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PHILADELPHIA COUNTY COURT OF COMMON PLEAS
TRIAL DIVISION

FREDERICK RITTERREISER, and ASHTON TECHNOLOGY GROUP, INC., Plaintiffs, v. MARY CUMMINS, JOHN DOE #1, and JOHN DOES #2 through #5, Defendants.	)	April Term, 2001 No. 0104 002722

MEMORANDUM IN SUPPORT OF

DEFENDANT CUMMIN'S PRELIMINARY OBJECTIONS (Pa.R.C.P. 1028(a))

Defendant Mary Cummins (herein "Defendant") respectfully submits the following memoranda in support of Defendant's preliminary objections pursuant to Pa.R.C.P. 1028(a)(1), Pa.R.C.P. 1028(a)(2), Pa.R.C.P. 1028(a)(3), and Pa.R.C.P. 1028(a)(4). The Court should consider each preliminary objection to be alternative to the remaining objections. Defendant will rely upon the following memoranda of points and authorities, and the Affidavit of Mary K. Cummins and its exhibits, attached herewith and expressly incorporated therein.

I. Jurisdiction (Pa.R.C.P. 1028(a)(1))

(a) Objection. Defendant objects to Plaintiffs' complaint in its entirety, on the ground that it does not allege facts which establish personal jurisdiction over Defendant in Pennsylvania. Defendant further objects to Plaintiffs' complaint in its entirety, on the ground that the Courts of Pennsylvania do not have personal jurisdiction over Defendant. No statement of fact was made in Plaintiffs' Answer to this objection to allege facts which establish personal jurisdiction over Defendant.

(b) Memorandum of Points and Authorities. Plaintiffs Rittereiser and Ashton Technology Group, Inc. (herein "Plaintiffs") have failed to plead facts which, if true, would establish personal jurisdiction over Defendant in this case, pursuant to Phil.R.C.P. *205.2(D). Because Plaintiffs make no such averment, and because Plaintiffs allege as a statement of fact that Defendant is a "citizen" of the state of California (see Plaintiffs' Complaint at ¶ 4), Defendant can only presume that Plaintiffs intend to establish jurisdiction under Pennsylvania's "long arm statute" (42 Pa. C.S. § 5322(b)). However, the Complaint does not set forth facts that would establish personal jurisdiction under this statute.

Defendant's second objection based on jurisdiction, and alternative to Plaintiffs' utter failure to plead jurisdictional facts, is that the Pennsylvania Courts in fact lack personal jurisdiction over Defendant Cummins under 42 Pa. C.S. § 5322(b).

42 Pa. C.S. § 5322(a)(3) and 42 Pa. C.S. § 5322(a)(4) establish personal jurisdiction when the alleged injury or alleged cause of action is alleged to have occurred within the borders of the Commonwealth; subsection (b) can apply if it is shown that Defendant has minimum contacts with or within the Commonwealth. None of these is true in the instant case, which is an alleged defamation case involving publication on the Internet. For purposes of applying Pennsylvania's long-arm statute, Defendant will rely upon Pennsylvania law as explained under *Barrett v. Press* (cited below), which is the preeminent case defining jurisdiction in Internet defamation suits under Pennsylvania law.

Factual background. Plaintiff Rittereiser alleges that he is a resident of New Jersey, and Plaintiff Ashton Technology alleges that it is a Delaware corporation. Rittereiser alleges

in his pleading that he conducts business within the Commonwealth of Pennsylvania by and through his relationship with Plaintiff Ashton Technology, as an officer and director. Plaintiff Rittereiser further states that his principal place of business is located in Philadelphia, which is also the primary office location of his employer, Ashton Technology.

Defendant Cummins, is a resident of the State of California. Defendant conducts business in, and is licensed to conduct business in, the State of California exclusively. See *Affidavit of Mary K. Cummins* throughout. Defendant subscribes to an Internet public message board service provided by Yahoo!, Inc. ("Yahoo").

