

2004

MILEADS ENTERPRISES, INC., Defendant and Appellant, vs. BRITTNEY FENN, Plaintiff and Appellee : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MLEADS ENTERPRISES, INC.,

Defendant/Appellant,

Case No. 20041072 - SC

vs.

(Oral Argument Requested)

BRITTNEY FENN,

Plaintiff/Appellee.

APPEAL FROM A COURT OF APPEALS DECISION REVERSING AN ORDER OF
THE THIRD DISTRICT COURT (SALT LAKE COUNTY, SANDY DIVISION, THE
HONORABLE JUDGE DENISE P. LINDBERG) DISMISSING THIS LAWSUIT
(Trial Court Case No. 030400108)

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**UTAH SUPREME COURT
BRIEF**

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I. JURISDICTION OF THE APPELLATE COURT

This Court has jurisdiction pursuant to Rule 45 of the Utah Rules of Appellate Procedure.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

This Court granted the Writ of Certiorari filed by Appellant Mleads Enterprises, Inc. (“Mleads”) as to the following issue:

Whether due process permits personal jurisdiction over a defendant who sends an email without knowledge of the residence of the recipient or the location at which the recipient will retrieve the message.

This appeal presents the issue of law, (*see Starways, Inc. v. Curry*, 1999 UT 50, p. 2 (1999)), of whether a finding of personal jurisdiction solely on the basis of a single email that was unknowingly accessed in Utah, without any other contacts whatever, violates the Due Process Clause of the United States Constitution and Utah’s long-arm statute.

III. STATUTES WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL

1. The Due Process Clause of the United States Constitution (reproduced at Appendix 1 hereto).

IV. STATEMENT OF THE CASE

This case involves a plaintiff’s attempt to hale into court an Arizona-based company that has no contacts with the State of Utah and which did not direct any activity to the State of Utah, but sent a single email that was accessed from Utah. Brittney Fenn (“Fenn”) alleged \$10 in statutory injuries pursuant to Utah Code Ann. 13-16-101 to 105

(Supp. 2002) (the “Statute”)) from a single e-mail (the “E-mail”). The record is undisputed that the Email was sent by a vendor of Mleads and that Mleads “Mleads did not know specifically that [its] agent would send an email to Fenn or to any Utah resident.”

The trial court granted Mleads’s Motion to Dismiss on the basis that Mleads did not know, and could not have reasonably anticipated, the E-mail would reach the state of Utah or its residents. (R. 88, District Court Order ¶ 19.) The Utah Court of Appeals reversed and vacated the judgment of the trial court, holding that “[s]ending one email to a resident of Utah is sufficient ‘contact’ to satisfy . . . the minimum contacts requirement of due process.” The Court of Appeals’ “single email rule” contravenes the purposeful availment requirements of the Due Process Clause and allows a non-resident defendant to be brought into this forum based on random and attenuated contacts. As Judge Bench articulated, “It is difficult to imagine a more attenuated contact than the one presented here: a single email message sent to a lone Utah recipient.” Accordingly, Mleads respectfully requests that this Court reverse the decision of the Court of Appeals.

V. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

Mleads is an eight (8) employee closely held Arizona corporation that generates leads (*i.e.*, expressions of interest by a potential customer) with respect to mortgage and home loans. (R. 29 (¶ 2 (Declaration of Shay Tyler (hereinafter “Tyler Decl.”))).) Mleads

generally contracts with third parties (the "Marketing Companies" or in this instance the "Marketing Company") to promote its services to end users who "opt-in" or affirmatively consent to receive information regarding Mleads services. (R. 29; Tyler Decl. ¶ 3.)

Mleads does not at any time (except for following the submission of a consumer's application to receive information from Mleads, or upon receipt of an unsubscribe request) learn any information regarding the locale, identity, or other information of a consumer—Mleads does not learn the identity, any contact information, or location of consumers prior to the transmission of messages by the Marketing Companies. (R. 29; Tyler Decl. ¶ 4.) The Marketing Companies, who are not agents or employees of Mleads, warrant and represent to Mleads that at all times, including when transmitting promotional messages and e-mails, the Marketing Companies comply with all relevant laws and regulations. (R. 29; Tyler Decl. ¶ 3.) Upon receiving promotions (*e.g.*, e-mail) regarding Mleads, a consumer may fill out an application requesting more information regarding a particular loan and transmit such information to Mleads. (R. 30; Tyler Decl. ¶ 5.) Mleads then provides the consumer's information on a batch (non-individual) basis to a financial institution which then contacts the consumer regarding a proposed loan. (R. 30; Tyler Decl. ¶ 6.)

Mleads lacks a single contact with the State of Utah. Mleads maintains an office solely in the State of Arizona and does not maintain any offices in the State of Utah. (R. 29; Tyler Decl. ¶ 2.) Mleads is not licensed to conduct business in the State of Utah.

(R. 29; Tyler Decl. ¶ 3.) Mleads does not employ any Utah-based employees or agents. (R. 29; Tyler Decl. ¶ 3.) Mleads does not recruit any employees or agents in the State of Utah. Mleads does not have any bank accounts in the State of Utah. (R. 29-30; Tyler Decl. ¶ 4.) Mleads does not maintain any telephone or facsimile numbers, or list any telephone or facsimile numbers in the State of Utah. (R. 30; Tyler Decl. ¶ 5.) Mleads does not advertise in any Utah newspapers or magazines or other Utah-based media or otherwise solicit business in the State of Utah. (R. 30; Tyler Decl. ¶ 6.) Mleads does not have any Utah-based shareholders. (R. 30; Tyler Decl. ¶ 7.) Mleads does not own or lease any property in the State of Utah. (R. 30; Tyler Decl. ¶ 8.) None of Mleads's employees have traveled to Utah on business. (R. 30; Tyler Decl. ¶ 9.) Mleads is not subject to taxation in the State of Utah. (R. 30-31; Tyler Decl. ¶ 10.) Finally, Mleads does not generate any substantial percentage of its revenues from activities in the State of Utah. (R. 31; Tyler Decl. ¶ 11.) In sum, Mleads has no contacts with the State of Utah. The sole alleged contact in this case is the E-mail, which the Marketing Company transmitted to Fenn, and which Fenn affirmatively consented to receive and fortuitously accessed while in the State of Utah. (R. 31; Tyler Decl. ¶ 12.)

B. PROCEEDINGS BELOW

1. Trial court proceedings.

Fenn filed this lawsuit on January 3, 2003, alleging a violation of the Statute arising from the Email sent to the email address <BAF@heartslc.com>. (R. 2,

Complaint.) Fenn did not allege any economic, physical, emotional, or dignitary damages from the E-mail. The Complaint contained a sole allegation ostensibly relating to jurisdiction:

Defendant sent, or caused to be sent, to plaintiff an unsolicited commercial e-mail.

(R. 86, District Court Order, ¶ 9.) Mleads, having no contacts with the State of Utah, brought a Motion to Dismiss for lack of personal jurisdiction. The Motion to Dismiss was accompanied by the declaration of Shay Tyler (“Tyler Declaration”), principal of Mleads. As noted by the District Court, the Tyler Declaration attested that Mleads:

(a) does not maintain any offices in the State of Utah, (b) does not transact any business in the State of Utah, (c) is not licensed to do Business in the State of Utah, (d) does not employ or recruit any employees or agents in Utah, (e) does not have any bank accounts in Utah, (f) does not maintain telephone or facsimile numbers in Utah, (g) does not advertise or solicit business in Utah, (h) does not have any shareholders in Utah, (i) does not pay taxes in Utah, [and] (j) does not generate any substantial percentage of its revenues from activities in Utah.

