

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EPIC ADVERTISING d/b/a)	Case No. 11-1705 SC
AZOGLEADS.COM, INC., a Delaware)	
corporation,)	ORDER DENYING DEFENDANTS'
)	<u>MOTION TO DISMISS</u>
Plaintiffs,)	
)	
v.)	
)	
ASIS INTERNET SERVICES, a)	
California corporation; and NELLA)	
WHITE, an individual.)	
)	
Defendants.)	
)	
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)	

I. INTRODUCTION

Before the Court is a Motion to Dismiss for Lack of Diversity Jurisdiction filed by Defendants Asis Internet Services ("Asis") and Nella White ("White") (collectively, "Defendants"). ECF No. 16 ("Mot."). Plaintiff Epic Advertising ("Plaintiff") filed an Opposition, and Defendants filed a Reply.¹ ECF No. 17 ("Opp'n"). For the following reasons, the Court DENIES Defendants' Motion.

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¹ Defendants filed an administrative motion requesting leave to file their Reply under seal. ECF No. 19. They argue that filing the Reply under seal is necessary because it discusses a settlement agreement containing strict confidentiality provisions, and because a copy of the settlement agreement is attached to the Reply as an exhibit. *Id.* The Court GRANTS Defendants' motion to file the Reply under seal pursuant to Civil Local Rule 79-5.

1 **II. BACKGROUND**

2 Plaintiff is an Internet marketing company that purchases
3 "consumer leads" from third party vendors and sells those leads to
4 its clients. Graff Decl. ¶¶ 2, 3.² This action involves
5 Plaintiff's attempt to collect on a judgment for monetary sanctions
6 against Defendants from a prior lawsuit, ASIS Internet Services v.
7 Optin Global, Inc., No. 05-5124 (N.D. Cal.) (hereinafter, "the 2005
8 action"). In the 2005 action, Defendants sued Plaintiff and twenty
9 other parties for allegedly sending over 10,000 deceptive and
10 unsolicited emails to ASIS's server. ASIS Internet Services v.
11 Optin Global, Inc., No. 05-5124, 2010 U.S. Dist. LEXIS 57825, at
12 *3-6 (N.D. Cal. May 19, 2010). The court granted summary judgment
13 in favor of Plaintiff and granted Plaintiff's motion for sanctions,
14 awarding it \$806,978.84 in fees. Id.

15 Plaintiff filed this action on April 7, 2011, alleging that
16 Defendants have not paid Plaintiff the money owed under the
17 sanctions award from the 2005 action. Compl. ¶ 12. Plaintiff
18 alleges that Asis is "a defunct internet service provider" whose
19 sole officer and director is White. Id. ¶¶ 24, 26. Plaintiff
20 alleges that Asis sold all of its assets and accounts to employees
21 well below market value, and White transferred all of Asis's
22 remaining funds to herself in an effort to avoid the sanctions
23 judgment. Id. ¶¶ 13, 14. Plaintiff asserts state law claims for
24 malicious prosecution, tort of another, and fraudulent transfer.
25 Id. ¶¶ 103-133. Plaintiff alleges federal jurisdiction on the
26 basis of diversity, claiming that it is a citizen of New York and

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28 ² David Graff ("Graff"), general counsel for Plaintiff, filed a
declaration in support of the Opposition. ECF No. 18.

1 Delaware and that Defendants are citizens of California. Id. ¶ 20.

2 In the instant Motion, Defendants argue that Plaintiff is a
3 citizen of California and, therefore, that this Court lacks subject
4 matter jurisdiction.