Yahoo! is located, headquartered, and operated in California. Yahoo! permits viewers and subscribers, pursuant to Yahoo!'s Terms of Service Agreement, to both view and post opinions on its popular finance message boards. *Exhibit A.* Internet public message boards are considered to be a bastion of free speech in American opinion, involving the free exercise of First Amendment privileged speech. *Global Telemedia International, Inc. v. Doe 1*, No. SA CV 00-1155 DOC (C.D.Cal. 02/23/2001). Plaintiffs' complaint revolves entirely around opinions which Defendant published on the Yahoo! message boards, which Plaintiffs allege are defamatory. The alleged defamatory messages are attached as an exhibit to Plaintiffs' complaint.

In order to view the alleged statements, as well as all other content on the Yahoo! message boards, Plaintiffs would have had to agree to accept the *Exhibit A* Yahoo! Terms of Service contract when viewing and printing out the messages alleged to be published by Defendant. The *Exhibit A* agreement, which was transacted with a California company conducting business in California, specifies that venue for any litigation arising out of the agreement shall be within the State of California. Furthermore, the agreement specifically prohibits the user from publishing defamatory content on the Yahoo! message boards. In

order to publish messages on the Yahoo! boards, Defendant had to agree to the Yahoo! Terms of Service agreement, while, in order to view the messages published by Defendant, both Rittereiser and Ashton Technology also had to enter into the terms of service agreement. Therefore, for purposes of venue, all three parties have stipulated to venue in California by virtue of the Yahoo! contract, which is incorporated by reference on every web page within the Yahoo! web site.

Showing jurisdiction. *Barrett v. Press* has an excellent discussion on "Internet Activity" and is incorporated herein by reference. *Barrett v. Press,* No. 99-736 (E.D.Pa. 04/12/1998) see ¶¶ 31-46 relating to the nature of Internet Activity.

Aside from the aforementioned *Exhibit A* contract, Plaintiffs must first prove Defendant had minimal contacts with the Commonwealth and reasonably anticipated "being haled into court there". *World-Wide Volkswagen,* 444 U.S. at 297 as cited in *Barrett*. While *World-Wide Volkswagen* permits the Court to "presume" the allegations are true, Plaintiffs make no allegations in their complaint that Defendant has had any minimal contacts with the forum state. Indeed, Defendant has never conducted business within Pennsylvania; has never resided in Pennsylvania; has never visited Pennsylvania. Defendant has never conducted business with Plaintiff Ashton Technology, or its CEO, Plaintiff Rittereiser. In summary, there are no minimal contacts with the forum state which Plaintiffs could possibly attribute to Defendant. Plaintiffs may otherwise argue (but failed to plead in their complaint) that Defendant interfered with the business operations of Plaintiff Ashton Technology, which has an office in Pennsylvania. But under *Barrett,* this argument (if proposed by Plaintiffs, which it wasn't) would fail because Plaintiffs would have to show that Defendant's minimal contacts within the Commonwealth were established purposefully. Ashton Technology is a national company and probably conducts more business, and sells more of its stock to shareholders, in

California and outside the Commonwealth than within. For example, Defendant Cummins, a California resident, purchased Ashton Technology stock in California through a California-licensed stock broker, E-Trade. Defendant's messages were directed at that national audience (*Affidavit* throughout). Therefore, no "purposeful" contacts with Pennsylvania can be, or were, alleged by Plaintiffs. *Burger King Corp.,* 471 U.S. at 474 as cited in *Barrett.* Thus, Plaintiffs have failed to show, let alone allege, that Defendant purposely availed herself of the privilege of conducting business within the forum state through here Internet activities.

Second, *Barrett* requires the "Effects Test" as outlined in *Calder v. Jones*, 465 U.S. 783 (1984). The Effects Test focuses on the extent to which Defendant's alleged tortious conduct is aimed at or has effect in the forum state:

"The Third Circuit has elucidated the Calder "effects test" as follows:

(1) "The defendant committed an intentional tort;

(2) "The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort;

(3) "The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity." Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998)."