(R. 85, District Court Order, ¶ 6.) Fenn filed a responsive pleading without any accompanying evidence or testimony—*i.e.*, Fenn “rested on the very general factual allegations made in [the] Complaint.” (R. 85, District Court Order, ¶ 8.) Fenn instead relied on the argument that Mleads had somehow waived its jurisdictional argument by appearing generally. Fenn further argued that the Statute itself conferred jurisdiction, and that Fenn’s general allegations were sufficient to find jurisdiction. (R. 86, District Court Order, ¶ 10.)

The District Court rejected Fenn’s arguments that jurisdiction was conferred by the Statute (R. 86, District Court Order, ¶ 13.) or that Mleads had waived its jurisdictional argument by not making a special appearance. (R. 86, District Court Order, ¶ 11.) The District Court considered the minimal jurisdictional allegations of the Complaint, along with the allegations of Tyler Declaration, which, because they were not controverted by specific allegations, were taken as true. The District Court concluded, based on these operative facts, that personal jurisdiction was not present in this case. (R. 88; District Court Order, ¶ 10.)

2. The decision of the Court of Appeals.

The Court of Appeals considered the issue of “whether the state can exercise personal jurisdiction over a defendant who caused one unsolicited commercial e-mail to be sent to a resident of the state.” *Fenn v. Mleads Enterprises, Inc.*, 2004 UT App. 412, p. 3, 103 P.3d 156 (2004). The Court of Appeals acknowledged that “Mleads did not know specifically that the agent would send an email to Fenn or to any Utah resident.” *Fenn*, 2004 UT App. 412 p. 2. The court did not end its inquiry there. The court instead focused on the volitional aspect of Mleads’s transmission of the E-mail, which it viewed as determinative:

The extent to which defendant caused the result is the more important aspect of the analysis. Mleads caused its agent to send email, and the agent sent an email to Fenn, who is a resident of Utah. The record does not disclose whether the agent sent a large volume of email all over the country or whether it sent one email to Fenn specifically. In either case, Mleads directed its agent to solicit business, and that direction instantiates the purpose that makes the

connection more than an “attenuated nexus.”

Fenn, 2004 UT App. 412, p. 21. In the view of the Court of Appeals, jurisdiction was appropriate because Mleads took voluntary action, regardless of whether that action was aimed at the State of Utah.

Judge Bench dissented from the decision of the Court of Appeals. Although Judge Bench did not write an opinion accompanying his dissenting vote he explained his reasoning in a different case:

I dissented in *Fenn* because I do not believe that a single email can vest Utah with personal jurisdiction over the defendant-sender where the plaintiff-recipient alleges no injury resulting from the transmission of the email. In order to satisfy the jurisdictional inquiry, due process requires that a nonresident defendant "purposefully avail[] itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). This "requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of . . . 'attenuated' contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984)).

It is difficult to imagine a more attenuated contact than the one presented here: a single email message sent to a lone Utah recipient. Here, as in *Fenn*, there is no allegation "that the email caused any reputational, economic, emotional, or physical 'injury.'" *Fenn*, 2004 UT App 412 at P20. In both cases, the plaintiffs allege only statutory damages of ten dollars. See Utah Code Ann. § 13-36-105 (Supp. 2003)

To craft its single email rule, the *Fenn* majority relied in part on *Starways, Inc. v. Curry*, 1999 UT 50, 980 P.2d 204. In *Starways*, the Utah Supreme Court held that the nonresident defendants' alleged transmission of libelous facsimiles vested Utah with jurisdiction. *Id.* at P9. Although the *Fenn* majority recognized that the absence of alleged injury in *Fenn* distinguished it from *Starways*, the majority concluded that this distinction was unimportant. *Fenn*, 2004 UT App 412 at PP20-21. However, I believe that *Starways* should

prevent Utah from taking jurisdiction over cases where no injury is alleged.

The single email rule established by Fenn therefore improperly ignores the "quality and nature" of the defendant's contact, vesting jurisdiction based solely on a single contact within Utah, however trivial. *Starways*, 1999 UT 50 at P8 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 90 L. Ed. 95, 66 S. Ct. 154 (1945)). Thus, contrary to the view of my colleagues, I believe that intentional contact alone is insufficient to confer jurisdiction. Moreover, the principle of judicial deference to legislative determinations should play no role in our due process inquiry.

Weaver v. Directlink Media Group, LLC, 2004 UT App 471 (Utah Ct. App. 2004)

(unpublished decision). This Court granted Mleads's Petition for Writ of Certiorari on March 17, 2005.

VI. STANDARD OF REVIEW

The Utah Supreme Court reviews this appeal of a motion to dismiss for lack of personal jurisdiction *de novo*. *Starways, Inc. v. Curry*, 1999 UT 50, p. 2 (1999). *Id.*

VII. SUMMARY OF ARGUMENTS

Due Process requires that the foreign defendant purposefully avail itself of the forum state. The only evidence on appeal of any such purposeful action by Mleads is a single email sent by a vendor of Mleads which Mleads had no knowledge or reason to know would be received in Utah. A "single email rule" is contrary to well established Due Process principles and is insufficient to establish personal jurisdiction.

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VIII. ARGUMENT

A. UNITED STATES SUPREME COURT PRECEDENT REQUIRES PURPOSEFUL DIRECTION OF ACTIVITY TOWARD THE FORUM STATE OR PLAINTIFF

The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits a state's power to assert personal jurisdiction over a non-resident defendant. U.S. Const. amend. XIV. "[The] constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process [is] whether the defendant purposefully established minimum contacts in the forum state." *Asahi Metal Indus. Co. v. California*, 480 U.S. 102, 109, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (internal citations and quotations omitted) (emphasis added); *see also Arguello v. Industrial Woodworking Machine Co.*, 838 P.2d 1120, 1123 (Utah 1992) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1995)).

1. Minimum contacts requires purposeful direction.

The minimum contacts requirement serves to protect a defendant against the burden of litigation in a distant or inconvenient forum, and to ensure that states do not reach beyond the limits of sovereignty imposed by their role in the federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). As noted by the Court of Appeals in this case, "[a] democratic government must exercise its powers against only those who have in some way assented to the governmental power." *Fenn*, 2004 UT 412 p. 14. Under United States Supreme Court precedent, the minimum contacts underlying the assertion of jurisdiction must have

some basis in the non-resident defendant's purposeful actions within the forum state, or directed towards the forum state. *See Calder v. Jones*, 465 U.S. 783, 812, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). The purposeful availment requirement ensures that defendants will not be "haled into a jurisdiction through 'random,' fortuitous,' or 'attenuated' contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1985). The operative term "purposeful" clearly contemplates some knowledge or intentionality requirement of the defendant vis a vis the forum state.

2. Mleads lacked minimum contacts in this case.

The present case presents an extreme example of a non-resident defendant who is haled into court based on a completely random, fortuitous or attenuated contact. The Record indicates Mleads itself does not have any contacts with the State of Utah, and Mleads hired the Marketing Company (based in the state of Florida) to assist in business promotion. (R. 28, Tyler Declaration, ¶ 3.) Marketing Company assured Mleads that at all times Marketing Company complied with relevant laws. (R. 28, Tyler Declaration, ¶ 3.) Additionally, Marketing Company did not provide to Mleads the locale of the end users to which the Marketing Company directs its promotion or advertising efforts or any other specific information regarding consumers, including their state of residence. (R. 28-9, Tyler Declaration, ¶ 4.) Marketing Company did not provide any such information even when Mleads requested. (R. 29, Tyler Declaration, ¶ 4.) Mleads was never aware of Fenn's identity, location, or state of residence before Fenn sued Mleads in Utah. (R.

