

## Exhibit 2

Not Reported in F.Supp.2d, 2007 WL 2178317 (E.D.Mich.)  
(Cite as: 2007 WL 2178317 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,  
E.D. Michigan,  
Southern Division.  
William E. BENNETT, Plaintiffs,  
v.  
America Online, Inc., Time Warner, Inc., TU-  
COWS, INC., and John Doe, Defendants.  
  
Civil Case No. 06-13221.  
July 27, 2007.

William E. Bennett, Mt. Morris, MI, pro se.

William F. Kolakowski, III, Dykema Gossett,  
Bloomfield Hills, MI, Krista L. Lenart, Dykema  
Gossett, Ann Arbor, MI, Harold Z. Gurewitz, Gure-  
witz & Raben, Detroit, MI, Rebecca J. Hillyer,  
Troy S. Brown, Morgan, Lewis, Philadelphia, PA,  
for Defendants.

***OPINION AND ORDER OVERRULING OBJEC-  
TIONS TO MAGISTRATE JUDGE'S REPORT  
AND RECOMMENDATION, ADOPTING RE-  
COMMENDATION, AND GRANTING MOTION  
TO DISMISS BY DEFENDANT TIME  
WARNER, INC.***

DAVID M. LAWSON, United States District  
Judge.

\*1 This matter is before the Court on objec-  
tions by the plaintiff to a report filed by Magistrate  
Judge Steven D. Pepe recommending that the mo-  
tion to dismiss filed by defendant Time Warner,  
Inc. be granted. This case has been on the magis-  
trate judge's docket pursuant to an order of refer-  
ence for general case management. After Time  
Warner filed its motion to dismiss, the magistrate  
judge sought additional information from the  
parties and considered matters outside the plead-  
ings. Appropriately, Judge Pepe partially converted  
the motion to one for summary judgment under  
Rule 56. After the report and recommendation was

filed, the plaintiff filed timely objections, the de-  
fendant responded, and the plaintiff replied. The  
Court has conducted a *de novo* review and con-  
cludes that the magistrate judge correctly recom-  
mended dismissal. The plaintiff alleges in his com-  
plaint, later amended, that the defendants infringed  
his copyright to a number of screen savers he up-  
loaded through his account with America Online,  
Inc. His theory is that Time Warner is liable for  
America Online, Inc.'s conduct due to its merger  
with America Online, Inc. or, alternatively, because  
America Online, Inc. is a subsidiary of Time  
Warner. However, as the magistrate judge noted,  
the America Online entity with which the plaintiff  
dealt did not actually merge with defendant Time  
Warner, Inc. Rather, defendant America Online,  
Inc., now apparently known as AOL, LLC, is a sub-  
sidiary of defendant Time Warner, Inc. Therefore  
Time Warner is not directly liable as a successor  
organization. Nor has the plaintiff made allegations  
sufficient to make out a claim of vicarious liability.  
Time Warner's motion to dismiss, therefore, will be  
granted.

**I.**

The plaintiff filed an amended complaint on  
October 2, 2006 in which he alleged that he and  
AOL had an implied contract pursuant to which the  
plaintiff granted AOL a non-exclusive, temporary  
software license that allowed AOL to provide his  
screen savers to AOL's members. Under this im-  
plied contract, AOL was required to protect the  
plaintiff's copyright rights and help promote the  
plaintiff's business by making the screen savers  
available to members. The plaintiff asserts that the  
non-exclusive license he granted to AOL contained  
a provision that supposedly limited AOL's right to  
copy and distribute his screen saver. The plaintiff  
uploaded the files at issue to AOL through his AOL  
connection, and AOL apparently put these files in  
what the plaintiff refers to as the "old screen saver  
libraries." Amend. Compl. ¶ 17, 18, 21.

According to the plaintiff, on July 22, 2003,

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AOL destroyed all links to the old screen saver libraries and no longer made those libraries available to its members. AOL created a new upload/download center that was linked to defendant Tucows' website. The plaintiff believes this violated his copyrights.

The amended complaint contains the following allegations regarding defendant Time Warner:

6. America On Line, Inc. and Time Warner, Inc., are Delaware Corporations that merged into one entity ... and was known as Defendant AOL Time Warner, Inc.

\*2 ...

10.... The full relationship with Defendant AOL Time Warner, Inc. and Time Warner, Inc. and Defendant AOL LLC will have to be confirmed after discovery.

First Am. Compl. at ¶¶ 6, 10. The plaintiff does not mention Time Warner anywhere else in the entire complaint. The plaintiff subsequently filed a second amended complaint on February 5, 2007, but that pleading was stricken on March 8, 2007 because the plaintiff had not obtained permission to file it.

On March 16, 2007, the plaintiff filed a motion seeking permission to file another amended complaint. The proposed third amended complaint contains the following allegations regarding Time Warner:

6. America On Line, Inc. and Time Warner, Inc., are Delaware Corporations that merged into one entity.

...

10. Defendant AOL Time Warner, Inc., (herein after AOL) is a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware .... The full relationship with Defendant AOL Time Warner, Inc. and Time

Warner, Inc. and Defendant AOL LLC will have to be confirmed after discovery....

11. At all times pertinent to this Complaint, Defendant Time Warner, Inc. is a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware.

...

Count-IX

(Defendant Time Warner, Inc. (f/k/a AOL Time Warner, Inc.) Vicarious Liability)

81. The afore pled merger was conducted under, Title 8, Section 251, the laws of the State of Delaware. (8 Del. C. § 251)

82. As a result of the afore pled merger, on February 4, 2000, the separate existence of the constituent corporations America Online, Inc. and Time Warner, Inc., ceased as a matter of law under Title 9, Section 259 (8 Del. C. § 259) of the laws of Delaware.