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6 **III. LEGAL STANDARD**

7 "Federal courts are courts of limited jurisdiction. They
8 possess only that power authorized by Constitution and statute . .
9 . ." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
10 (1994) (citations omitted). Federal Rule of Civil Procedure
11 12(b)(1) allows a party to seek dismissal of an action where
12 federal subject matter jurisdiction is lacking. Id. The plaintiff
13 has the burden of proving jurisdiction in order to survive a Rule
14 12(b)(1) motion. Id. As a court of limited jurisdiction, "[a]
15 federal court is presumed to lack jurisdiction in a particular case
16 unless the contrary affirmatively appears." Stock West, Inc. v.
17 Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

18 A party may seek dismissal for lack of jurisdiction "either on
19 the face of the pleadings or by presenting extrinsic evidence."
20 Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir.
21 2003). In a factual challenge, the court may consider evidence
22 demonstrating or refuting the existence of jurisdiction. Kingman
23 Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1195 (9th
24 Cir. 2008). "In such circumstances, no presumptive truthfulness
25 attaches to plaintiff's allegations, and the existence of disputed
26 material facts will not preclude the trial court from evaluating
27 for itself the merits of jurisdictional claims." Id.

28

1 **IV. DISCUSSION**

2 Plaintiff filed this action in federal court on the basis of
3 diversity jurisdiction pursuant to 28 U.S.C. § 1332, which provides
4 that "[t]he district courts shall have original jurisdiction of all
5 civil actions where the matter in controversy exceeds the sum or
6 value of \$75,000, . . . and is between -- (1) citizens of different
7 States[.]"

8 For the purposes of diversity jurisdiction, a natural person
9 is deemed a "citizen" of the state in which he or she is domiciled.
10 Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986). A corporation,
11 however, is deemed a citizen "of any State by which it has been
12 incorporated and of the State where it has its principal place of
13 business." 28 U.S.C. § 1332(c)(1). Thus, "a corporation is
14 typically a citizen of two states for determining the existence of
15 diversity jurisdiction: the state of incorporation and the state in
16 which it has its principal place of business." Breitman v. May Co.
17 California, 37 F.3d 562, 564 (9th Cir. 1994). A corporation's
18 principal place of business is its "nerve center" -- the location
19 where "a corporation's officers direct, control, and coordinate the
20 corporation's activities." Hertz Corp. v. Friend, 130 S. Ct. 1181,
21 1192, (2010). Typically, this is the location of a corporation's
22 headquarters. Id.

23 Defendants argue that Plaintiff is a citizen of California for
24 two reasons. First, they argue that Plaintiff recently filed
25 articles of incorporation in California. Mot. at 2. Defendants
26 attach to their Motion a copy of articles of incorporation filed
27 with the California Secretary of State on January 18, 2011, for a
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1 corporation named "Epic Advertising, Inc." Singleton Decl. Ex. A.³
2 Defendants offer this document as proof that Plaintiff is now a
3 California corporation. However, Plaintiff provides a sworn
4 declaration from its general counsel attesting that the articles of
5 incorporation proffered by Defendants do not pertain to Plaintiff
6 or any of its subsidiaries. Graff Decl. ¶ 11. Graff declares that
7 Plaintiff is a Delaware corporation and attaches proof of
8 Plaintiff's corporate registration with the Delaware Department of
9 State. Id. Ex. A. Defendants do not address the matter further in
10 their Reply.

11 Second, Defendants argue that Plaintiff recently merged with
12 Connexus Corporation ("Connexus"), a California corporation. Thus,
13 they argue, Plaintiff is now incorporated in both California and
14 Delaware and jointly headquartered in California and New York.
15 Mot. at 2. Defendants contend that a section of Plaintiff's
16 website states: "Epic Advertising and Connexus Corporation merge to
17 form Epic Media Group. The Company sets up two headquarters in New
18 York City and Los Angeles." Id. Defendants also contend that
19 Plaintiff's website lists Art Shaw ("Shaw") as the Chief Executive
20 Officer of Epic Media Group. Id. They then provide a web address
21 that they claim shows that Shaw "is based" in California. Id.