29, Tyler Declaration, ¶ 4.) Fenn did not put forth any evidence indicating, or even allege, that Mleads sold any product or services, directly marketed any product or services, or advertised any product or services to consumers in the State of Utah, or ever contemplated marketing here. The Email itself was sent to a location-neutral address, <BAF@heartslc.com>. (R. 2, Complaint.) The uncontroverted fact dispositive in this case is Mleads did not know any promotions would ever reach the state of Utah. Indeed, the Court of Appeals noted that “Mleads did not know specifically that the agent would send an email to Fenn or to any Utah resident.” Thus, Mleads did not undertake any purposeful act to avail itself to the laws and benefits of the State of Utah; nor did Mleads direct any actions towards the State of Utah or its residents, including Fenn. Jurisdiction is thus not proper under the Due Process Clause of the United States Constitution.

3. Application of traditional jurisdictional principles requires reversal of the decision of the Court of Appeals.

The decision of the Court of Appeals is inconsistent with personal jurisdiction and Due Process jurisprudence. Merely because the subject of this lawsuit pertains to communications over a global distribution mechanism, the Internet, does not justify modification centuries old jurisprudence. Courts and commentators have repeatedly cautioned that traditional principles of jurisdiction should not be abandoned in cyberspace. *See e.g., Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1160 (D. Wis. 2004) (“traditional principles of due process are sufficient to decide

personal jurisdiction questions in the internet context”); *Design88 Ltd. v. Power Uptik Prods.*, 2000 U.S. Dist. LEXIS 21042 (D. Va. 2000) (“orthodox principles of in personam jurisdiction simply did not wholly evaporate into cyberspace”); Hon. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207, 207 (1996) (counseling against developing specialized tests for cyberspace). Indeed, “[s]ince a defendant’s Internet activity is not different from activity in real space, the Internet is not so different that it requires the application of new or technology-specific rules.” Titi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L. J. 519, 541 (2004).

The United States Supreme Court expressly held that a non-resident distributor cannot be haled into court in a locale merely because one of its products happened to reach the locale. *See Asahi Metal Indus. Co. v. California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1986). In *Asahi*, the Supreme Court reiterated the purposeful availment requirement, stressing that Due Process requires some conscious action on the part of the non-resident defendant which is directed towards the forum state. *Asahi* also stands for the proposition that a non-resident defendant cannot be subject to jurisdiction in a state based on its release of instrumentalities into the stream of commerce that happen to reach the forum state and cause injury in the forum state.

Asahi involved the state of California’s attempt to assert jurisdiction over Asahi Metal Industry Co., Ltd. (“Asahi”), a Japanese company. Asahi manufactured a tube

assembly that found its way into a motorcycle tire that exploded while being driven by a California resident in California. The Supreme Court found that the State of California could not constitutionally exercise personal jurisdiction over Asahi, notwithstanding Asahi's awareness that the tube assembly may find its way to California. The Court relied on the fact that Asahi had not taken "any action to purposefully avail itself of the California market." *Asahi*, 480 U.S. at 105. Indeed, the Court reaffirmed that the connection between the non-resident defendant and the forum state "must come about *by an action of the defendant purposefully directed toward* the forum State." *Id* (emphasis added):

Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.

Asahi, 480 U.S. at 105 (citations omitted).

Mleads is in the same position as Asahi; and the email Fenn received is similar to Asahi's tube assembly. Asahi sold its tube assemblies to tire manufacturers (who then sold the tires to motorcycle manufacturers) and could not predict the states in which the tube assemblies may cause injuries. Likewise, in this case Mleads did not direct the E-

mail to Utah or to Fenn in particular; and Mleads could not have predicted a Utah resident would receive the E-mail here. The United States Supreme Court held that Asahi did not subject itself to jurisdiction in the State of California for an accident that happened to occur in California from Asahi's product. The Court ruled that jurisdiction was not proper because Asahi did not intentionally direct its product to the State of California. *Asahi*, 480 U.S. at 107-08. The Court noted that Asahi knew some tube assemblies would find their way to California; but, the Court would not allow for personal jurisdiction because Asahi did not *direct* its activities to California. *Asahi*, 480 U.S. at 104. Like *Asahi*, Mleads did not direct its activities to Utah. Additionally, Mleads did not know any emails would reach Utah. Accordingly, pursuant to *Asahi*, jurisdiction is not proper in this case.

4. Transmission of e-mail alone, without prior knowledge of the recipient's state of residence, cannot support jurisdiction.

The sender of an e-mail has no ability to differentiate from what location in the world an e-mail will be accessed. *See Hydro Engineering, Inc. v. Landa, Inc.*, 231 F. Supp. 2d 1130,1136, fn. 1 (C.D. Utah 2002) (“[e-mail] addresses [do] not identify the particular state in which the e-mail was actually received, opened”) (emphasis added). Fenn could have accessed her e-mail via any world wide web-enabled device located in any city, state or country on the planet. Even if Mleads or Marketing Company intended the E-mail to be accessed in the State of Utah, neither Marketing Company nor Mleads could control where the recipients accessed such e-mails. *Kaempe v. Myers*, 2001 U.S.

Dist. LEXIS 18386 (S.D. Ind. 2001) (noting the absence of control over the location of receipt of e-mail because an “e-mail could have been retrieved from anywhere in the world”) (emphasis added). Thus, where the record does not contain evidence that the non-resident defendant knew of the state of plaintiff’s residence prior to sending an e-mail, the transmission of a single e-mail, without more, cannot form sufficient basis for jurisdiction.

B. THE UTAH SUPREME COURT REQUIRES PURPOSEFUL AVAILMENT

1. This Court has rejected jurisdiction based on random acts.

Utah courts,¹ following the United States Supreme Court, have similarly required purposeful availment as a prerequisite to the assertion of jurisdiction. For example, in *Pellegrini v. Sachs & Sons*, 522 P.2d 704 (Utah 1974), the Utah Supreme Court noted that the assertion of personal jurisdiction requires

¹ Federal courts sitting in Utah have reached similar results. In *Stewart v. Hennesey*, the United States District Court for the District of Utah held that it could properly assert jurisdiction over a non-resident automobile upgrade business due to the e-mails and telephone conversations exchanged between the Utah plaintiff and the non-resident defendant. *Stewart v. Hennesey*, 214 F. Supp. 2d 1198, 1203 (D. Utah 2002). In relying on the e-mail based contacts between the Utah plaintiff and the non-resident defendant the court distinguished between a non-resident's act of making a world wide website generally available and the act of intentionally communicating with the plaintiff via the world wide website. The court noted that “[c]ourts have emphasized ‘purposeful availment,’ . . . courts look for a purposeful act by which defendant avails himself of the privileges and protections of the forum.” *Hennesey*, 214 F. Supp. 2d 1203. In *Hennesey*, the court concluded that jurisdiction was proper since the “defendant [] chose to do business through its website with the plaintiff.” *Id.* In contrast, such purposeful action is not present in this case.

some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Pellegrini v. Sachs & Sons, 522 P.2d 704, 706 (Utah 1974) (emphasis added). That case involved a claim brought by a plaintiff against a California car dealership. Plaintiff purchased the car in California and subsequently moved to Utah, where she sued the California dealership. The Utah Supreme Court held that jurisdiction was not proper since the California car dealership had not directed any activities towards the State of Utah or its residents and because the contact in question was brought about by an action of the plaintiff rather than of the defendant. *Pellegrini v. Sachs & Sons*, 522 P.2d 704, 706 (Utah 1974).