83. As a result of the afore pled merger, on February 4, 2000, Defendant AOL Time Warner, Inc. acquired all the rights, duties, liabilities, and property of AOL, LLC (f/k/a America Online, Inc.), and Time Warner, Inc. (f/k/a AOL Time Warner, Inc.), as a matter of law under Title 8, Section 259 (8 Del. C. § 259) of the laws of the State of Delaware.

84. As a result of the afore pled merger, the Corporate Officers of Time Warner, Inc. (f/k/a AOL Time Warner, Inc.), also served as Corporation Officers of AOL, LLC (f/k/a America Online, Inc.).

85. As a result of the afore pled merger, from February 4, 2000, to, at least, October 16, 2003, the two entities AOL, LLC (f/k/a America Online, Inc.) and Time Warner, Inc. (f/k/a AOL Time Warner, Inc.) was treated as one entity.

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86. The Corporate Officers pled in paragraph 81 above, knew, or should have known, that AOL, LLC (f/k/a America Online, Inc.) was contracting with Tucows, Inc., as pled in paragraph 10 above.

87. The afore pled Corporate Officers could have sought to stop the copyright infringement pled in Count III above.

88. Defendant Time Warner, Inc. (f/k/a AOL Time Warner, Inc.), stood to monetarily gain from the success of AOL, LLC (f/k/a America Online, Inc.).

\*3 89. Defendant Time Warner, Inc. (f/k/a AOL Time Warner, Inc.) is vicariously liable for AOL, LLC (f/k/a America Online, Inc.), and the infringement of plaintiff's Copyright.

...

WHEREFORE Plaintiff prays judgment:

I-Money Judgment:

a. On Counts I, II, VIII, and IX, against Defendants AOL, LLC (f/k/a America Online, Inc) and Time Warner, Inc. (f/k/a AOL Time Warner, Inc.), jointly and severally, statutory damages in an amount to be determined at hearing or trial, in the amount of \$300,000.00, but no less than \$300,000.00 (847 infringements x \$750 minimum = \$635,250.00) [sic]

...

c. On Count VI, against Defendants AOL, LLC (f/k/a America Online, Inc) and Time Warner, Inc. (f/k/a AOL Time Warner, Inc.), compensatory damages in an amount to be determined at hearing or trial but in no event less than the reasonable value of \$20.00 per hour of Plaintiff's upload time from 1999 to July 2003 as determined from Defendant America Inline [sic], Inc.'s records; and

d. On Count VII, against Defendants AOL, LLC

(f/k/a America Online, Inc) and Time Warner, Inc. (f/k/a AOL Time Warner, Inc.), compensatory damages in an amount to be determined at hearing or trial but in no event less than [sic] \$10,000.00; and

e. On Count XIII, against Defendants AOL, LLC (f/k/a America Online, Inc) and Time Warner, Inc. (f/k/a AOL Time Warner, Inc.) treble the amount of damages plaintiff is found to be entitled to (15 USC 15).

...

II-Declaratory Judgment:

i. On Count X, Declaring Defendant Time Warner, Inc. (f/k/a AOL Time Warner, Inc.)/AOL, LLC (f/k/a America Online, Inc.)'s new upload agreement (Exhibit 10 Book of Exhibits) and any like provisions in their adhesive members contract, known as "Terms of Service," (TOS). Null and void as against public policy because the terms of the nonexclusive license "irrevocable and perpetual" when the whole contract can be terminated at the will of the parties.

i. On Count XI, Declaring Defendants Time Warner, Inc. (f/k/a AOL Time Warner, Inc.)/AOL, LLC (f/k/a America Online, Inc.)'s forum selection clause contained in it's [sic] adhesive 2003 Terms of Service Agreement (TOS) unconscionable and void as against the public policy of Michigan because Michigan residents cannot contract for the venue of post contract causes of actions.

j. On Count XII, Declaring Defendants Time Warner, Inc. (f/k/a AOL Time Warner, Inc.)/AOL, LLC (f/k/a America Online, Inc.)'s forum selection clause contained in it's [sic] adhesive 1998 Terms of Service Agreement (TOS) unconscionable and void as against the public policy of Virginia because it is not conspicuous.

Proposed Third Am. Complaint [dkt # 81]. The magistrate judge issued an order indicating he will

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not rule on the plaintiff's motion to file this proposed amended complaint until after this Court rules on the objections.

In order to determine the corporate relationship between AOL and Time Warner, the magistrate judge ordered supplemental briefing. Defendant Time Warner, Inc. filed an affidavit from Katherine Wychulis, chief corporate counsel for defendant AOL, LLC [dkt # 71], in which Ms. Wychulis explains the steps taken to combine AOL and Time Warner. This affidavit is the basis for the magistrate judge's conclusion.

\*4 The magistrate judge thoroughly traced the serpentine history of America Online, Inc.'s and Time Warner's combination based on evidence that was not refuted by the plaintiff. That history need not be repeated here. It is sufficient to summarize that AOL, LLC is a successor to defendant America Online, Inc., and it is a subsidiary of AOL Holdings, LLC, which is owned by defendant Time Warner, Inc., Google, Inc., and TW AOL Holdings, Inc. (which is wholly-owned by Time Warner, Inc.). The magistrate judge determined that no merger occurred between the present Time Warner, Inc., which is a defendant in this case, and AOL, LLC or its predecessor defendant America Online, Inc. Rather, AOL, LLC and its predecessors have always operated independently of defendant Time Warner, Inc. or as a subsidiary owned by defendant Time Warner, Inc. Defendant Time Warner, Inc. is a parent company of AOL, LLC. “[N]o reasonable jury could find such a merger occurred to form the basis of corporate successor liability on the part of Defendant Time Warner, Inc.” R & R at 11. The Court agrees.

