UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

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| DR. CARLOS BRINGUIER | : | |
| VS. | : | C.A. NO. 67-648 |
| GAMBI PUBLICATIONS, INC.<br>HAROLD WEISBERG<br>AND<br>DELL PUBLISHING CO., INC. | : | DIVISION "F" |

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF PROCESS AND RETURNS OF SERVICE OF PROCESS AND MOTION TO DISMISS THE ACTION FOR LACK OF JURISDICTION

MAY IT PLEASE THE COURT:

Complainant has filed an action for alleged libel by publication in New York of a book entitled "WHITEWASH - THE REPORT ON THE WARREN REPORT". Complainant has alleged that GAMBI PUBLICATIONS, INC., is a foreign corporation not qualified to do business in the State of Louisiana but allegedly doing business in the State "because of the sale and distribution of the magazine 'Saga' " (in which portions of the book WHITEWASH were reprinted). Complainant avers that Defendant, HAROLD WEISBERG is a non-resident of the State of Louisiana but alleges that he "conducts business in the State of Louisiana" by virtue of the sales in Louisiana of his book and by virtue of his being the author and publisher of the book. Complainant avers in his Amended Complaint that DELL PUBLISHING CO., INC., is a foreign corporation but does not aver that the said corporation is in fact not qualified to do business in the State of Louisiana. Complainant avers that the said DELL PUBLISHING COMPANY, INC., is the publisher of the book WHITEWASH.

Service on all Defendants was effected through the Secretary of State apparently under the provisions of the "Long-Arm Statutes of the State of Louisiana".

L.S.A.-R.S. 13:3471 provides for service through the Office of the Secretary of State on foreign corporations not required

by law to appoint an agent for the service of process if they have "engaged in a business activity" in this State.

L.S.A.-R.S. 13:3201 provides for personal jurisdiction over non-residents "transacting any business in this State" or "causing injury or damage by an offense or quasi offense committed through an act or omission in this State or an act or omission outside of the State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State". L.S.A.-R.S. 13:3204 provides for the method of service of process on such individual non-residents.

In INTERNATIONAL SHOE CO. VS. STATE OF WASHINGTON, 326 U.S. 310, 66 S. Ct. 154 (1945) the United States Supreme Court ruled that a foreign corporation can be subjected to suit and service of process if it had certain "minimum contacts" with the State arising from the Defendant Corporation's contacts with the forum. The Supreme Court elaborated on this "minimum contacts" ruling in the case of McGEE V. INTERNATIONAL LIFE INSURANCE COMPANY, 355 U.S. 220, 78 S. Ct. 199 (1957) wherein it held:

> "* * * It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. Cf. Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 S. Ct. 553, 79 L.Ed. 1097; Pennoyer v. Neff, 95 U.S. 714, 735, 24 L.Ed. 565.* * *"

It was these cases that resulted in the "Long-Arm Statutes" adopted by a number of the States including the State of Louisiana.

Affidavits are in the course of being prepared on behalf of all Defendants to this action and will be promptly filed in the Record in this Cause in further support of these Motions to Quash the Service and the Returns on the Service and to Dismiss the Action. These Affidavits will indicate that none of the Defendants have any business activity in the State of Louisiana, that none are qualified to do or are doing business in the State of Louisiana and that the sole contact on the part of any of these Defendants with the State of Louisiana was the sale and distribution of a certain

number of copies of the book WHITEWASH in the State of Louisiana (which sales constituted an infinitesimal portion of the total sales of the book).

