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and doing business as OSIRUSOFT RESEARCH
AND ENGINEERING and OSIRUSOFT

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

PALLORIUM, INC., a Texas Corporation,

Plaintiff,

vs.

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

Defendants.

CASE NO. 03CC12794

Judge Geoffrey T. Glass
Dept. C22

NOTICE OF MOTION AND MOTION TO
AMEND ANSWER; MEMORANDUM
OF POINTS AND AUTHORITIES

DATE: February 1, 2005
TIME: 2:00 p.m.
DEPT.: C22

Trial Date: None Set

TO ALL PARTIES HERETO AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE THAT Defendant STEPHEN J. JARED, also known as JOE
JARED, individually, and doing business as OSIRUSOFT RESEARCH AND ENGINEERING
and OSIRUSOFT, will and hereby does move the court for an order permitting him to file an
amended answer. The motion shall be heard at 2:00 p.m. on February 1, 2005 in Department
C22 of the above-entitled court, located at 700 Civic Center Drive West, Santa Ana, California.

This Motion is made on the grounds that Plaintiff's action is barred by The
Communications Decency Act (and the Telecommunications Act) of 1996, as set forth more fully
in the pending motion for judgment on the pleadings, and the answer must be amended to

1 properly set forth that affirmative defense.

2 This Motion is based upon this Notice of Motion, the accompanying Memorandum of
3 Points and Authorities, all pleadings on file herein, such other matters that the Court may
4 judicially notice and such other oral evidence that will be presented at the hearing of the Motion.
5

6 Dated: January 6, 2005

THE MORRIS LAW FIRM

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8 By: 
AARON P. MORRIS, Esq.

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10 Attorneys for Defendant STEPHEN J. JARED
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 Is an Internet webmaster entitled to create a database to filter out e-mail that he deems to
4 be spam? If someone listed in that database disagrees with the webmaster's opinions on what
5 constitutes spam, can he sue to recover damages? Those are the questions presented by this
6 action.

7 In the instant action, Plaintiff Pallorium, Inc. claims that it has an absolute right to have
8 any e-mails it sends out to be delivered to the addressees. Plaintiff claims that defendants have
9 (1) wrongfully blocked Plaintiff's e-mail from entering defendants' network, and (2) wrongfully
10 allowed others to use a filter created by defendant Jared to filter what he deemed to be spam, to
11 keep such e-mail out of their network systems, thus causing e-mail originating from plaintiff's
12 server to be blocked and resulting in lost revenue to plaintiff.

13 Like many with a computer and an e-mail address, defendant Stephen "Joe" Jared was
14 tired of receiving unwanted "spam" e-mails. In an attempt to resolve the problem, he gathered
15 and compiled information available to the general public, and created a filter he used for his own
16 server and network system. In addition to the widely available lists of known spammers, which
17 target specific entities, Defendant Jared also elected to block any e-mails from "open servers".
18 An open server is a computer that has been left open (usually inadvertently) on the Internet.
19 Spammers seek out open servers, because they can hide their identities by sending the spam
20 through these computers. This is strictly a matter of opinion and choice. Someone with an open
21 server may have no wrongful intent, but they contribute to the spam problem. Internet users are
22 certainly free to decide that they do want to receive any e-mail flowing through an open server.

23 After seeing the positive affect his filter had on stopping junk e-mail, defendant Jared
24 decided to make his filter, and list of ISP addresses used in the filter, available to others through
25 his web site at no cost. No advertising occurred, and no sums were received by defendants from
26 those who chose to download and use the filter. Furthermore, those who accessed defendant
27 Jared's web site, which contained a link to a filter relay, were informed that his filter was
28 comprehensive and aggressive, and might exclude e-mails those who downloaded the filtration

1 list, or their customers, may want to receive. Therefore, defendant Jared informed them, if they
2 chose to download the filter, they may need to modify it for their own purposes. The decision
3 regarding whether, or how, to use the filter was left entirely to those third parties who accessed
4 the site.

5 As a result of certain spam providers becoming angry with defendant Jared's site, and the
6 use of his filter by third parties, an individual created a virus that was designed to attack and
7 disable Jared's network and web site (a technique called "denial of service"). This "Trojan
8 horse" made it impossible for Jared to access his network, receive or respond to e-mails, or to
9 make any changes to the filter or relay web site. Those who contacted defendant Jared about the
10 site were informed of the attack on his system, and his inability to access or change any
11 information contained on it. It was during this time period when defendant's system was under
12 attack, and could not be accessed, that plaintiff attempted to request that its Internet address be
13 removed from the list of open servers. Plaintiff was informed of defendant's inability to access
14 the network due to the Trojan horse which afflicted it, but this lawsuit was filed anyway.

15 Defendant filed a motion for judgment on the pleadings, due to plaintiff's failure to state
16 facts to support a cause of action against the defendants. However, at the time Defendant filed
17 his answer, he was representing himself. He did not properly allege as an affirmative defense the
18 federal statute that bars the instant action. This court continued the hearing on the motion for
19 judgment on the pleadings in order to afford Defendant the opportunity to file this motion to
20 amend.