The magistrate then addressed the plaintiff's alternate theories of liability against defendant Time Warner, Inc. Because the plaintiff contended that Time Warner, Inc. is the *alter ego* of America Online, Inc., the magistrate judge commented that to pierce the veil in Michigan, a plaintiff must show that (1) the corporate entity was a mere instrumentality of another entity or individual; (2) the corpor-

ate entity was used to commit a fraud or wrong; and (3) the plaintiff suffered an unjust loss. R & R at 13 (citing *Foodlands Distributions, Inc. v. Al-Naimi*, 220 Mich.App. 453, 559 N.W.2d 379 (1996)). The magistrate disregarded the legal conclusions alleged in the plaintiff's complaint and considered only the facts pleaded. Because the plaintiff failed to allege facts meeting these three requirements, Judge Pepe concluded that the plaintiff had not alleged sufficient facts to pierce the corporate veil. “The mere fact that Time Warner's name was once AOL Time Warner, Inc. does not mean that Time Warner exercised significant control over the actions of its subsidiary, and no such factually supported allegations appear in Plaintiff's complaints.” R & R at 15.

## II.

The plaintiff has four objections to the magistrate judge's report. Taking them in reverse order, the plaintiff argues that the magistrate judge erroneously concluded that no merger took place. The plaintiff claims the magistrate judge's decision does not comport with the evidence. The plaintiff believes AOL, LLC's predecessor company, America Online, Inc., merged with Time Warner, Inc. # 1 to form defendant Time Warner # 2's predecessor AOL Time Warner, Inc. However, the undisputed evidence contradicts that contention. The plaintiff has neither pleaded any facts (as opposed to unsupported conclusions) nor offered any information outside the pleadings to contradict Judge Pepe's thorough discussion of the organizational history of the entities involved. This objection, therefore, will be overruled.

\*5 The plaintiff next argues that the defendant's 12(b)(6) motion cannot be granted because the magistrate judge considered matters outside the complaint. The plaintiff claims the magistrate judge's resolution of factual issues is improper at this point as no discovery has taken place. This argument has no merit. Courts may consider public records and filings with government agencies without converting a motion to dismiss under Rule 12(b)(6) to a summary judgment motion. *Jackson v. City of*

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*Columbus*, 194 F.3d 737, 745 (6th Cir.1999) (noting that without converting the motion, “[c]ourts may ... consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies”), *overruled on other grounds* by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). In this case, the magistrate judge ordered both sides to present additional materials well before deciding the motion, and thereby he gave “all parties ... reasonable opportunity to present all material made pertinent to” the issue, as Rule 12 requires. *See Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir.2004).

The plaintiff also states Time Warner has admitted that it merged with America Online, Inc. The plaintiff cites paperwork Time Warner submitted to the SEC, which states “The Company ... was formed on February 4, 2000 in connection with the AOL-Historic TW Merger.” Pl.’s Obj. Ex. 4, SEC documents at 123. The defendant answered this argument by stating that “[m]any forms of business combinations are popularly described as mergers.” Def. Time Warner’s Resp. to Obj. at 9. The Court agrees that a casual remark in the popular media will not serve to establish a legal conclusion, and Time Warner’s submission using short-hand terms does not diminish the hard facts determined by Judge Pepe as to the history of the combination of the two entities and the resulting subsidiary enterprises.

Lastly, the plaintiff contends that the corporate veil theory is not applicable to this copyright infringement case, and the magistrate judge erred in discussing it. Rather, the plaintiff insists, his theory of liability against Time Warner is based on vicarious liability because Time Warner allegedly profited from AOL, LLC’s infringing activity. The plaintiff relies heavily on *Gordon v. Nextel Comm’n*, 345 F.3d 922, 925 (6th Cir.2003), in support of this objection.

In *Gordon*, the court of appeals affirmed the dismissal of a copyright infringement claim based

in part on vicarious liability, and explained the elements of the claim as follows:

Regardless of the defendants’ actual knowledge of the removal or alteration of the copyright information, a party may be held vicariously liable for the actions of others under certain circumstances within the copyright context. Vicarious liability exists when (1) a defendant has the right and ability to supervise the infringing conduct and (2) the defendant has an obvious and direct financial interest in the infringement. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir.1963). These elements are independent requirements, and each must be present to render a defendant vicariously liable. *See id.* Lack of knowledge of the infringement is irrelevant. *See id.* Vicarious copyright liability is an “outgrowth” of the common law doctrine of respondeat superior, which holds the employer liable for the acts of its agents. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir.1996). However, vicarious liability extends beyond the traditional scope of the master-servant theory. *See Nimmer on Copyright*, § 12.04. As long as the required elements are presented, a defendant may be liable, even in the absence of a traditional employer-employee relationship. *See id.*

\*6 *Nextel*, 345 F.3d at 925. The plaintiff contends that even if America Online, Inc. (now AOL, LLC) is a subsidiary of Time Warner, Inc., Time Warner’s status as parent to America Online, Inc. is sufficient grounds to find liability. The plaintiff states that a parent company can be held vicariously liable if it can supervise the actions of its subsidiary and has a financial interest in the subsidiary. However, the plaintiff states the requirements too broadly and fails to acknowledge that the supervision and financial interest must be in the infringing activity. “Vicarious liability exists when (1) a defendant has the right and ability to supervise the infringing conduct and (2) the defendant has an obvious and direct financial interest in the infringe-

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ment.” *Nextel*, 345 F.3d at 925 (emphasis added).