It is respectfully submitted that this case falls squarely within the four corners of the decision in the case of BUCKLEY VS. NEW YORK TIMES COMPANY, U.S. Ct. of Appeals, 5th Circ., 338 F. (2d) 470 (1964). The Court there held:

> "The law is well settled that the mere circulation of a periodical through the mails to subscribers and independent distributors constitutes neither doing business nor engaging in a business activity. Street & Smith Publications v. Spikes (5th Cir. 1941), 120 F. 2d 895, cert. denied 314 U.S. 653, 62 S. Ct. 102, 86 L.Ed. 2d 524; Insull v. New York World-Telegram Corp. (7th Cir. 1959), 273 F. 2d 166."
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> "* * * The principle of Pennoyer v. Neff, 95 U.S.714, 24 L.Ed. 565, to the effect that jurisdiction of any court to render an IN PERSONAM judgment depends upon a DE FACTO power over the defendant's person, and 'presence' within the territorial jurisdiction of a court is a prerequisite to the court's being able to bind by judgment, has been changed by International Shoe and McGee only to the extent that 'presence' does not mean actual presence in the ordinary sense but 'presence' in the constitutional sense; this 'presence' in the constitutional sense depends upon a finding from the facts that 'minimum contacts,' through a business activity, exist with the forum territory to a degree that the exercise of jurisdiction by maintenance of the case does not 'offend "traditional notions of fair play and substantial justice." '
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> With an application of these legal principles to the facts concerning the business activities in the State of Louisiana of these several newspaper companies during the years 1960, 1961 and 1962, it is evident that even the broadest view of the principles of International Shoe and McGee will not bring these activities within the 'minimum contacts' rule. The 'quality and nature' of the activities of these newspaper companies during the period involved was not 'continuous and systematic'; to the contrary, these activities constituted at most a 'casual presence' in the State of Louisiana; such is not enough to make it reasonable and just, and in conformity with the due process requirements of the Fourteenth Amendment, for the State of Louisiana to enforce against them obligations arising out of such activities. As the Supreme Court stated in International Shoe:
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> 'To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.' "
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> * * *
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> "The several judgments quashing the service of process and ordering dismissal of these seven cases as made by the District Court for the Eastern District of Louisiana are each affirmed."

The Complaint itself makes reference only to the fact that the book WHITEWASH was sold and distributed in the State of Louisiana. As indicated in the BUCKLEY case, supra, the mere circulation of a periodical through the mails to subscribers and independent distributors constitutes neither doing business nor engaging in a business activity.

As will be shown by the Affidavits, the activities of the Defendants are not such as to come within the "minimum contacts" rule and that the activities of the Defendants during the period involved were not "continuous and systematic" and that such activities in the State of Louisiana at most constituted a "casual presence", if any presence at all.

The BUCKLEY case, supra, was followed by the United States Court of Appeals for the 5th Circuit in the case of NEW YORK TIMES COMPANY VS. CONNOR, 365 F. (2d) 567 (1966) wherein the Court after quoting from decisions of the United States Supreme Court in GROSJEAN VS. AMERICAN PRESS CO., 297 U.S. 233, 56 S. Ct. 444 (1936) and NAACP VS. BUTTON, 371 U.S. 415, 83 S. Ct. 328 (1963) held:

> "These two cases illustrate instances where First Amendment rights have been held superior in recognized areas of state regulation. The restriction on the exercise of jurisdiction over non-resident newspaper corporations imposed by BUCKLEY should be viewed in the same light. It is not intended for the convenience of individual publishers; nor does it ignore the resulting inconvenience to victims of libelous publications of limited distribution in their state. Rather, it is a recognition that jurisdiction based upon minimal contacts similar to those in ELKHART when applied to the press will 'limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties' and will 'freeze out of existence' the distribution on a limited basis of publications espousing unpopular positions in a particular locale. It is on this basis that BUCKLEY'S requirement of a greater degree of contacts to sustain jurisdiction over non-resident newspaper corporations continues to be good law alongside of ELKHART." (Emphasis by the Court)

As emphasized in the foregoing decision in cases involving 1st Amendment rights, such rights have been held superior in the area of state regulation and a greater degree of "contacts" is required to sustain jurisdiction.

It is respectfully submitted that the Defendants did not and do not have the "minimum contacts" with the State of Louisiana

requisite to the conferring of jurisdiction on this Honorable Court over persons of the Defendants; that accordingly the action should be dismissed for want of jurisdiction and the service of process and returns on service of process should be quashed.

Respectfully submitted,

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