2. *Starways v. Curry* Supports Reversal

The Court of Appeals improperly relied upon *Starways v. Curry*, 1999 UT 50 (1999) in reversing the decision of the trial court. *Starways*, a Utah business, alleged that the foreign defendants libeled them "both in personal conversations and in nationally broadcast facsimile transmissions." *Id.* at p. 5. *Starways* is factually distinguishable from the present matter because the record in that case contained uncontroverted allegations that the defendants caused facsimile transmissions to be sent to Utah and that the defendants had personal conversations with individuals located in Utah. In the present matter, however, the record is uncontroverted that Mleads had no knowledge that the Email would be received in Utah and there were no additional facts supporting personal

jurisdiction.

Moreover, this Court made clear that the decision in *Starways* would have been different had the defendants merely intentionally sent a facsimile without knowledge that the facsimile would be received in Utah. This Court articulated that

We note that it may ultimately become clear that defendants did not cause defamatory facsimiles to be transmitted into Utah but did send them elsewhere and that it was reasonably foreseeable that a copy would end up in Utah. Such an attenuated nexus would not be sufficient, standing alone, to justify the imposition of personal jurisdiction over the defendants. *See Calder*, 465 U.S. at 789 ("The mere fact that [a defendant] can 'foresee' that [a defamatory article] will be circulated and have an effect in [a state] is not sufficient for an assertion of jurisdiction")

Starways, 1999 UT at p. 12, n3. The facts at bar present the circumstance distinguished by this Court in *Starways*.

Judge Bench, the dissenting judge below, further distinguished *Starways* based on the nature of the alleged injury. In this case, there is no allegation in this case that the Email caused any "reputational, economic, emotional, or physical 'injury.'" *Fenn*, 2004 UT App 412 at P20. In *Starways*, in contrast, plaintiff alleged injury to its reputation based upon defendants' allegations "that Starways was being sued for over one billion dollars and that the contracts Starways has with its carrier and suppliers are illegal. *Starways*, 1999 UT 50, p10, n2. Judge Bench's analysis recognizing the nature of the injury in question should be adopted by this Court.

Finally, a claim based upon phone and facsimile communications is qualitatively different than a claim based upon a single email communication. In *Starways*, the

defendants sent facsimiles and made phone calls to Utah. Communications made via telephone lines necessarily include area codes, which reveal the location of the recipient. By contrast, an email address is location-neutral and includes no information which would give the sender reason to believe that the recipient was located in any particular jurisdiction.

Accordingly, *Starways* is factually distinguishable from the present matter. Mleads had no “knowledge of the residence of the recipient or the location at which the recipient will retrieve the message”. *Fenn v. Mleads*, 2005 Utah LEXIS 42 (Utah, 2005) (granting writ of certiorari). Moreover, the *Starways* decision expressly differentiated the facts in that case from the case at bar and advised that, without evidence that the communication would “end up in Utah”, it would not be sufficient, standing alone, to justify the imposition of personal jurisdiction over the defendants.

C. THE COURT BELOW CONFLATED THE CONCEPTS OF VOLITION AND AIMING

The Court of Appeals found that Mleads did not intend for any email to reach Utah. Nonetheless, it found jurisdiction because Mleads knew that email was being sent somewhere. The Court of Appeals held:

Mleads directed its agent to solicit business, and that direction instantiates the purpose that makes the connection more than an “attenuated nexus.”

Fenn, 103 P.3d at 162. In so ruling, the Court of Appeals conflated the concepts of volition (*i.e.*, intending to send an email) and aiming (*i.e.*, directing an email to Utah).

See, e.g., Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 807 (9th Cir. 2004).

The Court of Appeals also misapplied the “effects” test.

1. Volition and aiming are distinct concepts in the jurisdictional analysis.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 787 (9th Cir. 2004) is a recent case that demonstrates that volition and aiming are distinct concepts in the jurisdictional analysis. *Schwarzenegger* involved a lawsuit brought by California governor Arnold Schwarzenegger who sued in California, and alleged that an Ohio car dealership utilized his likeness without his permission. The dealership had no employees or offices in the State of California, and otherwise did not transact any business there. Governor Schwarzenegger argued that the dealership’s acts of propagating the advertisement was sufficient to confer jurisdiction. The Ninth Circuit disagreed, noting that while the dealership committed an intentional act, the dealership did not “expressly aim . . . its intentional act — the placement of the advertisement — in California.” *Schwarzenegger*, 374 F.3d at 806. The Ninth Circuit separated the intentional act and express aiming analysis. According to the Ninth Circuit, jurisdiction is proper where there is an intentional act which is also intended to have an effect in the forum state. In that case, the two elements were not present, because “[the dealership’s intentional act . . . was expressly aimed at Ohio [where the advertisement aired] rather than California.” *Id.*

The Court of Appeals acknowledged that Mleads did not intend the E-mail to be sent to the State of Utah. *See Fenn*, 2004 UT App. 412, p. 2 (“Mleads did not know

specifically that the agent would send an email to Fenn or any Utah resident.”). Because Mleads did not expressly aim its activities to Utah, jurisdiction is not proper. The fact that Mleads caused the E-mail to be sent (*i.e.*, “[t]he extent to which [Mleads] caused the result of the important aspect of the analysis” *Fenn*, 2004 UT App. at p 21) is not determinative. Rather, a foreign defendant must purposefully avail itself of the local jurisdiction, not simply purposefully have conducted the act in question.

2. The Court of Appeals recast and misapplied the effects test.

The focus of the Court of Appeals on “[t]he extent to which the defendant caused the result” also misapplies the “effects” test set forth in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804.

Calder involved a lawsuit brought by an entertainer who lived in California against defendants who lived and worked in Florida. Plaintiff sued, alleging that she had been libeled by an article published by defendants. Defendants argued that they should not be subject to jurisdiction in California because they were not responsible for circulation of the article in California. Defendants analogized themselves to the hypothetical welder who works on a boiler which later explodes in California. *Calder*, 465 U.S. at 789. The Court disagreed, noting that “[defendants] are not charged with mere untargeted negligence. Rather, their intentional . . . actions were expressly aimed at California.” *Id.* The Court relied on the fact that defendants knew that plaintiff (the subject of the allegedly libelous article) lived and worked in California, and that defendants’ magazine

had the largest circulation in California. *Id.* Defendants’ knowledge that their actions would affect plaintiff in California (*i.e.*, defendants’ specific knowledge that plaintiff lived and worked in California) and the fact that defendants knew that their libelous article would be transmitted to California were determinative in *Calder*.

In this case, the Court of Appeals based jurisdiction on the fact that Mleads caused the e-mail to be sent. Unlike in *Calder*, in this case, Mleads had no *a priori* knowledge that the E-mail would harm Fenn in Utah. The Record is devoid of any evidence that a large part of Mleads’s marketing efforts were focused on Utah. Applying *Calder*’s test thus requires a finding of no jurisdiction.

