

**Daniel L. Balsam**

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March 20, 2007

Commissioner Paul Slavit  
Superior Court of California, County of San Francisco  
Small Claims Division  
400 McAllister Street, Room 103  
San Francisco, CA 94102

**Re: *Balsam v. Deniro Marketing LLC*, Case No. 820194**  
**Trial Date: March 28, 2007 – 8:30 am**

Dear Commissioner Slavit:

I apologize that the Court is receiving this letter only seven days before trial. Although Allan Henning of Deniro Marketing claimed in his venue challenge that he was sending me a copy on March 14, he actually did not send it until March 19, and I received it on March 20. A copy of the UPS shipping label is attached, showing that Mr. Henning printed it on March 19 at 10:44 am. The UPS tracking report, also attached, shows a pickup scan on March 19 at 2:13 pm and delivery March 20 at 9:46 am. (Actually, by signing the venue challenge under penalty of perjury under the laws of the State of California, Mr. Henning just perjured himself in this regard.)

As far as the merits of this action, the subject of the lawsuit is an unlawful spam advertising Deniro's website, [www.AmateurMatch.com](http://www.AmateurMatch.com). The spam violates Business and Professions Code § 17529.5 and the Consumers Legal Remedies Act, Civil Code § 1750 *et seq.*, in numerous ways, which I will prove at trial. Venue is proper in San Francisco County under Code of Civil Procedure §§ 393, 395(a) and (b), and 395.5 because I received the spam in San Francisco County. Deniro is inappropriately trying to forestall litigation and change venue for its own convenience.

**Venue Under Code of Civil Procedure**

CCP § 393(a) states that "The county in which the cause, or some part of the cause, arose, is the proper county for the trial of the following actions: For the recovery of a penalty or forfeiture imposed by statute []." Because the liquidated damages of B&P Code § 17529.5(b)(1)(B)(ii) are penalties as opposed to actual damages (*see Phillips v. NetBlue Inc.*, No. C-05-4401 SC, \*1, 10-13 (N.D. Cal. Dec. 12, 2006) (Order Denying Defendants' Motion for Leave to Amend Answer)), venue is proper where the cause of action arose. The fact that Deniro may be located in San Joaquin County has no bearing on venue. My cause of action

arose when I received the spam in San Francisco County; if I had never received the spam, I would never have been injured. Therefore, venue is proper in San Francisco because I was injured in San Francisco.

CCP § 395(a) states that “If the action is for injury to person or personal property . . . the superior court in . . . the county where the injury occurs . . . is a proper court for the trial of the action.” As above, I was injured in San Francisco County when I received the spam in San Francisco County.

CCP § 395(b) states that “[I]n an action arising from an offer or provision of goods, services, loans or extensions of credit intended primary for personal, family or household use . . . the superior court in the county where . . . the buyer or lessee resides at the commencement of the action is the proper court for the trial of the action.” Because the spam offered services for personal use, venue is proper in San Francisco because I was (and still am) a resident of San Francisco County at the commencement of this action.

Finally, CCP § 395.5 states that “A corporation or association may be sued in the county . . . where the obligation or liability arises.” Here, even though Deniro is located in San Joaquin County, Deniro’s liability arose in San Francisco County, where I received the unlawful UCE. In *United Pac. Ins. Co. v. Super. Ct. of Sutter Cty.*, 254 Cal. App. 2d 897 (1st Dist. 1967), the court denied the corporate defendant’s motion to change venue from Sutter County (where the wrongful attachment arising out of a levy on a bank account took place) to San Francisco (defendant’s principal place of business). In *Shores v. Chip Steak Co.*, 130 Cal. App. 2d 627 (2d Dist. 1955), the court held that venue in a libel/misleading labeling lawsuit was proper in Los Angeles County (where the newspaper at issue circulated and the effects of the libel were felt), even though the corporate defendant’s principal place of business was in Alameda County.

While of course venue is always proper in Deniro’s home county of San Joaquin, all relevant provisions of the CCP establish that venue is *also* proper where the cause of action arose, and that is where the effects of the unlawful spam were felt and where I was damaged: San Francisco County.

### **Venue Under the Consumers Legal Remedies Act**

A lawsuit alleging violations of the CLRA “may be commenced . . . in the county where the transaction or any substantial portion thereof occurred.” Civ. Code § 1780(c). As above, if the spam were lost in cyberspace and I never received it, then it would not matter where it originated. But I *did* receive the spam, and thus *the most important part* of the transaction – where the transaction was completed – occurred where I received the spam: San Francisco County.

