

1 **JOE JARED**
2 **517 N. Emerald Dr.**
3 **Orange , CA 92868**
4 **(714) 532-4569**

5 **Defendant In Pro Per**

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF ORANGE**
10 **CENTRAL JUSTICE CENTER**

11 PALLORIUM, INC., a Texas Corporation,

12 Plaintiff,

13 vs.

14 STEPHEN J. JARED, also known as JOE
15 JARED, individually, and doing business as
16 OSIRUSOFT RESEARCH AND
ENGINEERING and OSIRUSOFT; and
DOES 1 to 50, inclusive,

17 Defendants.

CASE NO. 03CC09250

Judge David R. Chaffee
Dept. C25

OPPOSITION TO MOTION FOR ORDER
ESTABLISHING ADMISSIONS,
MOTION TO COMPEL RESPONSES
FOR FORM INTERROGATORIES,
SPECIAL INTERROGATORIES AND
DEMANDS FOR PRODUCTION, AND
MOTION FOR SANCTIONS;
DECLARATION OF JOE JARED

DATE: August 3, 2004
TIME: 2:00 p.m.
DEPT.: C25

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22 Defendant JOE JARED, also known as STEPHEN J. JARED, individually and doing
23 business as OSIRUSOFT RESEARCH AND ENGINEERING and OSIRUSOFT, respectfully
24 submits the following memorandum of points and authorities in opposition to the (1) motion for
25 order establishing admissions, (2) motion to compel responses to form interrogatories, (3) motion
26 to compel production of documents, (4) motion to compel responses to special interrogatories,
27 and (5) motion for sanctions brought by Plaintiff Pallorium, Inc.
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I

INTRODUCTION

All discovery responses sought by Defendant’s motions have been provided without objection, so the motions all are moot except for the motions for sanctions. Additionally, as will be shown, Plaintiff’s motions are all defective because counsel for Plaintiff failed to meet and confer in good faith prior to bringing the motions. Finally, it is clear that the motions were brought in bad faith and without “substantial justification,” justifying the denial of any sanctions award.

Strictly as a hobby, and to fight the huge problem with unwanted e-mails, Defendant developed a web site that acted as a spam filter for e-mail. He did not charge any money for this service, and persons or entities that chose to use his service did so voluntarily. No representations were made concerning the accuracy of the filtering software, and the vast majority of the spam information concerning spammers was taken from outside sources.

Plaintiff’s case is frivolous, because Plaintiff will never be able to show that Defendant owed it any duty. Persons who used the site understood that Defendant would be relying on a number of sources and filtering methods to try and block the onslaught of spam. It was understood that this aggressive approach might result in the filtering of e-mail that might not be classified as spam under other circumstances. But under any circumstances. Defendant was free to block whomever he chose. Plaintiff has no inherent right under the law to have its e-mail messages pass through Defendants’ filter, nor is Defendant required to provide some “appeal” process if someone feels that their messages should not be blocked.

So frivolous is the action that Defendant, acting *in pro per*, thought it would be dismissed out-of-hand. He filed a “motion to dismiss” and thought would be the end of the case. When that did not resolve the matter, he did his best to move forward with his defense, and timely responded to the discovery requests to the best of his ability. The confusion of this in pro per Defendant must be kept in mind. He responded to the document demands, the special interrogatories and the requests for admissions. He did not respond to the form interrogatories,

1 but only because he thought that preprinted document was the instructions on how to respond to
2 the other discovery.

3 This matter could have all been cleared up very easily, but counsel for Plaintiff decided to
4 play games. So that he could attest to having conferred with Defendant, he called and discussed
5 the responses, but he would not make clear what was needed. Instead of simply stating, “you
6 need to attach a verification,” counsel would say only that “you need to respond in the
7 appropriate manner.” The meet and confer requirement mandates a *good faith* effort to resolve
8 the discovery dispute. At the very least, this requirement imposes a duty to explain to an in pro
9 per party what document is needed to make the responses acceptable.

10 With the assistance of counsel, Defendant has now properly responded to all of the
11 discovery demands. The current motions are therefore moot. The motions should be denied, and
12 due to the failure of Plaintiff’s counsel to meet and confer in good faith, the request for sanctions
13 should be denied.