The “right and ability to supervise” means more than simply owning some or all of the shares of stock in a company. The cases finding vicarious liability usually deal with much more day-to-day control than just the parent-subsidary relationship. See, e.g. *King Records, Inc. v. Bennett*, 438 F.Supp.2d 812, 852 (M.D.Tenn.2006) (finding an individual vicariously liable for a business's infringement when the individual defendant was the sole shareholder of the business, “made all final decisions, and was ultimately responsible for anything that happened at [the business]”); *Microsoft Corp. v. Sellers*, 411 F.Supp.2d 913 (E.D.Tenn.2006) (finding individual owner vicariously liable for infringement where he was “the sole owner of the company and was responsible for the overall operation of the business and its day to day operations[, and] was the primary, if not sole, moving force behind the illegal acts of the business”); *Jobete Music Co., Inc. v. Johnson Commc'ns, Inc.*, 285 F.Supp.2d 1077, 1084 (S.D.Ohio 2003) (finding majority owner of radio station vicariously liable for infringement where his duties “include supervising the station staff ... [through which] station employees report to the Department Heads, and these supervisors, including the Program and Music Director, who is responsible for selecting the programming for the station, report to him”). Compare these cases to *Banff Ltd. v. Limited, Inc.*, 869 F.Supp. 1103 (S.D.N.Y.1994), where the court dismissed vicarious liability claims on summary judgment because the plaintiff had alleged nothing more than the parent company's ownership of its subsidiary. “Simply [being] the parent is not enough.” Rather, “the plaintiff must show that the parent ... has the right and ability to supervise the subsidiary, which is evidenced by some continuing connection between the two in regard to the infringing activity.” *Id.* at 1110. See also *Goes Lithography Co. v. Banta Corp.*, 26 F.Supp.2d 1042, 1045 (N.D.Ill.1998) (holding that bare allegations that the infringer is a wholly-owned subsidiary of the parent is insufficient to establish vicarious liability;

the plaintiff “must allege facts which show a continuing connection between the parent and the subsidiary to the infringing activities to make out a case for vicarious liability”).

\*7 Regarding the financial benefit aspect of the test, *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir.2004), found no financial benefit accrued to America Online, Inc. when an infringer uploaded the plaintiff's short story onto a file-sharing network that America Online, Inc. allowed its users to access. The plaintiff alleged that the defendant Robertson uploaded short stories written by the plaintiff to USENET, a peer-to-peer network. Because America Online, Inc. provides its subscribers with access to USENET, the plaintiff alleged that America Online, Inc. was vicariously liable. The court of appeals rejected this claim, finding no financial benefit to America Online, Inc.:

We note that there is no evidence that indicates that AOL customers either subscribed because of the available infringing material or canceled subscriptions because it was no longer available. While a causal relationship might exist between AOL's profits from subscriptions and the infringing activity taking place on its USENET servers, Ellison has not offered enough evidence for a reasonable juror so to conclude.

*Ellison*, 357 F.3d at 1079.

The plaintiff's first amended complaint contains no factual allegations on these two factors. The complaint alleges only that America Online, Inc. and Time Warner merged. First Am. Compl. at ¶ 6. There are no facts in the complaint from which the Court could conclude that Time Warner had the right to supervise America Online, Inc.'s destruction of the screen saver libraries or the creation of a new upload/download center linked to Tucows' website. The parent/subsidary relationship alone is not sufficient to show the ability to supervise.

The plaintiff has not alleged that Time Warner somehow profited by America Online, Inc.'s al-

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leged infringement of his copyright in these screen savers. In fact, it's hard to see how Time Warner could possibly have profited through America Online, Inc.'s copying of a few free screen savers. "[T]here is no evidence that indicates that [Time Warner or AOL] customers either subscribed because of the available infringing material or canceled subscriptions because it was no longer available." *Ellison*, 357 F.3d at 1079. Although the defendant's motion originally was styled as a motion to dismiss, there are not even any allegations in the first amended complaint that this is the case.

The proposed second amended complaint does little in the pleading of facts to shore up these deficiencies. On the question of the right and ability to supervise the infringing conduct, the plaintiff alleges only that there are overlapping corporate officers among Time Warner and AOL, LLC, and the two companies were treated as one entity. On the financial interest issue, the plaintiff alleges only that Time Warner stood to profit from AOL, LLC's success. These allegations do not satisfy the two elements necessary for a claim of vicarious liability. The plaintiff's objection on this ground, therefore, must be rejected.

### III.

\*8 The plaintiff's objections to Magistrate Judge Pepe's report and recommendation lack merit. The proposed amendment to the complaint does not alter the Court's view with respect to defendant Time Warner, Inc.

Accordingly, it is **ORDERED** that the petitioner's objections to the magistrate judge's report and recommendation [dkt # 76] are **OVERRULED**.

It is further **ORDERED** that the report and recommendation [dkt # 73] is **ADOPTED**.

It is further **ORDERED** that the motion to dismiss filed by defendant Time Warner, Inc. [dkt # 9] is **GRANTED**.

It is further **ORDERED** that the Time Warner,

Inc. is **DISMISSED** from the case as a defendant.

It is further **ORDERED** that the matter is referred to the magistrate judge to conduct all additional pretrial matters, including disposition of pending motions. The Court requests a report on the items docketed as numbers 51, 61, 67, and 81 by the end of August 2007.

### **REPORT AND RECOMMENDATION**

**STEVEN D. PEPE**, United States Magistrate Judge.

On September 15, 2006, Defendant Time Warner filed its [Fed.R.Civ.P. 12\(b\)\(6\)](#) motion to dismiss Plaintiff's Complaint against it, arguing that Plaintiff's Complaint contains no allegations of wrongdoing against Time Warner (Dkt.# 9). On the same date, Defendants AOL LLC and Time Warner filed a motion to dismiss or transfer this case to the Eastern District of Virginia pursuant to [28 U.S.C. § 1404\(a\)](#), because of a forum selection clause contained in Plaintiff's Terms of Service Agreement with AOL (Dkt.# 11). The jurisdictional issue was dealt with first, and after multiple submissions and judicial determinations, this matter was finally resolved on February 12, 2007, in this Court's denial of Defendants' motion for reconsideration of its earlier order denying such a transfer (Dkt.# 60). Once it was finally determined that this forum would decide the merits of Plaintiff's claims, Defendant Time Warner's [Rule 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim against it was scheduled for hearing. On February 21, 2007, a hearing was held to determine and understand the relevant ownership and management status of America Online, Inc., for the relevant time period and the evolution of American Online, Inc., and Time Warner, Inc., AOL Holdings LLC and TW AOL Holdings, Inc., and their relation to Time Warner, Inc. All pre-trial matters were referred to the undersigned for general case management (Dkt.# 16). Because the present motion seeks dismissal of a party, this matter is being handled under [28 U.S.C. § 636\(b\)\(1\)\(B\)](#). For the reasons stated below, it is **RECOMMENDED** that Defendant Time Warner's 12(b) (6) motion to dismiss be **GRAN-**