No such "effects" under (2) and (3) above are alleged in Plaintiffs' complaint. In fact, Plaintiffs state just the opposite, by alluding to "SEC investigations", "FBI investigations", and SEC and FBI "indictments" of Plaintiff Ashton's "former investment banking firm". The allegations of paragraphs 31 through 39 of Plaintiffs' complaint are national in nature, and

make no specific reference to Pennsylvania as being the "focal point" of said alleged injuries, but rather Plaintiffs aver by implication that the alleged injuries are "national" in nature. In order to pass the *Calder* tests, Plaintiffs would have to show that the alleged tortious conduct outside the Commonwealth was minimal when compared to that within the forum state. This is not possible since the Internet publications were directed at a national, and international audience as a whole, and were passive in nature.

Third, *Barrett* requires that the court consider "Fair Play and Substantial Justice" as the third and final prong of considering jurisdiction. Just as in *Barrett,* since Plaintiffs Rittereiser and Ashton Technology have failed to allege or prove that Defendant Cummins had minimum contacts with Pennsylvania necessary to have reasonably anticipated being haled into court in Pennsylvania, then this Court need not examine this element. *Penzoil Prods. Co.*, 149 F.3d at 201 (as cited in *Barrett*). The court states:

> "…we cannot help but think that the exercise of personal jurisdiction over non-commercial on-line speech that does not purposefully target any forum would result in hindering the wide range of Discussion permissible on listserves, USENET Discussion groups and Web sites that are informational in nature. However, we need not reach the issue of whether the exercise of jurisdiction would be reasonable or unfair in this case. Plaintiff has failed to prove that Defendant has the minimum contacts sufficient to meet the first prong of the specific jurisdiction analysis."

Even though this Court need not consider the element of "Fair Play and Substantial Justice", Defendant respectfully points out that had Plaintiffs brought suit in the proper forum in the State of California, Plaintiffs' claims would be subject to California's "anti-SLAPP" statute, which allows that jurisdiction to sanction plaintiffs who bring lawsuits which are frivolous, without merit, and which attack Internet message posters who engage in protected free speech. *Global Telemedia International, Inc. v. Doe 1*, No. SA CV 00-1155 DOC (C.D.Cal. 02/23/2001).

Summary. Defendant is a resident of California. Defendant conducts business only within California, and is licensed by the State of California to conduct business only within that state. Defendant has never conducted business in Pennsylvania, has never visited Pennsylvania, and has had no minimum contacts there. Defendant published messages on a web site maintained by a California company, under a contract which stipulates that venue is in California. The alleged Internet postings are passive in nature, such that they are not directed at any particular forum, but rather are posted in the general interests of the investing public.

Plaintiff Rittereiser is a resident of New Jersey. Plaintiff Ashton Technology is a Delaware corporation. Both Plaintiffs maintain a primary office in Pennsylvania, but conduct business nationally, including the State of California. Both Plaintiffs viewed the subject Yahoo! messages allegedly published by Defendant under a Terms of Service Agreement which stipulates that venue is in California.

Finally, Plaintiffs have failed to show that Defendant has had minimum contacts with the forum state, or that the focal point of the alleged tort(s) is Pennsylvania, more so than any

other forum. Accordingly, Plaintiffs' complaint should be dismissed for lack of personal jurisdiction over the Defendant pursuant to Pa.R.C.P. 1028(a)(1).

II. Failure of Plaintiffs to conform to law, and to rule of court (Pa.R.C.P. 1028(a)(2)).

(a) Objection. Defendant objects to Plaintiffs' Complaint in its entirety, because it fails to comply with Pa.R.C.P. 1020(a), and the Local Rules (Phil.R.C.P.) relating to Mandatory Arbitration and the Commerce Program.