The small claims complaint SC-100 itself serves as the affidavit of venue because I checked box 5(a) and signed the complaint. Choice #3 states that this Court covers the area where I was injured.

## **Case Authority Regarding Jurisdiction for Spam Lawsuits is Persuasive as to Venue**

Specifically in the context of spam, since *jurisdiction* is appropriate where spam is received, then this Court should conclude that *venue* is also appropriate where spam is received. *Internet Doorway, Inc. v. Parks* held:

By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation. . . . Assuming the e-mail was sent by [defendant] from Texas, if the e-mail had never been received or “opened” by the Mississippi recipient, no injury would have befallen Internet Doorway in this forum. Accordingly, the tort was complete when the e-mail was opened by the recipient, not when it was transmitted . . . Therefore, the “injury” occurred in Mississippi, and the tort, as alleged, took place in Mississippi.

138 Supp. 2d 773, 779, 777 (S.D. Miss. 2000). *See also Verizon Online Services Inc. v. Ralsky*, 203 F. Supp. 2d 601, 612, 619 (E.D. Va. 2002) (confirming that jurisdiction is proper where the spam is received and the effects of the tort are felt).

Here, even if the unlawful spams originated outside of San Francisco County, the *effects* of the spams were felt and I was injured when I received the spam in San Francisco County. If the spam had been “lost” in cyberspace so that I never received it, the tort would not been completed. But I *did* receive the spam, I was damaged by it, and venue is therefore proper in San Francisco County.

## **Deniro Ignored Statutory Language and Case Authority for Purposes of its Own Convenience**

Because Deniro obviously would prefer to litigate in its own county, Deniro misquoted the statute. For example, on page 2 of Deniro’s letter, paragraph 3 quotes CCP § 395.5, but paragraph 4 states that “There is no contract alleged, so the only county available under that provision is ‘the county where the principal place of business of such corporation is situated,’ which is San Joaquin County.” Deniro thus conveniently omits the relevant clause in the middle of § 395.5: “or where the obligation or liability arises.”

On page 2, in paragraph 1, Deniro also claims that the cause of action “arose where the alleged spam was sent.” The case authority concludes the opposite, that the cause of action arises where the spam is received. *See Internet Doorway v. Parks* and *Verizon Online Services v. Ralsky, supra*.

San Joaquin County is not so far from San Francisco County so that Deniro would be unreasonably burdened by defending in San Francisco; absent extraordinary circumstances, a party’s convenience should not be considered in a challenge to venue. *Wrin v. Ohlandt*, 213 Cal. 158, 160 (1931).

### **This Court Has Recently Denied Similar Challenges to Venue**

This Court has recently denied similar challenges to venue by companies outside San Francisco County who advertised in spam sent into San Francisco County. *See Balsam v. Ronco Inc. and FYM Corp.*, case no. 817197 (defendant Ronco's (located in Ventura County) challenge to venue denied, September 7, 2006), *Balsam v. Cardinale Nissan Inc. and Future Ford Inc.*, case no. 817203 (defendant Cardinale Nissan's (located in Monterey County) challenge to venue denied, August 28, 2006), *Balsam v. Cardinale Nissan Inc. and Future Ford Inc.*, case no. 817203 (defendant Future Ford's (located in Placer County) challenge to venue denied, August 28, 2006).

### **Conclusion**

For the above reasons, this Court should deny Deniro's challenge to venue, and allow the trial to proceed on the merits as scheduled on March 28, 2007 at 8:30am.

If this Court denies Deniro's challenge to venue but needs to reschedule the trial, please reschedule as soon as possible on any the following dates, at 8:30am:

Friday, March 30  
Monday, April 2  
Tuesday, April 3  
Wednesday, April 4  
Monday, April 9  
Tuesday, April 10  
Wednesday, April 11  
Monday, April 16  
Wednesday, April 18  
Monday, April 23  
Wednesday, April 25  
Friday, April 27  
Monday, April 30  
Tuesday, May 1  
Wednesday, May 2

Respectfully Submitted,

Daniel L. Balsam

Cc: Mr. Allan Henning, Deniro Marketing LLC, 6777 Embarcadero Drive, Suite #3,  
Stockton, CA 95219, and via fax to 209-447-7672