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**TED.**

### **I. Procedural History**

After Defendant Time Warner filed its Fed.R.Civ.P. 12(b)(6) motion to dismiss Plaintiff's Complaint against it, Plaintiff filed his first Amended Complaint on October 2, 2006 (Dkt.# 18), and his response to Defendant's 12(b)(6) motion on October 4, 2006 (Dkt.# 19). Defendant Time Warner subsequently filed its October 16, 2006, reply brief (Dkt.# 28) to which Plaintiff filed an October 20, 2006, sur-reply (Dkt.# 32). On January 31, 2007, Plaintiff filed his motion for leave to file another sur-reply brief opposing Defendant Time Warner's motion to dismiss (Dkt.# 56) and on February 5, 2007, Plaintiff filed his second Amended Complaint (Dkt.# 58).

\*9 Because matters outside the pleadings were earlier submitted on Defendant's motion, and further clarification was needed to resolve the current motion, prior to the February 21, 2007, hearing, both parties were ordered to provide supplemental filings which would describe in detail, through the use of declarations under 28 U.S.C. § 1746(2) and organizational “berry” charts displaying the ownership and management status of America Online, Inc., for the relevant time period and the evolution of American Online, Inc., Time Warner, Inc., AOL Holdings LLC and TW AOL Holdings, Inc., and their relation to Time Warner, Inc. These submissions are referred to herein as Dkt. # 69, filed on February 22, 2007 (Plaintiff's Submissions) and Dkt. # 71, filed on February 27, 2007 (Defendant Time Warner's Submissions). Because “matters outside the pleadings are presented” and considered on the corporate structures of the various entities, this Rule 12(b)(6) motion can be “treated as one for summary judgment and disposed of as provided in Rule 56.” Fed.R.Civ.P. 12(b).

### **II. Background Facts**

#### **A. Alleged Cause of Action**

As set forth in Plaintiff's Complaint, Plaintiff is

author and owner of the copyrighted audiovisual works “Pheasants in Flight Screen Saver” and “Solitude Screen Saver.” America Online, Inc., (now AOL LLC) is an Internet Service Provider of which Plaintiff was a subscriber. (Dkt. # 1, ¶¶ 7, 10; Dkt. # 11, p. 6 <sup>FN1</sup>). Pursuant to contract, Defendant Tucows provided third-party Internet services to America Online, Inc., including but not limited to providing America Online, Inc., with certain uploading and downloading services, providing certain content for download on the America Online, Inc., site by America Online, Inc. members, and categorizing and indexing such content in a format designated by America Online, Inc. (Dkt.# 7, ¶ 8).

**FN1.** Page number reflects ECF pagination.

America Online, Inc., maintained a center for its members through which they could upload and download software, thereby sharing software with other members (Dkt.# 1, ¶ 11). Plaintiff indicates that he granted America Online, Inc., a non-exclusive software licence to use his software for the downloading and personal use of its members subject to the following restrictions:

The uploader claims and guarantees to have full and clear copyright to this work. This work is for personal use of downloading member and may not be modified, distributed, etc. in whole or in part. This work cannot be uploaded to any electronic system or BBS or included in any compact disk (CD-ROM) or collection of any kind without the written permission from the uploader. To do so places the user at legal risk of sever [sic] fines and penalties for copyright infringement.

Plaintiff notes that this made his software available to America Online, Inc.'s “20,000,000+” members (Dkt.# 1, ¶ 17).

On or about July 23, 2003, Plaintiff claims that America Online, Inc. destroyed the old libraries containing the software and created a new upload/

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download center, which continued to make available for download Plaintiff's software. In doing so, Plaintiff alleges that America Online, Inc. exceeded the software license he had provided them and violated his copyright because it did not adequately inform him of the change in procedure (Dkt.# 1, ¶¶ 17, 19, 20). This new center contained content provided by Tucows, including content that Tucows received from America Online, Inc., categorized and indexed, and returned to America Online, Inc., for the center.

\*10 Further, Plaintiff alleges that his copyrighted software was made available on Tucows' own Internet site. He claims that Tucows distributed his "Pheasants in Flight" screen saver to at least 4 people and his "Solitude" screen saver to at least 3 people. Plaintiff alleges that therefore America Online, Inc., and Tucows are liable for copyright infringement. (Dkt.# 1, ¶¶ 23, 26, 30, 33-35). Tucows denies the content available for download on America Online, Inc.'s internet site was ever "piped" through Tucows' Internet site (Dkt.# 7). Plaintiff's claims against Defendant Time Warner, Inc. is based on its 2000 "merger" with AOL LLC's predecessor, American Online, Inc. Prior to alleged copyright infringements in 2003. Thus, the core of the contentions against Defendant Time Warner, Inc., is whether it is a merged successor corporation to America Online, Inc., or whether it is, as it contends, a parent corporation of a subsidiary corporation now known as AOL LLC, which is a separate successor corporation to America Online, Inc. As noted below. the details of the 2000 "merger" of Time Warner, Inc., and America Online, Inc. is sufficiently complex that any confusion as to the Defendants' corporate structure by Plaintiff and others is fully understandable.