(b) Memorandum of Points and Authorities. Defendant's objection here deals with Plaintiff's failure to conform to (1) Pa.R.C.P. 1020(a), (2) application of the "Civil Cover Sheet" which represents that the amount of Plaintiff's claims is less than $50,000 but not eligible for arbitration, and (3) Plaintiff's averment that this action is subject to the Commerce Program.

Rule 1020(a) requires that a separate cause of action be stated for each injury and the relief requested by the plaintiffs. Plaintiffs Rittereiser and Ashton Technology, in the within action, have appeared to formulate a mixture or "hodgepodge" of at least two or possibly three claims for relief, some with multiple counts, such that it is not discernable as to what claim for relief Plaintiffs are actually pleading (this will be discussed further below).

For example, in their pleading heading, Plaintiffs state that the action is a "complaint for injunctive relief"; also, in the "prayer" section following the pleadings, Plaintiffs allude to "Temporary, Preliminary, and Permanent" injunctive relief, but also alludes to "actual damages", "exemplary damages", and "punitive damages". Including the request for injunctive relief, Plaintiffs appear to be requesting multiple claims for relief. Yet only one claim for relief is pleaded jointly for both plaintiffs, "Libel and Business Defamation", which alleges that both plaintiffs business reputations have been damaged, and that Plaintiff Rittereiser's personal reputation has been damaged, and allege actual damages without specificity of amount. Both plaintiffs allege "damage to business reputation" but only Plaintiff Rittereiser alleges "damage to personal reputation". At the minimum, both plaintiffs would have to plea separate counts under Rule 1020(a). Therefore, the pleading of multiple claims for relief as a single "combined" claim are in violation of Rule 1020(a), and are such that the Defendant could not reasonably be expected to plea individual defenses against the multiple claims as pleaded.

Regarding the amount of Plaintiff's claim, Plaintiffs make no averment in their pleadings as to the amount of their claim. Therefore, Defendant is left to rely upon Plaintiffs' representation on the "Civil Cover Sheet", which is not part of the pleadings, that the amount of their respective claims is less than $50,000, or somewhere between $1 and $49,999.99. Therefore, Compulsory Arbitration is required under Local Rule 1301.

Finally, Plaintiffs plea that their action is subject to the Commerce Program. This is simply ridiculous. In order to qualify for the Commerce Program, the plaintiffs would have to allege that (1) Defendant Cummins is a business competitor of Plaintiff Ashton Technology; and (2) that in the course of business Defendant Cummins tortiously interfered with Plaintiffs' business activities. No such averments have been made. Accordingly, this Court should dismiss Plaintiffs' efforts to process this case under the Commerce Program.

III. Insufficient Specificity (Pa.R.C.P. 1028(a)(1)).

(a) Objection. Defendant objects to Plaintiffs' Complaint in its entirety, because its allegations lack the specificity required by **Pa.R.C.P. 1028(a)(1).**

(b) Memorandum of Points and Authorities. Plaintiffs' Complaint is so unclear in its allegations, that Defendant cannot properly answer. For example, is this a complaint for injunctive relief as stated in the heading? Or is this a claim for damages for libel and business defamation as stated in the single claim for relief? Furthermore, plaintiffs allege "libel per se" in paragraph 35, which would be a distinctly separate claim from "defamation and libel" and "injury to the business reputation" of both plaintiffs. Which is it? Or is it both or neither? As stated above, with the allusions to various claims and counts, all combined as a single claim, and the vagueness as to the intended claim as pleaded, Plaintiffs' claim(s) should be dismissed accordingly.

Finally, while Plaintiffs have properly, in their pleading, attributed specific alleged defamatory statements to specific defendants, Plaintiffs have in turn combined all allegations for claims for relief against all defendants, as though all defendants were responsible for posting all of the messages in Plaintiffs' Complaint. This is improper, because no conspiracy has been alleged by Plaintiff, and because the character, intent, and content of the messages posted by Defendant Cummins are extremely diverse from that of the messages posted by the other John Doe defendants. Accordingly, Plaintiffs' entire cause of action should be stricken and dismissed.