21
22 **II. THE DISCRETION OF THE COURT TO ALLOW A PARTY TO AMEND ANY**
23 **PLEADING SHOULD BE LIBERALLY EXERCISED SO THAT CASES MAY BE**
24 **DECIDED ON THEIR MERITS.**

25 The court, in its discretion, may allow an amendment to any pleading in the furtherance
26 of justice and on such terms as may be proper. Code of Civil Procedure §§ 473(a), 576.
27 Amendment may be allowed by the court at any time before or after the commencement of trial.
28 Code of Civil Procedure § 576. A court is rarely justified in refusing a party leave to amend so

1 that he or she may properly present the case. *Redevelopment Agency v. Herrold* (1978) 86
2 Cal.App.3d 1024, 1031. Indeed, it is an abuse of discretion to deny a timely motion to amend
3 when the refusal deprives a party of the right to properly assert a meritorious cause of action or
4 defense, if granting leave will not prejudice opposing party. *Id.*; *Morgan v. Superior Court*
5 (1959) 172 Cal.App.2d 527, 530. If an amendment is appropriate, the trial court should permit
6 the amendment, even if doing so will necessitate continuing the trial, and even if the matter is a
7 fast track matter. *Honig v. Financial Corp of America* (1992) 2 Cal.App.4th 960, 967.

8 The amended answer provided herewith will "further justice" by permitting the parties to
9 present in one action all of the facts necessary for the trier of fact to make a proper determination.
10 If Defendant is forced to proceed with the current answer, he will be deprived of the opportunity
11 to present a defense that may well dispose of the entire action. Proceeding without that defense
12 would create a legal fiction, permitting Plaintiff to assert that Defendant's conduct was somehow
13 wrongful, when in fact it was absolutely protected by Federal law.

14 Plaintiff contends Defendant owed it a duty to ensure that the information contained on
15 the relay web site was accurate because Defendant knew others were accessing the web site and
16 using the information contained there to filter the information these third parties permitted to
17 enter their networks. Plaintiff has failed to state a cause of action against defendant due to the
18 immunity provided to defendant for the content of the web site, and for the use of that
19 information by others.

20 The Communications Decency Act (and the Telecommunications Act) of 1996, 47 U.S.C.
21 §230(b) provides:

22 "It is the policy of the United States...

23 (3) to encourage the development of technologies which maximize user control over what
24 information is received by individuals, families, and schools who use the Internet and
25 other interactive computer services;

26 (4) to remove disincentives for the development and utilization of blocking and filtering
27 technologies that empower parents to restrict their children's access to objectionable or
28 inappropriate online material..."

1 In furtherance of the above stated purposes, interactive computer services, and their users,
2 are provided immunity from civil actions based upon information published on web sites. The
3 statute defines the term "interactive computer service" as "any information service, system, or
4 access software provider that provides or enables computer access by multiple users to a
5 computer server, including specifically a service or system that provides access to the Internet
6 and such systems operated or services offered by libraries or educational institutions." The term
7 "information content provider" is defined as "any person or entity that is responsible, in whole or
8 in part, for the creation or development of information provided through the Internet or any other
9 interactive computer service." (47 U.S.C. section 230(f)(2-3).)

10 The application of 47 U.S.C. § 230 on interactive computer services and their users was
11 discussed in *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327 (Zeran), cert. den.
12 (1998) 524 U.S. 937, in which the federal court held that section 230, by its "plain language,"
13 created a federal immunity to any cause of action that would make interactive service providers
14 liable for information contained on the web site which was obtained from a third-party. *Id.* at p.
15 330. The Court went on to explain that the purpose of the statute was to extend to web site
16 creators the same immunities provided to publishers and editors of "hard copy" data.

17 In *Gentry v. Ebay* (2002) 99 Cal. App. 4th 816 the Court was asked to determine if Ebay
18 could be liable under a negligence theory as a result of a buyer of an item listed on Ebay claiming
19 the information contained in the listing was false. The Court of Appeal found Ebay was immune
20 from liability under subsection (c)(1) of section 230 because the information contained on the
21 web site was obtained from third parties. The analysis of the Court in *Gentry* is equally
22 applicable here.

23 As evidenced by the allegations of the complaint, defendant is being sued because he
24 published on a web site a list of Internet addresses which were identified by others as either
25 "spammers" or servers allowing spam to be distributed through them. The listed addresses were
26 included in the filter defendant Jared used to keep unwanted junk e-mail from entering his
27 company's network. Plaintiff claims defendant had a duty to plaintiff to not include its Internet
28 address in the filter list because by being included, e-mails originating from plaintiff were not

1 being received by those who downloaded the information contained on the site and used it
2 without modification to filter the email allowed into these third party network systems, thus
3 causing plaintiff to lose revenue.

4 Clearly the conduct complained of, namely posting on a web site an accumulation of
5 information available to the general public from various sources on the web, is protected by 47
6 U.S.C. 230. No facts are pled to establish that the immunity afforded defendant under 47 U.S.C.
7 230, and the cases interpreting it, does not apply here. As a publisher and/or editor of
8 information obtained from others, defendant is immune from liability for the claims pled in the
9 complaint. 47 U.S.C. § 230(c)(1); *Gentry v. Ebay* (2002) 99 Cal. App. 4th 816, 833-834.