### **B. Corporate Structure and History**

On June 12, 1989, Time Warner, Inc. ("Time Warner # 1" for identification purposes only), was incorporated in Delaware (*See*, Ex. B). On May 24, 1985, America Online, Inc. ("America Online Inc. # 1" for identification purposes only), was incor-

porated in Delaware. In January 2000, an announcement was made regarding the combination of Time Warner # 1 and America Online Inc. # 1. On February 4, 2000, a new corporate entity known as AOL Time Warner, Inc., was incorporated in Delaware. Legal entities known as Time Warner Merger Sub, Inc. ("Time Warner Merger Sub") and America Online Merger Sub, Inc. ("America Online Merger Sub") were also incorporated in Delaware on March 22, 2000 as wholly owned subsidiaries of AOL Time Warner, Inc. On January 11, 2001, Time Warner Merger Sub was merged into Time Warner # 1 and America Online Merger Sub was merged into America Online Inc. # 1. As a result of these two mergers, Time Warner # 1 and America Online Inc. # 1 became wholly owned subsidiaries of AOL Time Warner, Inc.

In October 2003, AOL Time Warner, Inc., changed its name to Time Warner, Inc. ("Time Warner # 2" for identification purposes only). Time Warner # 2, which is a defendant in this case, thus became the parent corporation of America Online Inc. # 1.

Thus, the Time Warner, Inc. # 1 and America Online Inc. # 1 "merger" was accomplished by creating a new corporate entity, AOL Time Warner, Inc., and two wholly owned "Merger Sub" entities, that thereafter merged with Time Warner Inc. # 1 and America Online Inc. # 1, making Time Warner Inc. # 1 and America Online Inc. # 1 subsidiaries of the newly formed parent corporation, AOL Time Warner, Inc., which successor corporation, Time Warner Inc. # 2 has been named as a Defendant in this litigation.

\*11 On April 3, 2006, America Online Inc. # 1 converted to a Delaware limited liability company and changed its name to AOL LLC. AOL LLC is a subsidiary of AOL Holdings LLC, which is owned by Time Warner Inc. # 2 (2.5%), Google, Inc. (5%), and TW AOL Holdings, Inc. (92.5%). TW AOL Holdings, Inc., which is a Virginia corporation, is wholly-owned by Time Warner Inc. # 2. Thus, Defendant AOL LLC is 2.5% directly owned by Time

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Warner, Inc. # 2, and 92.5% indirectly owned by Time Warner Inc. # 2's wholly owned subsidiary, TW AOL Holdings, Inc., and 5% directly owned by Google, Inc. (Lou Costello might ask at this time "who's on first?" <sup>FN2</sup>)

**FN2.** *Who's on First? by Abbott and Costello*, <http://www.baseball-almanac.com/humor4.shtml>

AOL LLC was granted a certificate of authority to transact business or conduct affairs in Michigan as a foreign corporation on November 8, 2006.

On May 12, 2006, another legal entity known as America Online, Inc. ("America Online Inc. # 2 for identification purposes only), was incorporated in Delaware. According to the declaration of Katherine Wychulis, Chief Corporate Counsel for Defendant AOL LLC., America Online Inc. # 2 was formed, in part, to preserve the name America Online, Inc. (See, Dkt # 71). America Online Inc. # 2 was granted a certificate of authority to transact business or conduct affairs in Michigan as a foreign corporation on December 7, 2006. It was formed after the alleged wrongdoings involved in this case, it is not a Defendant, and this information is provided for purposes of thorough disclosure of the various "America Online" and "AOL" corporate iterations.

### III. ANALYSIS

#### A. The Legal Standards

##### (1) Legal Standards for Motions to Dismiss

Fed. R. Civ. P 12(b) permits dismissal for "failure to state a claim upon which relief can be granted." "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even in everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir.1993). When deciding a motion under that Rule, "[t]he court must construe the complaint in the light most favorable to the

plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir.1996). "A judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir.1995). "However, while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Ibid.* "In practice, 'a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.' " *In re DeLorean*, 991 F.2d 1236, 1240 (6th Cir.1993) (emphasis in original) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988)). See also, *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987) (liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences); *Ana Leon T. v. Federal Reserve Bank*, 823 F.2d 928, 930 (6th Cir.1987) (per curiam) (mere conclusions are not afforded liberal Rule 12(b)(6) review).

##### (2) Legal Standards for Summary Judgment

\*12 In the present case certain factual issues concerning corporate organization need be resolved prior to and in relation to a determination of whether Plaintiff has stated a claim against Defendant Time Warner, Inc. Under Fed.R.Civ.P. 56, summary judgment is to be entered if the moving party demonstrates there is no genuine issue as to any material fact. The Supreme Court has interpreted this to mean that summary judgment should be entered if the evidence is such that a reasonable jury could find only for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). See also *Lenz v. Erdmann Corp.*, 773 F.2d 62 (6th Cir.1985). In resolving a summary judgment motion, the Court must view

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the evidence in the light most favorable to the non-moving party. See *Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir.1986); *Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir.1983). But as the Supreme Court wrote in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986):

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Moreover, when a motion for summary judgment is filed, the adverse party may not merely rely "upon the mere allegations or denials of the adverse party's pleading, but ... by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

## B. Factual Analysis

### 1. The Alleged "Merger"

In Plaintiff's complaints and briefs, he has alleged Defendant Time Warner's liability, both based on an alleged merger between America Online Inc. # 1 and Time Warner Inc. # 1, and alternatively on an alter-ego or vicarious liability theory in which he alleges Time Warner Inc. # 2 (formerly AOL Time Warner, Inc.) should be held liable for the acts of its subsidiary AOL LLC (formerly American Online Inc. # 1).<sup>FN3</sup> In preparation for a

February 21, 2007, hearing regarding the relevant ownership and management status of America Online, Inc., both parties submitted supplemental filings to the Court, which describe through the use of declarations and "berry" charts the ownership and management status of America Online, Inc., for the relevant time period and the evolution of American Online, Inc., Time Warner, Inc., AOL Holdings LLC and TW AOL Holdings, Inc., and their relation to Time Warner, Inc. These submissions made clear that America Online Inc. # 1, the internet service provider Plaintiff alleges is liable for copyright infringement and other related claims, did not merge in February 2000 with Time Warner # 1 to form AOL Time Warner, Inc. (now Time Warner, Inc. # 2).