D. CASES FROM OTHER JURISDICTIONS HAVE REJECTED JURISDICTION IN SIMILAR CIRCUMSTANCES

The majority of courts from other jurisdictions read the “effects” test set forth in *Calder v. Jones* as requiring “purposeful availment”. Many recent cases involving actions taken, and injuries allegedly perpetrated, over the Internet, and which have had occasion to apply *Calder*, hold that Due Process—regardless of the effect of defendant’s conduct—continues to require purposeful availment. *See, e.g., Pavlovich v. Superior Court*, 29 Cal. 4th 262, 270, 58 P.3d 2, 127 Cal. Rptr. 2d 329 (2002). In *Pavlovich*, the California Supreme Court noted that “most courts agree that merely asserting that a defendant knew or should have known that his intentional acts would cause harm in the forum state is not enough to establish jurisdiction under [Calder’s] effects test.” *Pavlovich*, 29 Cal. 4th at 270 (emphasis added). *Pavlovich* involved a lawsuit filed by the

DVD Copy Control Association (“DVDCCA”) against Matthew Pavlovich (“Pavlovich”), a Texas resident. DVDCCA alleged that Pavlovich misappropriated DVDCCA trade secrets by posting the source code of a program called DeCSS, which allowed users to circumvent CSS (content scrambling system) technology which generally prevented the playing of copyrighted motion pictures without the necessary algorithms and keys. Pavlovich had never been to California and had no direct contacts with California, but DVDCCA argued that since he knew or should have known that he harmed the motion picture industry by posting DeCSS, he should anticipate being haled into a California court. The California Supreme Court disagreed:

DVDCCA’s argument therefore boils down to the following syllogism: jurisdiction exists solely because Pavlovich’s tortious conduct had a foreseeable effect in California. But mere foreseeability is not enough for jurisdiction. [citations omitted] Otherwise the commission of any intentional tort affecting industries in California would subject a defendant to jurisdiction in California. We decline to adopt such an expansive interpretation of the effects test.

Pavlovich, 29 Cal. 4th at 277 (emphasis added) (citing *Callaway Golf Corp. v. Royal Canadian Golf Ass’n*, 125 F. Supp. 2d 1194, 1200 (C.D. Cal. 2000) (finding jurisdiction not proper against Canadian not-for-profit entity which allegedly libeled California corporation based on Canadian entity’s presumed knowledge of California plaintiff’s location and principal place of business) (“Merely knowing that a corporate [plaintiff] might be located in California does not fulfill the effects test.”)).

Many other recent cases have similarly rejected an expansive reading of *Calder*’s effects test. For example, *Young v. New Haven Advocate*, involved a Virginia prison

warden's claims that he had been defamed by an article published by Connecticut newspapers and posted on-line. The reporters knew that the subject of the story resided in Virginia and made several calls into Virginia to gather information for the articles. The lower court accepted the warden's claims that jurisdiction was proper because the newspapers knew that the warden would be harmed in Virginia since he resided and worked there. The Fourth Circuit disagreed, holding that the newspapers, "through the Internet postings, [did not] manifest an intent to target and focus on Virginia readers." *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

E. POLICY REASONS COUNSEL AGAINST THE SINGLE EMAIL RULE

To find jurisdiction on the basis of one single un-targeted e-mail message alone would require every single business operating over the Internet to be apprised of, and comply with, a patchwork of state and international laws, even though a particular business may not have purposefully directed any activity to those jurisdictions. This requirement would place an untenable burden on businesses who only plan on conducting business locally and who may lack the necessary resources to conduct their business on a national scale. As stated by this Court:

It requires but a moment's reflection to see what practical difficulties could result if the many thousands of retailers, who sell the many thousands of products, which are transported into other states, were required to defend wherever it might be alleged that the product had arrived and caused injury.

Pellegrini v. Sachs & Sons, 522 P.2d 704, 707 (Utah 1974).

F. EVEN IF THE COURT FINDS PURPOSEFUL AVAILMENT, THE EXERCISE OF JURISDICTION WOULD BE CONTRARY TO TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

Even if the Court finds sufficient contacts between Mleads and the State of Utah, Due Process further requires the Court to consider whether the assertion of personal jurisdiction offends “traditional notions of fair play and substantial justice.” *Arguello v. Industrial Woodworking Machine Co.*, 838 P.2d 1120, 1122 (Utah 1992). This inquiry requires the Court to weigh (1) the burden on defendants; (2) the forum state’s interest in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient relief; (4) the interest of the interstate system in the most efficient resolution of disputes; and (5) the collective interests of states in furthering important substantive social policies. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

1. The burden on Mleads is substantial.

As recognized by the Court of Appeals, “traveling to Utah and hiring Utah counsel to defend itself in this case undoubtedly burdens Mleads, a small, Arizona-based company.” *Fenn*, 2004 UT App 412, at p. 25. This factor weighs against reasonableness. Additionally, the burden on the non-resident defendant must be viewed in light of the importance of the conflict, which is often evidenced by the amount in controversy. *Id.* Admittedly, Mleads would be significantly taxed by being required to litigate this claim in Utah Courts. However, when viewed in the context of the amount in controversy (i.e., ten

dollars (\$10.00) per e-mail (*see* R. 2, Complaint ¶ 12) the burden on Mleads becomes unreasonable, and the exertion of personal jurisdiction contravenes traditional notions of fair play and substantial justice.

2. The forum state's interest in adjudicating the dispute.

The forum state has an obvious interest in ensuring resolution of a claim brought by one of its citizens. In this case, however, two facts tip this factor against finding jurisdiction. First, as noted below, the plaintiff in this case asserts a violation of statutory rights and not an injury to person or property. Second, the Statute has since been repealed by the Utah legislature (*see* Utah Repeal of Unsolicited Commercial or Sexually Explicit Email Act, ch 278, § 1, 2004 Utah Laws 278), and Congress enacted a statute superseding the Statute (15 U.S.C. § 7701, *et seq.* (the CAN-SPAM Act of 2003) (providing that it “supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto”). These developments show both a diminished state interest in resolving these types of claims and a federal pronouncement that these types of claims are better regulated through federal laws.

3. The plaintiff's interest in obtaining convenient and effective relief.

Fenn undoubtedly has an interest in obtaining convenient and effective relief with

respect to her claims. However, “Fenn did not allege that she suffered any economic, physical, emotional, or dignitary damages.” *Fenn*, 2004 UT app 412, p2. Thus, the strength of Fenn’s interest is significantly less than it would have been if she were seeking to vindicate personal injuries or reputational injuries.

4. The interest of the interstate system in the most efficient resolution of disputes.

This interest of the interstate system requires this case to be dismissed. The particular e-mail in question can subject Mleads to damages of ten dollars (\$10.00). It makes little sense from an efficiency standpoint to force Mleads to expend far in excess of the amount of the claim to defend against the claim. A more efficient way to resolve the dispute is to place the burden on the plaintiff who is then appropriately incentivized (by the availability of attorney’s fees) to bring the lawsuit or to refrain from doing so.

5. The collective interests of states in furthering important substantive social policies.

The repeal of the Statute and the enactment of federal legislation superseding the Statute greatly diminish the interest of the State of Utah in furthering the social policies the Statute targets. Instead, the facts of this case should be brought under statutes compliant with the federal legislation, instead of under the repealed Statute. Consequently, jurisdiction in Utah for this case is improper.

IX. CONCLUSION

The Court of Appeals incorrectly held that Mleads is properly subject to jurisdiction in the State of Utah on the basis of one single e-mail that “Mleads did not know specifically . . . [would reach] Fenn or . . . any Utah resident.” The Due Process Clause requires purposeful availment. In this case, Mleads did not purposefully direct any activity to Utah. Accordingly, Mleads respectfully requests this Court reverse the judgment below and direct the Court of Appeals to enter an order affirming dismissal of the Complaint by the trial court.

DATED this 4th day of May, 2005.

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X. APPENDICES

Appendix 1: The Due Process Clause of the United States Constitution

Appendix 2: Copies of Opinions of the Court of Appeals

APPENDIX A-1

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES, AND REGULATIONS

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV, § 1.

APPENDIX A-2

COPIES OF THE OPINIONS OF THE COURT OF APPEALS

LEXSEE

Brittney Fenn, on behalf of herself and all others similarly situated, Plaintiff and Appellant, v. MLeads Enterprises, Inc.; and John Does I through X whose true names are unknown, Defendants and Appellees.