10 Therefore, Defendant is entitled to judgment on the pleadings, and both justice and
11 judicial economy mandate that Defendant be permitted to assert this necessary affirmative
12 defense.

13
14 **IV. CONCLUSION.**

15 For all the reasons set forth hereinabove, Defendant respectfully requests that the court
16 permit him to file the First Amended Answer attached hereto.

17
18 Dated: January 6, 2005

The Morris Law Firm

19
20 By



Aaron Morris

21
22 Attorneys for the Defendant
23 STEPHEN J. JARED, also known as JOE
24 JARED, individually, and doing business as
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9 AND ENGINEERING and OSIRUSOFT

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

13 **PALLORIUM, INC., a Texas Corporation,**
14 **Plaintiff,**

15 **vs.**

16 **STEPHEN J. JARED, also known as JOE**
17 **JARED, individually, and doing business as**
18 **OSIRUSOFT RESEARCH AND**
19 **ENGINEERING and OSIRUSOFT; and**
20 **DOES 1 to 50, inclusive,**

21 **Defendants.**

CASE NO. 03CC12794

Judge Geoffrey T. Glass
Dept. C22

FIRST AMENDED ANSWER

22 Defendant STEPHEN J. JARED, also known as JOE JARED, individually, and doing
23 business as OSIRUSOFT RESEARCH AND ENGINEERING and OSIRUSOFT ("Defendant")
24 hereby answers the unverified complaint ("complaint") of the Plaintiff, PALLORIUM, INC.
25 ("Plaintiff") as follows:

26 Pursuant to California Code of Civil Procedure Section 431.30(d), Defendant denies,
27 generally and specifically, each and every allegation contained in the complaint, and further
28 denies that Plaintiff has been damaged in the sum or sums alleged or in any sum whatsoever.

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1 **AFFIRMATIVE DEFENSES**

2 **First Affirmative Defense**

3 The complaint and each and each and every purported cause of action contained therein
4 fails to state facts sufficient to constitute a cause of action against Defendant.

5 **Second Affirmative Defense**

6 The complaint and each and every purported cause of action contained therein fails to
7 state facts sufficient to support an award of punitive and/or exemplary damages against
8 Defendant.

9 **Third Affirmative Defense**

10 The complaint and each and every purported cause of action contained therein is barred
11 by the doctrine of unclean hands.

12 **Fourth Affirmative Defense**

13 The complaint and each and each and every purported cause of action contained therein is
14 barred by the doctrine of estoppel by virtue of Plaintiff's own acts and/or omissions.

15 **Fifth Affirmative Defense**

16 The complaint and each and each and every purported cause of action contained therein
17 is barred by the Federal Communications Decency Act, 47 U.S.C. § 230 *et seq.*

18 **Sixth Affirmative Defense**

19 The complaint and each and each and every purported cause of action contained therein is
20 barred because Plaintiff failed to take reasonable steps to mitigate its alleged damages.

21 **Seventh Affirmative Defense**

22 Assuming without admitting, for purposes of this affirmative defense only, that Plaintiff
23 has suffered any damages, then such damages, if any, were solely the result of the actions,
24 conduct, inaction, fault and/or negligence of Plaintiff thereby relieving Defendant from any and
25 all responsibility for Plaintiff's purported claims, and each of them.

26 **Eighth Affirmative Defense**

27 Assuming without admitting, for purposes of this affirmative defense only, that Plaintiff
28 has suffered any damages then such damages, if any, were solely the result of the actions,

1 conduct, inaction, fault and/or negligence of persons and/or entities other than Defendant,
2 thereby relieving Defendant from any and all responsibility for Plaintiff's purported claims, and
3 each of them.

4 Ninth Affirmative Defense

5 At all times relevant hereto, Plaintiff failed to exercise ordinary care, caution or prudence
6 and the damages, if any, which Plaintiff alleges, were proximately caused and contributed to by
7 the negligence of Plaintiff and therefore the damages, if any, are barred and/or must be reduced in
8 proportion to Plaintiff's own negligence.

9 Tenth Affirmative Defense

10 The complaint and each and each and every purported cause of action contained therein
11 is barred by the doctrine of justification.

12 Eleventh Affirmative Defense

13 The complaint and each and each and every purported cause of action contained therein
14 fails to state a cause of action because Defendant did not owe any duty to Plaintiff.

15
16 **WHEREFORE**, Defendant prays for judgment against Plaintiff as follows:

- 17 1) That Plaintiff take nothing by his complaint and that judgment be entered in favor of
18 Defendant;
19 2) That Defendant be awarded his costs of suit and expenses;
20 3) Any and all additional relief the Court deems just and proper.

21
22 DATED: January 6, 2005

THE MORRIS LAW FIRM

23
24
25 By: 

Aaron P. Morris, Esq.

26 Attorneys for Defendant STEPHEN J. JARED,
27 also known as JOE JARED, individually, and
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