IV. Legal Insufficiency of Plaintiffs' Complaint (Pa.R.C.P. 1028(a)(4)).

(a) Objection. Defendant objects to Plaintiffs' Complaint in its entirety, because it fails to allege facts which, if true, would constitute a claim for relief against Defendant.

(b) Memorandum of Points and Authorities. Notwithstanding the confusion and vagueness of Plaintiffs' complaint as described above, Plaintiffs purport to make a claim for relief for injunctive order. Further claims are alluded to by Plaintiffs for defamation, business defamation, and libel per se. Even though it is Defendant's position that these claims, which are alluded to, have not been stated with sufficient specificity and in the proper form as separate claims and counts, Defendant will discuss the legal sufficiency of each claim as though they had been alleged in the proper form.

Injunctive Relief. In what can only be described as an "oxymoron", Plaintiffs Rittereiser and Ashton Technology request both "temporary" and "permanent" injunctive relief as part of the same cause of action (see "prayer", Plaintiffs' Complaint). This is contradictory and improper. If Plaintiffs are seeking temporary, i.e. preliminary relief, this can only be done through motion. See Local Rule 206.1(A)(1). **"Such requests shall be filed initially with the Prothonotary, and thereafter with the Motion Court."** Accordingly, this "temporary" reference should be stricken from Plaintiffs' Complaint.

As to permanent injunctive relief, Plaintiffs have to allege and show that Plaintiffs are subject to imminent harm which cannot be redressed by law. *Fox-Morris Associates, Inc. v.*

Conroy, 460 Pa. 290, 294, 333 A.2d 732, 734 (1975). An element is that the relief requested must protect from harm that is irreparable, that is, for which a damage amount cannot be determined. *Edward Soja and Barbara Soja v. Factoryville Sportsmen's Club* 1987.PA.348 (Blue Book citation).

Plaintiffs have made no such allegation or showing. To prove precise damages, Plaintiffs need only present expert testimony, and then try the mater before judge or jury. Indeed, Plaintiffs have demonstrated that any damages which they may allege are for a very specific amount a very specific amount. While not controlling, Plaintiffs have stated in the "Civil Cover Sheet" that the specific amount of damages is less than $50,000. Therefore, it is impossible for Plaintiffs to show cause for a claim of permanent injunctive relief when the damages are definite and limited, and all references thereto should be stricken.

Defamation. Notwithstanding Plaintiffs failure to allege their respective personal and business defamation claims as separate counts, Defendant will address here the legal insufficiency of these claims as though Plaintiffs had pleaded them appropriately.

Under Pennsylvania law, the elements of a prima facie case of defamation are: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) its understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. *Gilbert v. Bionetics Corp.*, No. 98-2668, 2000 WL 807015, at *3 (E.D. Pa. June 6, 2000) (citing 42 Pa.C.S.A. § 8343(a); *Elia v. Erie Ins. Exch.*, 634 A.2d 657, 659 (Pa. Super. Ct. 1993). When applicable to the defense, the Defendant has the burden of proving: "(1) the truth of the defamatory communication; (2) the privileged character of the occasion on which it was published; or (3) the character of the subject matter of defamatory comment as of public concern." Id.

In the instant case, Plaintiffs have not pleaded sufficient ultimate facts in order to meet the above requirements. For example, Plaintiffs, in their pleadings, admit the existence of past and ongoing FBI and SEC investigations of themselves, and the fact that Plaintiffs' former investment banker was indicted and charged with fraud, and as having Mob involvement. Plaintiffs, in their pleadings, make prima facie statements of fact which in fact tie Plaintiffs to various investigations including that of ties to the Mob. Therefore, it is impossible for Plaintiffs to allege defamation against Defendant Cummins under points (1), (3), (4), and (5) above, having admitted these circumstances as a defensive element of truth. As to the messages allegedly posted by Defendant Cummins, these are all postings of opinion referencing statements of fact which Plaintiffs have admitted to, and therefore cannot possibly be considered to be defamatory. Plaintiffs may not like the fact that Cummins and other defendants are publishing statements of what Plaintiffs may consider to be "old history" or "old news", but nonetheless Cummins and the other defendants are certainly entitled to express their opinions over these matters.