Case No. 20030948-CA

COURT OF APPEALS OF UTAH

2004 UT App 412; 103 P.3d 156; 512 Utah Adv. Rep. 37; 2004 Utah App. LEXIS 452

November 12, 2004, Filed

SUBSEQUENT HISTORY: Writ of certiorari granted *Fenn v. Mleads*, 2005 Utah LEXIS 42 (Utah, Mar. 17, 2005)

PRIOR HISTORY: [***1] Third District, Sandy Department. The Honorable Denise P. Lindberg.

DISPOSITION: Dismissal vacated; remanded for further proceedings.

LexisNexis(R) Headnotes

COUNSEL: Daniel Garriott, Denver C. Snuffer Jr., Sandy, and Jesse L. Riddle, Draper, for Appellant.

Jill L. Dunyon, Salt Lake City, Derek A. Newman and Venkat Balasubramani, Seattle, Washington, for Appellees.

JUDGES: Before Judges Bench, Jackson, and Orme.

OPINIONBY: JACKSON

OPINION: [**158] JACKSON, Judge:

[*P1] The district court dismissed Plaintiff Brittney Fenn's claim for lack of personal jurisdiction; Fenn appeals. We vacate the dismissal and remand.

BACKGROUND

[*P2] MLeads Enterprises, Inc. (MLeads), an Arizona corporation, contracted with a marketing agent to advertise MLeads's services to consumers. In August 2002, Fenn, a Utah resident, received one unsolicited email that advertised MLeads's services. MLeads did not know specifically that the agent would send an email to Fenn or to any Utah resident. The email did not include "ADV:" in the subject line. Fenn brought suit against MLeads pursuant to the Unsolicited Commercial and

Sexually Explicit Email Act (the Email Statute). See Utah Code Ann. §§ 13-36-101 [***2] to-105 (Supp. 2003) (repealed 2004). [**159] Fenn did not allege that she suffered any economic, physical, emotional, or dignitary damages.

[*P3] We must decide whether the state can exercise personal jurisdiction over a defendant who caused one unsolicited commercial email to be sent to a resident of the state. n1 This issue is a matter of first impression in Utah and, as far as our research has revealed, in all of the United States. Accordingly, to aid understanding of the issue, we will describe the context in which this issue arose.

n1 Because the trial court disposed of this case at an early stage, some important facts remain unresolved. Specifically, the parties dispute whether Fenn had consented to receive the email in a previous visit to the website of a related entity and whether MLeads or its marketing agent had any means to discover the physical location or residency of the recipients of its email. The record also contains no information as to the nature of the agreement between MLeads and its marketing agent.

We similarly have no information on whether an automated system or an employee generated the email. Simple software tools automate the process by which email are created and transmitted, enabling companies to eliminate employee involvement after the initial programming.

[***3]

[*P4] In 1994, companies began to market via unsolicited email. See Elizabeth A. Alongi, Note, Has the U.S. Canned Spam?, 46 *Ariz. L. Rev.* 263, 263 (2004). Since then, the rate at which companies use unsolicited email to advertise has grown exponentially. See *id.* By 2003, fifty-

2004 UT App 412, *P4; 103 P.3d 156, **159;
512 Utah Adv. Rep. 37; 2004 Utah App. LEXIS 452, ***

six percent "of all email traffic" was unsolicited commercial email. *Id.* It can be quite costly to Internet service providers and corporations to receive massive volumes of unsolicited email. See *id.* at 264.

[*P5] In response to the growing problem, in 1999, Tennessee became the first state to require the characters "ADV:" in the subject lines of unsolicited commercial email. See Tenn. Code Ann. § 47-18-2501 (Supp. 1999). Three years later, Utah codified the Email Statute. See Utah Code Ann. §§ 13-36-101 to-105 (repealed 2004). The Email Statute required that unsolicited commercial email include "ADV:" as the first four characters in the subject line. See *id.* § 13-36-103(1)(b)(i) (repealed 2004). The Email Statute allows for civil enforcement by permitting recipients to recover reasonable attorney fees and [***4] costs in addition to the lesser of \$10 per email or \$25,000 per day. See *id.* § 13-36-105(2) (repealed 2004).

[*P6] By 2002, when the legislature passed the Email Statute, Utah became one of four states to have such legislation. See *id.*; Colo. Rev. Stat. § 6-2.5-103 (2000); Kan. Stat. Ann. § 50-6,107 (Supp. 2003); Tenn. Code Ann. § 47-18-2501 (Supp. 2003). Thus, Utah's requirement was unusual but not unique, and such requirements had existed for three years by the time that Fenn received the email in this case.

[*P7] Despite the four states' laws, the problem of unsolicited email continued. In 2003 and 2004, twelve other states adopted legislation requiring "ADV:" in the subject line of unsolicited commercial email. n2 Finally, in 2003, Congress passed legislation regulating unsolicited commercial email. See 15 U.S.C. §§ 7701-7713 (Supp. 2004). The federal law aims primarily at fraudulent or misleading email, rather than nonfraudulent, unsolicited email, as is at issue here. See *id.* The federal law does not require the "ADV:" text and preempts state statutes, such as the Email Statute. See *id.* [***5]

n2 See, e.g., Ariz. Rev. Stat. § 44-1372.01 (Supp. 2004); 815 Ill. Comp. Stat. 511/10 (Supp. 2003); La. Rev. Stat. Ann. § 51:1741.1 (Supp. 2003); Me. Rev. Stat. Ann. tit. 10, § 1497 (Supp. 2003); Mich. Comp. Laws §§ 445.2503-.2508 (Supp. 2003); Minn. Stat. § 325F.694 (repealed 2003); Mo. Rev. Stat. § 407.1138 (Supp. 2003); N.M. Stat. Ann. §§ 57-12-23 to-24 (Supp. 2003); N.D. Cent. Code § 51-27-04 (Supp. 2003); 15 Okl. St. Ann. § 776.6 (Supp. 2004); S.D. Codified Laws § 37-24-6(13) (Supp. 2003); Tex. Bus. & Comm. Code Ann. § 46.003 (Supp. 2003).

ISSUE AND STANDARD OF REVIEW

[*P8] This case requires us to determine whether a Utah court has authority to exercise personal jurisdiction over a defendant whose only contact with the state was to employ an agent [***6] who sent one unsolicited commercial email to a resident of Utah. Because this pre-trial jurisdictional decision was made on documentary evidence only, it presents only legal questions that are reviewed for correctness. See *Starways, Inc. v. Curry*, 1999 UT 50,P2, 980 P.2d 204.

[**160] [*P9] The Email Statute has been superseded by federal law, see 15 U.S.C. §§ 7701-7713 (Supp. 2004), and repealed by the Utah legislature, see Utah Repeal of Unsolicited Commercial or Sexually Explicit Email Act, ch. 278, § 1, 2004 Utah Laws 278. However, during the time in which the statute was in effect, the lower court announced its decision. We review the trial court's decision in light of the statutory scheme in effect at the time, i.e., while the Email Statute was in effect. See *State v. Webster*, 2001 UT App 238,PP1, 41, 32 P.3d 976; *Barber v. Farmers Ins. Exch.*, 751 P.2d 248, 249 (Utah Ct. App. 1988).