22 In response, Plaintiff argues that its principal place of
23 business is in New York. Graff attests that Plaintiff's
24 headquarters are located in New York City; its officers and
25 directors work out of its New York headquarters; its executive and
26 administrative functions are performed in New York; and the

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28 ³ Jason K. Singleton ("Singleton"), attorney for Defendants, filed
a declaration in support of the Motion.

1 majority of its computers, office equipment, and other assets are
2 located in New York. Graff Decl. ¶¶ 5-9. Graff declares that
3 Plaintiff's Chief Executive Officer is not Shaw, but Don Mathis,
4 who works out of the company's New York headquarters. Id. ¶ 6.

5 Regarding the Connexus acquisition, Graff declares that
6 Connexus is now a wholly owned subsidiary of Plaintiff. Id. ¶¶ 12-
7 13. He avers that Plaintiff continues to maintain its headquarters
8 in New York, while Connexus maintains a separate headquarters in
9 Los Angeles. Id. ¶ 14. Plaintiff notes that, under Danjaq, S.A.
10 v. Pathe Communications Corp., Inc., 979 F.2d 772, 775 (9th Cir.
11 1992), "the citizenship of a parent [corporation] is distinct from
12 its subsidiary where . . . there is no evidence of an alter ego
13 relationship."

14 Defendants argue in reply that Connexus is not a subsidiary of
15 Plaintiff. They contend that Plaintiff and Connexus merged by way
16 of a stock-for-stock merger and, therefore, that Plaintiff and
17 Connexus are effectively a single parent entity incorporated in
18 both California and Delaware and maintaining "joint headquarters"
19 in California and New York. Reply at 1-2. In support of this
20 argument, Defendants submit what they contend is a document that
21 Plaintiff filed with the Securities and Exchange Commission
22 ("SEC"). The document states: "[p]ursuant to a merger agreement,
23 Azoogole.com, Inc. acquired Connexus Corporation in a stock-for-
24 stock merger, with cash paid in lieu of fractional shares." Reply
25 Ex. A. Defendants have not filed a declaration authenticating the
26 document, nor have they asked the Court to take judicial notice of
27 the document. Furthermore, whether the method by which Plaintiff
28 acquired Connexus was a stock-for-stock merger has no bearing on

1 whether the acquisition resulted in Connexus becoming subsidiary of
2 Plaintiff. See Ass'n of Communs. Enters. v. FCC, 235 F.3d 662, 664
3 (D.C. Cir. 2001); Wright v. Or. Metallurgical Corp., 222 F. Supp.
4 2d 1224, 1227-1228 (D. Or. 2002). The purported SEC filing does
5 not refute Graff's sworn statement that Connexus is Plaintiff's
6 wholly owned subsidiary.

7 Plaintiff has established to the Court's satisfaction that
8 Connexus is its subsidiary. Thus, under Danjaq, the citizenship of
9 Connexus is irrelevant to whether Plaintiff is a California citizen
10 for the purposes of determining diversity jurisdiction. The Court
11 finds, based on Graff's declaration, that Plaintiff's "nerve
12 center" lies in New York, not in California, and that Plaintiff is
13 not incorporated in California. Accordingly, Plaintiff is not a
14 California citizen, and this Court has diversity jurisdiction under
15 28 U.S.C. § 1332. Defendants' Motion is DENIED.⁴

16

17 **V. CONCLUSION**

18 For the foregoing reasons, the Court DENIES the Motion to
19 Dismiss filed by Defendants Asis Internet Services and Nella White.

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21 IT IS SO ORDERED.

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23 Dated: September 29, 2011

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UNITED STATES DISTRICT JUDGE

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26 ⁴ Defendants also argue in their Reply that this matter should be
27 sent to arbitration pursuant to a 2007 settlement agreement between
28 Connexus and Defendants. Reply at 2-3. Because this argument is
raised for the first time in Defendants' Reply, the Court does not
address it here. If Defendants wish to file a proper motion on the
matter, they may do so.