The Court must also consider whether the postings allegedly made by Defendant Cummins and offered by Plaintiffs as being "defamatory" offer a "prima facie defense", even though Defendant is not pleading defenses at this stage of the proceedings, because Plaintiffs have themselves alleged the truthful nature of the SEC and FBI investigations, the Mob ties of a former associate, and the criminal indictment of a former investment banker. *Conroy v.*

Pittsburgh Times, 139 Pa. 334, 339, 21 A. 154 (1891). See also *Global Telemedia*, cited above. Both Plaintiffs have admitted as to being public figures, inasmuch as Plaintiffs admit and have pleaded that Ashton Technology is a publicly traded company, and that Plaintiff Rittereiser is its CEO. Both Plaintiffs solicit the investing public and the market to give money to Plaintiff Ashton Technology in exchange for stock (see *Affidavit*). Therefore, all published communications by Defendant, as alleged by Plaintiffs, are privileged on their face under elements (2) and (3) above on Constitutional grounds, in that both Plaintiffs are public figures, and that the opinions and observations expressed by Defendant are matters of public interests. Accordingly, it would be impossible for Plaintiffs to prove that the subject published messages are defamatory, or to prevail at trial on this issue. Id. (See also *Keeshan v. Home Depot*, U.S.A., Inc., No. 00-529 (E.D.Pa. 03/27/2001) where the Pennsylvania cases are cited.)

Finally, in order to allege defamation, Plaintiffs must allege malice on the part of Defendant Cummins, because Plaintiffs are both public figures, as referenced above. *Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964); *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Plaintiffs have made no such statement of ultimate facts alleging malice (knowledge and intent), and accordingly, Plaintiffs cause of action must fail, because it cannot be supported lacking this crucial element.

Libel per se. Paragraph 35 of Plaintiffs' Complaint, as currently written, alleges libel per se on the part of all defendants. As referenced above, Plaintiffs make no attempt, in asserting this specific allegation, to sort out the various messages posted by the different defendants. In order to constitute libel per se, the publication must clearly assert that a crime had been committed by either or both of the Plaintiffs. *Rush v. Philadelphia Newspapers Inc.*, 732 A.2d 648, 1999 PA Super 141 (Pa.Super. 06/09/1999). Nowhere does Defendant Cummins state, nor do the Plaintiffs allege that she clearly stated, that either Plaintiff had committed an actual crime, or that any plaintiff had been convicted or accused of committing any crime. Rather, Plaintiffs allege that Defendant Cummins' posts "suggest involvement" (see ¶ 35). The statements allegedly made by Defendant Cummins which accurately associate both Plaintiffs to past FBI and SEC investigations, to a criminal indictment of a former associate of Plaintiffs, and to former ties with an entity controlled by the Mob, does not of, and by, itself contain an assertion that a crime had been committed by either Plaintiff. In the United States, it is the common knowledge, and the indisputable common belief, that a person is "innocent until proven guilty", and this adage is taught to every school child at a very young age. *Montgomery v. Dennison*, 363 Pa.255, n. 2, at 263, 69 A.2d 520 (1949). Therefore, when applying tests (4) and (5) under *Gilbert* above, it is inconceivable that any Internet message recipient (i.e. the reader) could have mistakenly understood that Defendant was clearly stating that Plaintiffs had committed a crime, or had been convicted of committing a crime, when expressing her opinions and views. Finally, all messages on Internet message boards must be viewed in the context in which they are displayed. These message boards are rich with satire, sarcasm, hyperbole, and wit. *Global Telemedia* above. Again, it is inconceivable that any of the exhibited messages of Defendant Cummins could be read as authoritative statements of fact. They are what they claim to be: the opinions and views of Mary K. Cummins.