ANALYSIS

[*P10] To exercise jurisdiction, (i) a Utah statute must permit the court to exercise jurisdiction, and (ii) the exercise of jurisdiction must "comport[] with due process requirements of the Fourteenth [***7] Amendment." *Lee v. Frank's Garage & Used Cars, Inc.*, 2004 UT App 260,P7, 97 P.3d 717 (quoting *In re W.A.*, 2002 UT 127, P14, 63 P.3d 607, cert. denied, 538 U.S. 1035, 155 L. Ed. 2d 1065 (2003)).

I. Statutory Requirement

[*P11] Fenn argues that the Email Statute itself implicitly confers jurisdiction because it creates a cause of action. However, even assuming that Fenn preserved and adequately briefed this point, the Utah Supreme Court recently foreclosed this argument: "Liability and jurisdiction are independent. . . . [The statute] speaks to liability only and does not purport to grant personal jurisdiction. Nothing in the statutory language indicates that the legislature intended to do so." *MFS Series Trust III v. Grainger*, 2004 UT 61,P21, 96 P.3d 927, 504 Utah Adv. Rep. 7 (quotations and citation omitted). Thus, to convey jurisdiction, a statute must do more than merely create a cause of action.

[*P12] Fenn alternately argues that the state's long-arm statute, Utah Code section 78-27-24 (1998), confers personal jurisdiction over MLeads. The long-arm statute provides:

Any person . . . whether or not a citizen or resident of [***8] this state, who in person

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or through an agent does any of the following enumerated acts, submits himself . . . to the jurisdiction of the courts of this state as to any claim arising out of or related to:

- (1) the transaction of any business within this state; . . . (3) the causing of any injury within this state whether tortious or by breach of warranty[.]

Utah Code Ann. § 78-27-24(1),(3) (1998). Subsection (1) applies to this situation because advertising in the state qualifies as the "transaction of any business within this state." n3 Id. § 78-27-24(1). In any event, "the Utah long-arm statute 'must be extended to the fullest extent allowed by due process of law.'" *Starways*, 1999 UT 50 at P7 (quoting *Synergetics v. Marathon Ranching Co Ltd.*, 701 P.2d 1106, 1110 (Utah 1985)); see also Utah Code Ann. § 78-27-22 (1969). Hence, whether the long-arm statute provides jurisdiction in this case depends only upon whether due process permits the exercise.

n3 Whether subsection (3) applies depends on whether a statutory violation constitutes an "injury." We decline to address that issue here.

[***9]

II. Due Process

[*P13] A court can exercise two forms of personal jurisdiction: (i) general and (ii) specific. See *Phone Directories Co., Inc. v. Henderson*, 2000 UT 64, P11, 8 P.3d 256. The plaintiff bears the burden of establishing personal jurisdiction over the defendant. See *Neways, Inc. v. McCausland*, 950 P.2d 420, 422 (Utah 1997). Fenn does not allege that Utah could exercise general personal jurisdiction over MLeads. Thus, we consider only whether Fenn established that the court could exercise specific personal jurisdiction.

[*P14] A democratic government must exercise its powers against only those who have in some way assented to the governmental power, such as by pursuing the benefits available in the forum. Accordingly, due process requires that the defendant have "minimum contacts" with the forum jurisdiction [*P161] "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *MFS Series Trust*, 2004 UT 61 at PP9,10 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)).

[*P15] Courts previously have articulated [***10] the framework of personal jurisdiction analysis in sev-

eral ways. Compare *Starways, Inc. v. Curry*, 1999 UT 50, PP8, 11, 980 P.2d 204, with *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 661-62 (Utah 1989). Most recently, Utah has applied a four-part analysis to the due process inquiry. See, e.g., *MFS Series Trust*, 2004 UT 61 at P10. Despite the differences in the organization and structure, this four-part analysis makes fundamentally the same queries as the other analyses.

[*P16] First, the court considers if the defendant "purposefully availed itself of the privilege of conducting activities within the forum state." Id. (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)) (other citation and alteration omitted). Second, the court considers whether the claim arose out of the defendant's Utah activity. See id. (citing *Neways, Inc. v. McCausland*, 950 P.2d 420, 423 (Utah 1997)). Third, the court considers if the defendant "should [have been able to] reasonably anticipate being haled into court" in Utah. Id. (citing *Synergetics*, 701 P.2d at 1110) [***11] (other citation omitted). Finally, the court considers the state's interest and "fairness" to the parties. Id.

A. Purposeful Availment

[*P17] Under the first prong, a state may exercise jurisdiction only against a defendant who has "purposefully directed his activities at residents of the forum." n4 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) (quotations and citation omitted). For example, the United States Supreme Court deemed a defendant's activities "purposefully directed" when a corporation placed products in "the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injured consumers." Id. at 473 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)). Likewise, the Court deemed a magazine publisher's activities "purposefully directed" when the publisher distributed a defamatory story in the forum. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984); see also *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)). [***12]

n4 We recognize that a status exception exists to this rule, but it is inapplicable in this case. See *In re W.A.*, 2002 UT 127, 63 P.3d 607, cert. denied, 538 U.S. 1035, 155 L. Ed. 2d 1065 (2003).

[*P18] In a similar vein, in a case in which the defendants allegedly made defamatory statements to individuals in Utah and caused libelous facsimiles to be sent to Utah, the Utah Supreme Court held that a court prop-

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erly exercised jurisdiction. See *Starways*, 1999 UT 50 at PP5, 12. Moreover, email contacts alone can establish jurisdiction when the contacts are extremely numerous. See *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601 (E.D. Va. 2002); *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773 (S.D. Miss. 2001) (involving millions of email); *Washington v. Heckel*, 122 Wn. App. 60, 93 P.3d 189, 193 (Wash. Ct. App. 2004) (involving millions of email but not directly addressing personal jurisdiction).

[*P19] The Utah [***13] Supreme Court noted in dicta in *Starways* that Utah could not properly exercise jurisdiction against a defendant who "did not cause" communications "to be transmitted into Utah but did send them elsewhere . . . [even if the defendant could have] reasonably foreseen that a copy would end up in Utah." *Starways*, 1999 UT 50 at P12 n.3. "Such an attenuated nexus would not be sufficient, standing alone, to justify the imposition of personal jurisdiction. . . ." *Id.* Thus, foreseeable but undirected contacts cannot justify a court's exercise of jurisdiction.

[**162] [*P20] This case incorporates aspects of both the circumstances hypothesized in *Starways* and the intentional availment of forum markets in *World-Wide Volkswagen* but is not squarely on point with either case. In this case, unlike *World-Wide Volkswagen*, MLeads did not place a "product" into the stream of commerce. Moreover, Fenn does not allege that the email caused any reputational, economic, emotional, or physical "injury." On the other hand, unlike the hypothetical situation posited in *Starways*, MLeads did cause the communications to come into Utah.

[*P21] The extent to which the defendant [***14] caused the result is the more important aspect of the analysis. MLeads caused its agent to send email, and the agent sent an email to Fenn, who is a resident of Utah. The record does not disclose whether the agent sent a large volume of email all over the country or whether it sent one email to Fenn specifically. In either case, MLeads directed its agent to solicit business, and that direction instantiates the purpose that makes the connection more than an "attenuated nexus."

B. Reasonably Anticipate Being Haled Into Court n5

n5 We dispense with the second query of the minimum contacts test because Fenn's claim clearly arose out of activity in Utah.

[*P22] Under the next prong of our analysis, for a court to exercise jurisdiction, "defendants' conduct and connection with the forum State must be such that they should [have been able to] reasonably anticipate

being haled into court there." *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106, 1110 (Utah 1985) (quoting *World-Wide Volkswagen*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)) [***15] (alterations omitted). This inquiry closely parallels the purposeful availment test: courts have exercised jurisdiction against a defendant whose activity was directed toward the forum state. For example, the Court of Appeals for the Tenth Circuit has held that a court may exercise jurisdiction in a defamation case in which the defendant mailed a single letter into the forum. See *Burt v. Board of Regents*, 757 F.2d 242, 244-45 (10th Cir. 1985).