**FN3.** Plaintiff claims that as a result of the alleged merger, Defendant Time Warner, Inc. # 2 acquired all the rights, duties, liabilities, and property of the alleged wrongdoer America Online, Inc. # 1.

\*13 As described above, on June 12, 1989, Time Warner, Inc. ("Time Warner Inc. # 1") was incorporated in Delaware. On May 24, 1985, American Online, Inc. ("America Online Inc. # 1") was incorporated in Delaware. In January 2000, an announcement was made regarding the combination of Time Warner # 1 and America Online Inc. # 1 and on February 4, 2000, a new entity known as AOL Time Warner, Inc. was incorporated in Delaware. Legal entities known as Time Warner Sub, Inc. ("Time Warner Merger Sub") and America Online Merger Sub, Inc. ("America Online Merger Sub") were incorporated in Delaware on March 22, 2000. Time Warner Merger Sub and America Online Merger Sub were formed as wholly owned subsidiaries of AOL Time Warner, Inc. On January 11, 2001, Time Warner Merger Sub was merged into Time Warner, Inc. # 1 and America Online Merger Sub was merged into America Online, Inc. # 1. As a result of these two mergers, Time Warner Inc. # 1 and America Online, Inc. # 1 became wholly owned subsidiaries of AOL Time Warner, Inc. In

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October 2003, AOL Time Warner, Inc. changed its name to Time Warner, Inc. (“Time Warner, Inc. # 2”).

It is therefore clear that throughout America Online Inc. # 1's corporate history it has operated either independent of Time Warner Inc. # 1 or as a subsidiary directly (2.5%) and indirectly (92/5%) owned by AOL Time Warner, Inc. (now Time Warner, Inc. # 2). Plaintiff's alleged harm occurred in 2003, well after the February 2000 formation of AOL Time Warner, Inc., and well after America Online Inc. # 1 became a subsidiary of AOL Time Warner, Inc. The October 2003 name change of AOL Time, Inc., to Time Warner, Inc. (“Time Warner, Inc. # 2”), has no relevant effect in this matter. This name change back to “Time Warner, Inc.” (which may cause confusion with the former Time Warner Inc. # 1) does not provide any evidence of an actual corporate merger or subsequent liability. Defendant Time Warner (“Time Warner Inc. # 2”) has provided virtually undisputed evidence that clearly establishes a merger between America Online Inc. # 1 and Time Warner, Inc. # 1 never occurred in the traditional sense, and that Time Warner Inc. # 2 is actually parent corporation of the separate alleged corporate wrongdoer, AOL LLC (formerly America Online, Inc. # 1). Thus, it is clear that no reasonable jury could find could find such a merger occurred to form the basis of corporate successor liability on the part of Defendant Time Warner, Inc. Thus, it is recommended that summary judgment be granted on the issue that Defendant Time Warner is a parent corporation of AOL LLC (formerly America Online Inc. # 1). It is further recommended that based on this factual judgment, Defendant Time Warner be dismissed from this case for lack of any successor corporate liability based on an alleged, but ultimately unfounded, merger.

## 2. Vicarious Liability

Plaintiff has also alleged that Defendant Time Warner is vicariously liable for the acts of America Online Inc. # 1 under an alter ego theory (Dkt.# 18,

¶ 6). Plaintiff's claim is most fully explained in his second Amended Complaint (Dkt. # 58; Plaintiff's first Amended Complaint was filed October 2, 2006 (Dkt. # 18)), which Defendants have moved to strike, because Plaintiff failed to properly obtain leave of the Court to file as required under Fed.R.Civ.P. 15(a), nor did Plaintiff obtain Defendants' consent to the filing (Dkt.# 66). In this disputed second Amended Complaint, Plaintiff alleges that Defendant Time Warner Inc. # 2 is vicariously liable as a result of the “merger on February 4, 2000” (Dkt. # 58, Count IX). He claims that as a result of the merger, from February 4, 2000, to at least October 16, 2003, the two entities America Online Inc. # 1 and Time Warner Inc. # 1 were treated as one entity, with the same corporate officers, and that the corporate officers pled in paragraph 81 of his second Amended Complaint knew, or should have known, that American Online Inc. # 1 was contracting with Tucows, Inc. Moreover, he states that Defendant Time Warner Inc. # 2 stood to gain financially from the success of America Online Inc. # 1.

\*14 As discussed in the previous section, a merger between America Online Inc. # 1 and Time Warner Inc. # 1 never occurred in the traditional sense. Rather, on January 11, 2001, America Online Inc. # 1 became a wholly owned subsidiary of a newly formed corporation, AOL Time Warner, Inc., and in October 2003, this newly formed AOL Time Warner, Inc., changed its name to Time Warner, Inc. (“Time Warner # 2”). On April 3, 2006, America Online, Inc. # 1 converted to a Delaware limited liability company and changed its name to AOL LLC. AOL LLC is a subsidiary of AOL Holdings, LLC, which is owned by Time Warner, Inc. # 2 (2.5%), Google, Inc. (5%) and TW AOL Holdings, Inc. (92.5%) (TW AOL Holdings, Inc., a Virginia corporation, is wholly owned by Time Warner, Inc. # 2). AOL LLC was granted a certificate of authority to transact business or conduct affairs in Michigan as a foreign corporation on November 8, 2006.

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Because a traditional “merger” did not occur between America Online Inc. # 1 and Time Warner Inc. # 1, and because Time Warner # 2 is not a successor corporation of Time Warner Inc. # 1 (rather, Time Warner # 2 is the parent company of Time Warner # 1, as well as the parent corporation of subsidiary AOL LLC), the only manner in which Time Warner, Inc. # 2 can be held liable for the alleged actions of its subsidiary America Online, Inc. # 1, is by piercing the corporate veil.