Because Plaintiffs have failed to plead ultimate facts, rather than just legal conclusions, in supporting their claims of defamation and libel per se, Plaintiffs complaint must be stricken

and accordingly dismissed.

Respectfully submitted this 27th Day of June, 2001.

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By: Mary K. Cummins, Defendant pro se

IN THE ACTION OF

RITTEREISER et al, Plaintiffs Case No. 014002722

v.

CUMMINS, et al, Defendants

State of California)
) ss.
County of Los Angeles)

AFFIDAVIT OF MARY K. CUMMINS

I, Mary K. Cummins, being first duly sworn, do depose and say, subject to the laws of the State of California and the Commonwealth of Pennsylvania, as follows:

1. I am a defendant in the within proceedings, have personal knowledge of the facts thereof, and am a competent person over the age of 18, and if called upon to testify as to the matters within this affidavit I would be competent to do so.
2. I am a resident of the State of California. I conduct business primarily within the State of California, and I am licensed by the State of California to conduct business therein.
3. I have never resided in, or even visited, the Commonwealth of Pennsylvania. I have never, and do not, conduct business in Pennsylvania.
4. I am a shareholder of Plaintiff Ashton Technology Group, Inc., a Delaware corporation ("ASTN"). I purchased shares of ASTN stock through my stock broker, E-Trade, a California company which acts as a broker-dealer which sells stock for Ashton Technology to California residents within the State of California. I have no commercial business dealings with Plaintiff ASTN.

5. Prior to the filing of the within action by the plaintiffs, I registered to join a California-based Internet service called Yahoo! ("Yahoo"), which allows residents of California and the public to post messages on its financial message boards. When I subscribed to this service, I was required to accept Yahoo's Terms of Service Agreement ("TOS"), a true and correct copy which is attached as "Exhibit A".
6. Any person, including the plaintiffs in this action, who use Yahoo online services are subject to the TOS agreement, which is incorporated on every web page at the bottom of every posted message. Paragraph 24 of the TOS agreement specifically state:

> **"The TOS and the relationship between you and Yahoo shall be governed by the laws of the State of California without regard to its conflict of law provisions. You and Yahoo agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California."**

7. Because I have no minimum contacts with the Commonwealth of Pennsylvania, and because of the language specifying venue in the TOS agreement above, I have not and cannot anticipate being "hailed into court" in Pennsylvania.
8. I am informed, and do believe, that Plaintiffs ASTN and Rittereiser have in the past been the subject of various investigations by governmental agencies, including, but not limited to, the FBI, the SEC, and the Justice Department. As a result of these investigations, several persons have been indicted on criminal charges, including two individuals formerly associated with Plaintiff ASTN's securities, who are alleged by the FBI to have Mob ties. In my opinion, these allegations and indictments constitute material information which should be made available to the investing public. I have publicly stated these opinions on public message boards.
9. I am informed, and do believe, that Plaintiff Rittereiser was a consultant to ASTN during the material time that the FBI alleges that the criminal activity took place. However, I have never stated that Rittereiser committed a crime, or that he was convicted of committing a crime.

10. Upon information and belief, the within action against me was filed by Plaintiffs in the Commonwealth of Pennsylvania, even though Plaintiffs know that Pennsylvania lacks jurisdiction over this matter. I believe this action to be frivolous and without merit, and accordingly, I intend to seek relief in whatever form may be available, including, but not limited to, sanctions against the plaintiffs.

_____
Mary K. Cummins, Defendant

State of California)
) ss.
County of Los Angeles)

Subscribed and sworn to before me this 27th day of June, 2001.

_____
Notary Public for California

CERTIFICATE OF SERVICE

I do hereby verify that service of a true and correct copy of the within Preliminary Objections and Affidavit was made on the 27th day of May, 2001, to the counsel below named by United States Mail, postage pre-paid :

Alan L. Frank

1835 Market St., #320

Philadelphia, PA 19103

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Mary Cummins, Defendant pro se