[*P23] Similarly, the Arkansas Supreme Court upheld the exercise of jurisdiction against a defendant who sent email to a recipient in Arkansas. See *Kirwan v. Arkansas*, 351 Ark. 603, 96 S.W.3d 724, 731 (Ark. 2003) (discussing territorial jurisdiction over a criminal defendant). The statute at issue in *Kirwan* made it illegal to "distribute," "ship," or "exchange" certain materials. *Id.* The court reasoned that the objectionable conduct was delivery of the email and thus that the conduct occurred in Arkansas, even if the email were sent from another state. See *id.* In the case at hand, the Email Statute made it illegal to "send[]" noncompliant email "to an email address held by a resident of [Utah]. [***16] " Utah Code Ann. § 13-36-103(1). In this context, "send" and "ship" are synonyms, and thus the conduct at issue here occurred in Utah, even if the "sending" was done from another state. n6

n6 Without commenting on the adequacy of such a claim in Utah, we also recognize that a federal district court in Virginia exercised jurisdiction on the basis that the out-of-state defendants accessed the Internet through an Internet service provider headquartered in Virginia. See *Bochan v. La Fontaine*, 68 F. Supp. 2d 692, 695-96, 699 (E.D. Va. 1999).

[*P24] In contrast, courts have held jurisdiction to be improper where a defendant maintains only passive contact with the forum, as through posting a static internet website. See *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1298-99 (10th Cir. 1999); *Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1323-24 (D. Utah 1998). Sending an email to a forum requires more purpose than maintaining a passive internet [***17] website, however. Thus, MLeads should have anticipated being haled into court wherever its email were received, even in Utah.

C. State's Interest and Fairness

[*P25] To assess the final prong of our analysis and

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determine whether jurisdiction would offend "traditional notions of fair play and substantial justice,"

generally, a court weighs: (1) the burden on the defendants; (2) the forum state's [**163] interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interest of the interstate system in the most efficient resolution of disputes; and (5) the collective interests of states in furthering important substantive social policies.

Internet Doorway, Inc. v. Parks, 138 F. Supp. 2d 773, 779 (S.D. Miss. 2001) (citation omitted). First, traveling to Utah and hiring Utah counsel to defend itself in this case undoubtedly burdens MLeads, a small, Arizona-based company.

[*P26] Second, by virtue of the fact that its legislature enacted this statute, Utah demonstrates an interest in preventing its residents from receiving noncompliant email. Yet, this interest can be recognized honestly [***18] only as relatively minor. Fenn did not allege any injury. Fenn alleged that she received one statute-violative email from MLeads. Utah has since repealed this statute, and Congress did not include the text requirement in the federal legislation. See 15 U.S.C. §§ 7701-7713. Further, when courts have found that personal jurisdiction did exist to enforce similar legislation against nonresident defendants, the cases involved allegations of fraud and millions of email, which are not alleged here. n7 See *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 601 (E.D. Va. 2002); *Internet Doorway*, 138 F. Supp. 2d at 774; *Washington v. Heckel*, 122 Wn. App. 60, 93 P.3d 189, 191-92, 193 (Wash. Ct. App. 2004). Nonetheless, Utah has an interest in the enforcement of its statutes for the benefit of its residents.

n7 Also, two of these cases were brought by Internet service providers, who suffer significantly more injury than an individual email recipient. See *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 604 (E.D. Va. 2002); *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 774 (S.D. Miss. 2001).

[***19]

[*P27] Third, Fenn has an economic interest in this lawsuit. The statute provided that the recipient of an unsolicited email could recover actual damages, or \$10 per unsolicited email to a maximum of \$25,000 for each day

that the violation occurred, as well as costs and attorney fees. See Utah Code Ann. § 13-36-105. Because Fenn pleaded no damages and received only one unsolicited email from MLeads, she could recover \$10. n8

n8 This assumes that because Fenn is not a lawyer she is ineligible to share the proceeds of the attorney fees award pursuant to rule 5.4 of the Utah Rules of Professional Conduct. See Utah R. Prof'l Conduct 5.4(a).

[*P28] Moreover, while the test here does not explicitly consider the possible benefits to the plaintiff's attorney, the Email Statute's award of attorney fees reflects the Utah Legislature's interest in encouraging private parties, such as Fenn, to enforce this statute. Because Utah benefits from its attorneys earning fees and Fenn benefits from having [***20] attorneys who will represent her rights, such benefits should be considered.

[*P29] Fourth, in considering "the interest of the interstate system in the most efficient resolution of disputes," *Internet Doorways*, 138 F. Supp. 2d at 779, we recognize that if we affirm the dismissal of this case, Fenn likely will have no recourse. n9 Such a dismissal may be an efficient resolution, but a dismissal would abandon the fifth factor, the "important substantive social policies" at issue in this case. *Id.* Accordingly, we hold that the interests of Utah and Fenn in prosecuting this case outweigh the burden placed on MLeads. Thus, the exercise of personal jurisdiction in this case is fair and comports with traditional notions of fair play and substantial justice.

n9 Fenn probably would not have a claim under federal law, common law, or the laws of the states that arguably have more connection to the activities at issue here. The federal CAN-SPAM law was not in effect at the time and probably would not be implicated in this situation. See 15 U.S.C. §§ 7701-7713 (Supp. 2004). Further, Fenn may have brought a common law trespass to chattel claim, but a successful claim would require Fenn to prove actual damages. See *Intel v. Hamidi*, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (Cal. 2003); *Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255, 115 Cal. Rptr. 2d 258, 261 (Cal. Ct. App. 2002). Arizona, where MLeads is based, did not have a similar statute in effect at the time of this email, and its current statute provides for enforcement through the attorney general only. See Ariz. Rev. Stat. § 44-1372.01 (Supp. 2004) (effective Sept. 18, 2003). Florida, where MLeads's marketing agent is based, has no similar provision.

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[***21]

proceedings as may now be appropriate.

[**164] CONCLUSION

Norman H. Jackson, Judge

[*P30] Sending one email to a resident of Utah is sufficient "contact" to satisfy the long-arm statute and the minimum contacts requirement of due process for a statutory claim arising from the sending of that email. Additionally, the state's and Fenn's interests in this case trump the burdens imposed upon MLeads. Thus, we hold that the district court ruled incorrectly in dismissing this case on summary judgment for lack of personal jurisdiction. We vacate the dismissal and remand for such

[*P31] I CONCUR:

Gregory K. Orme, Judge

[*P32] I DISSENT:

Russell W. Bench,

Associate Presiding Judge

PROOF OF SERVICE

The undersigned certifies that on this 4th day of May, 2005, I caused the foregoing **OPENING BRIEF OF APPELLANT** (original and 10 copies to Clerk; and 2 copies to Appellee) to be sent via First Class U.S. Mail to the Utah Supreme Court at the following address:

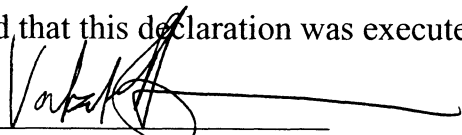
Utah Supreme Court
PO Box 140230
Salt Lake City, UT 84114-0230

and I also caused the same to be served via First Class U.S. Mail on the following party:
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I declare under penalty of perjury under the laws of the State of Utah and the United States that the foregoing is true and correct and that this declaration was executed on May 4th, 2005 at Seattle, Washington.



Venkat Balasubramani