment. Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 256 (11<sup>th</sup> Cir.1996) (quoting International Shoe v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quotation omitted))

The Florida long-arm statute determines whether this court may assert personal jurisdiction over the nonresident Defendant. “Since the extent of the long-arm statute is governed by Florida law, federal courts are required to construe it as would the Florida Supreme Court.” Cable/Home Communication v. Network Prod's, 902 F.2d 829, 856 (11<sup>th</sup> Cir.1990).

Florida’s long-arm statute is to be strictly construed. Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 891 (11<sup>th</sup> Cir.1983). Under Florida law, the plaintiff bears the burden of proving personal jurisdiction: “When a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents.” Jet Charter Serv., Inc. v. Koeck, 907 F.2d 1110, 1112 (11<sup>th</sup> Cir.1990), cert. denied, 499 U.S. 937, 111 S.Ct. 1390, 113 L.Ed.2d 447 (1991).

As referenced hereinabove, the Florida long arm statute, § 48.193 Florida Statutes (2017), provides in relevant part:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself ... to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or

business venture in this state or having an office or agency in this state....

The Affidavit of James Marcus provides that he conducts no business in Florida.

The next inquiry is whether this Relief Defendant has established sufficient “minimum contacts” with the state of Florida. On the face of the Affidavit no such contacts exist, and in its Amended Complaint, none are proffered by Plaintiffs. As to whether the exercise of jurisdiction over this resident of California would offend “traditional notions of fair play and substantial justice” it must be noted that “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987) at 114, 107 S.Ct. at 1033.

These burdens are relatively compelling in this case. This Relief Defendant is not alleged to have had any connection to the business dealings that are at the root of the allegations against the other Defendants. He has no connection to the State, and lives literally on the other side of the country. While the FTC and the Attorney General plead a compelling consumer protection interest in bringing the action against those Defendants alleged to be actors in this matter, there is no similar interest in joining this Relief Defendant in this action. Requiring this Relief Defendant to be joined in the exercise of personal jurisdiction over him does not comport with traditional notions of substantial justice and fair play.

WHEREFORE, because there was improper service of process in this matter,

and because there is no proper exercise of personal jurisdiction of this non-resident Relief Defendant, service of process should be quashed, and this matter should be dismissed for lack of personal jurisdiction.

/s/ Mark Wilensky  
MARK WILENSKY  
DUBINER & WILENSKY, L.L.C.  
1200 Corporate Center Way, Suite 200  
Wellington, FL 33414  
Telephone (561) 655-0150  
Facsimile (561) 833-4939  
Fla. Bar No. 290221  
E-Service: dubiner\_wilensky@bellsouth.net

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30<sup>th</sup> day of October, 2017, I electronically filed the foregoing document with the Clerk of this Court by using the CM/ECF system. I also certify that the foregoing document is being served this date on the Plaintiffs' counsel via transmission of Notices of Electronic Filing generated by the CM/ECF system.

/s/ Mark Wilensky  
Mark Wilensky



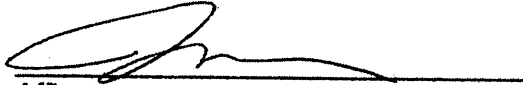
**AFFIDAVIT**

STATE OF CALIFORNIA )  
COUNTY OF Los Angeles )

BEFORE ME, the undersigned authority, personally appeared JAMES MARCUS,  
who, being by me first duly sworn, deposes and says:

1. I have been sued in this matter as a relief defendant.
2. I was not personally served with process in this case.
3. The Summons and Complaint was simply left on my door step when no person was at home.
4. I have lived in the State of California continuously since 2010.
5. Since beginning to reside in California, I have done no work in Florida.
6. I do no work in the State of Florida, and have not done any work in the State of Florida since at least the time that I began residing in California as set forth above.
7. I have no connection to the State of Florida. I do not reside in that state and do no work there.

FURTHER AFFIANT SAYETH NOT.

  
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME THIS 29<sup>th</sup> DAY OF October,  
2017, BY James Marcus, WHO IS PERSONALLY KNOWN TO ME OR WHO  
PRODUCED California AS IDENTIFICATION.  
Driver Lic.

A. Sheikh  
NOTARY PUBLIC

My commission expires: 01-27-2021

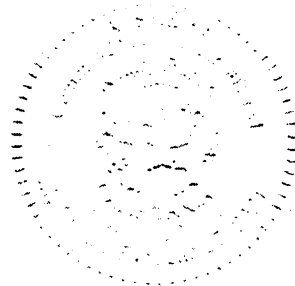
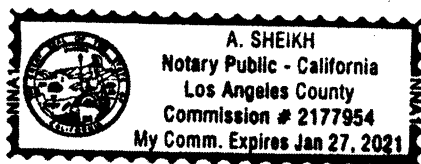


EXHIBIT "A"