Under Michigan law, there is a presumption that the corporate form will be respected. *Seasword v. Hilti*, 449 Mich. 542, 537 N.W.2d 221, 224 (1995) (citing *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 26 N.W.2d 757, 761 (1947)). “This presumption, often called the ‘corporate veil,’ may be pierced only where an otherwise separate corporate existence has been used to ‘subvert justice or cause a result that [is] contrary to some overriding public policy.’ “ *Id.* (alteration in original) (quoting *Wells v. Firestone*, 421 Mich. 641, 364 N.W.2d 670, 674 (1984)). Michigan courts will not pierce the corporate veil unless: (1) the corporate entity was a mere instrumentality of another entity or individual; (2) the corporate entity was used to commit a fraud or wrong; and (3) the plaintiff suffered an unjust loss. *Foodland Distribs. v. Al-Naimi*, 220 Mich.App. 453, 559 N.W.2d 379, 381 (1996) (citing *SDC Chem. Distribs., Inc. v. Medley*, 203 Mich.App. 374, 512 N.W.2d 86, 90 (1994)); see also *Gledhill v. Fisher & Co.*, 272 Mich. 353, 262 N.W. 371, 372 (1935). The propriety of piercing the corporate veil is highly dependent on the equities of the situation, and the inquiry tends to be intensively fact-driven. *Kline v. Kline*, 104 Mich.App. 700, 305 N.W.2d 297, 299 (1981) (per curiam); see *Herman*, 26 N.W.2d at 761 (“In determining whether the corporate entity should be disregarded and the parent company held liable on the contracts of its subsidiary because the latter served as a mere instrumentality or adjunct of the former, each case is sui generis and must be decided in accordance with its own underlying facts.”).

\*15 Mr. Bennett has had no direct dealings with Defendant Time Warner Inc. # 2, (nor with Time Warner Inc.# 1). and all of his claims arise out of his dealings with America Online Inc. # 1 (now AOL LLC). Mr. Bennett does not allege that Defendant Time Warner's shareholders have failed to treat Time Warner Inc. # 2 and AOL LLC as separate entities. Nor does he allege that recognition of Time Warner as a separate entity will cause him any injustice, or that its incorporators acted with fraudulent intent.<sup>FN4</sup> Instead, Mr. Bennett tries to conflate two separate corporate entities with a conclusory allegation that Time Warner's majority-owned subsidiary AOL, LLC is merely an “alter ego” of Time Warner.

FN4. At the hearing on this motion, counsel for Time Warner, Inc., and for AOL LLC (formerly America Online, Inc.) assured the Court that AOL LLC is an entity sufficiently capitalized and solvent to pay any judgment that might be rendered in this litigation. Plaintiff does not challenge this assertion nor allege that Defendant Time Warner, Inc., must be treated as an alter ego to avoid the injustice of his having a claim, which if reduced to judgment against AOL LLC, could not be collected.

Dismissal of claims against a parent corporation for failure to state a claim is appropriate where, as here, the Plaintiff has failed to make allegations sufficient to satisfy the elements of a veil piercing claim. In *Southeast Texas Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666 (6th Cir.2006), the Sixth Circuit recently granted a parent corporation's motion to dismiss a suit arising out of a subsidiary's alleged breach of a contract. In that case, dismissal under Fed.R.Civ.P. 12(b)(6) was granted because the complaint failed to “allege that [the parent corporation] was ‘involved in an elaborate shell game or [was] otherwise abusing the corporate form to effect a fraud.’ “ *Id.* at 680 (citations omitted). The Court further noted that the complaint contained “no averment that ‘the corporation [is] a sham and

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exist[s] for no other purpose than as a vehicle for fraud.’ “ *Id.* (citations omitted). *See also, Seasword* 449 Mich. 542, 537 N.W.2d 221 (claim against parent corporation dismissed; plaintiff failed to allege that the parent and subsidiary had “abused their presumably separate and distinct corporate forms.”).

Moreover, the Court can disregard statements contained in Plaintiff's complaints and briefs that are unsupported by any factual allegations. *See Blackburn v. Fisk Univ.*, 443 F.2d 121, 124 (6th Cir.1971) (granting motion to dismiss, and noting that “[t]here are no facts alleged in support of the conclusions, and we are required to accept only well pleaded facts as true, not the legal conclusions that may be alleged or that may be drawn from the pleaded facts.”) (citations omitted). *See also Botsford General Hosp. v. United Amer. Healthcare Corp.*, 2003 WL 22850448 at \*2 (Mich.App.2003) (holding that allegations regarding common directors and officers and “financing and expense matters” were insufficient to establish veil-piercing claim). The mere fact that Time Warner's name was once AOL Time Warner, Inc., does not mean that Time Warner exercised significant control over the actions of its subsidiary, and no such factually supported allegations appear in Plaintiff's complaints.

As the Supreme Court has recognized, “[i]t is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.” *U.S. v. Bestfoods*, 524 U.S. 51, 61, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998) (citations omitted). Given that Time Warner and AOL LLC are separate corporate entities, and Plaintiff has made no allegations that would justify piercing Time Warner's corporate veil, Defendant Time Warner should be dismissed from this action.

#### IV. RECOMMENDATION

\*16 For the reasons stated above, **IT IS RECOMMENDED** that summary judgment be gran-

ted on the factual issue that Defendant Time Warner is not a successor corporation of America Online, Inc., but is rather a parent corporation of AOL LLC (formerly America Online, Inc.) and **IT IS FURTHER RECOMMENDED** that Defendant Time Warner's motion to dismiss be **GRANTED** and that **TIME WARNER BE DISMISSED** as a party to this action.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections on or before March 16, 2007, hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir.1991); *Smith v. Detroit Fed'n of Teachers Local*, 231, 829 F.2d 1370,1373 (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections. If the Court determines any objections are without merit, it may rule without awaiting the response to the objections.

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