14 **II**

15 **ALL DISCOVERY RESPONSES HAVE BEEN SERVED, SO THE**
16 **MOTIONS TO HAVE THE REQUESTS DEEMED ADMITTED, TO**
17 **COMPEL RESPONSES AND TO COMPEL PRODUCTION ARE ALL MOOT**

18 **A. The motion for order establishing admissions is moot.**

19 Defendant served his responses to Plaintiff’s requests for admissions, without objection,
20 on July 23, 2004. Jared Decl., ¶ 4. A true and correct copy of the response is attached hereto as
21 Exhibit 2. Code of Civil Procedure section 2033(f) provides that where a party fails to respond
22 to requests for admissions, the court can order that those requests be deemed admitted “unless it
23 finds that the party to whom the requests for admission have been directed has served, before the
24 hearing on the motion, a proposed response to the requests”

25 Since such a response was served, the motion to have the requests deemed admitted is
26 moot.

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1 even sent a letter, outlining his complaints with the responses. This is not a sufficient good faith
2 attempt to resolve the matter. Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial, 8:1163
3 (The Rutter Group 2004).

4 **IV**

5 **UNDER THE CIRCUMSTANCES OF THIS CASE, THE**
6 **COURT SHOULD NOT AWARD SANCTIONS TO PLAINTIFF**

7 **A. It would be unjust to award sanctions to Plaintiff.**

8 Contrary to Plaintiff's claim that this court must award sanctions, Sections 2030(k),
9 2031(k) and 2033(k)¹ all provide that the court has discretion not to award sanctions if it finds
10 that "the one subject to the sanction acted with substantial justification or that other
11 circumstances make the imposition of the sanction unjust."

12 To award any sanctions to Plaintiff in this case would be a travesty of justice. As set
13 forth above, this motion was completely unnecessary, and most likely was Plaintiff's attempt to
14 take advantage of a pro per's misunderstanding of what was required.

15 **B. Since the motions are moot, Plaintiff cannot prevail on its motions.**

16 Proceeding on the sanctions portion of a motion to compel after the motion to compel has
17 been rendered moot presents a conundrum under the Code. Sanctions can only be awarded to the
18 party "who successfully makes or opposes a motion to compel." See, e.g., Code of Civil
19 Procedure section 2030(k). By definition, Plaintiff cannot succeed on these motions because
20 they were rendered moot when Defendant served the responses. By way of analogy, when a
21 defendant demurs to a complaint and the plaintiff responds by filing a first amended
22 complaint, the demurrer becomes moot. No one would contend that the defendant prevailed
23 under those circumstances. So it is here. Presumably this Court will not order that the requested
24 discovery be produced, because that has already been done. Since Plaintiff will not have
25 "successfully made a motion to compel," sanctions should not be awarded.

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27 ¹ Section 2033(k) does not contain this exact language, but it incorporates by reference
28 Section 2023, and that section does contain this discretionary language.

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V

CONCLUSION

For all of the reasons set forth hereinabove, the motions should be denied.

DATED: July 23, 2004

By: _____
Joe Jared, Defendant

1 **DECLARATION OF JOE JARED**

2 I, JOE JARED, declare as follows:

3 1. I am the Defendant in this action. I have personal knowledge of the facts
4 described below, and if called upon to testify, I could and would competently testify to the
5 following matters.

6 2. Strictly as a hobby, and to fight the huge problem with unwanted e-mails, I
7 developed a web site that acted as a spam filter for e-mail. I did not charge any money for this
8 service, and persons or entities that chose to use my service did so voluntarily. I never made
9 representations concerning the accuracy of the filtering software, and the vast majority of the
10 spam information concerning spammers was taken from outside sources.

11 3. Persons who used the site understood that I would be relying on a number of
12 sources and filtering methods to try and block the onslaught of spam. It was understood that this
13 aggressive approach might result in the filtering of e-mail that might not be classified as spam
14 under other circumstances. But under any circumstances, I was free to block whomever I chose.
15 Plaintiff has no inherent right under the law to have its e-mail messages pass through my filter.

16 4. I thought this action was so frivolous that it would be dismissed out-of-hand. I
17 filed a "motion to dismiss" and thought would be the end of the case. When that did not resolve
18 the matter, I did my best to move forward with my defense, and timely responded to the
19 discovery requests to the best of my ability. I responded to the document demands, the special
20 interrogatories and the requests for admissions. I did not respond to the form interrogatories, but
21 only because I thought that preprinted document was the instructions on how to respond to the
22 other discovery. With the help of an attorney, I have now responded to all of the outstanding
23 discovery, with verifications and without objection. Those responses were all served on July 23,
24 2004.

25 5. This matter could have all been cleared up very easily, but counsel for Plaintiff
26 did not cooperate in the process. He called me once and discussed the responses, but he would
27 not make clear what was needed. Instead of simply stating, "you need to attach a verification,"
28 counsel would say only that "you need to respond in the appropriate manner."

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6. It was not my intention to delay this action or to frustrate the discovery process.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 23, 2004

Joe Jared