THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

OMNI INNOVATIONS, LLC., a Washington Limited Liability company; EMILY ABBEY, an individual,

Plaintiffs,

v.

IMPULSE MARKETING GROUP, INC., a Nevada/Georgia corporation; JEFFREY GOLDSTEIN, individually and as part of his marital community; KENNETH ADAMSON, individually and as part of his marital community; GREGORY GREENSTEIN, individually and as part of his marital community; STEVE WADLEY, individually and as part of his marital community; JOHN DOES, I-X,

Defendants.

No. 06-cv-01469-MJP

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FRCP 12 (b)(2) & (6) OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT UNDER FRCP 12(e)

NOTE ON MOTION CALENDAR: JUNE 1, 2007

(Oral Argument Requested)

I. PRELIMINARY STATEMENT

Defendants Impulse Marketing Group, Inc. ("Impulse") and Jeffrey Goldstein ("Goldstein") (collectively referred to as "Defendants"), by and through their counsel of record, move this Court for dismissal of Plaintiffs' Complaint pursuant to FRCP 12(b)(2) and (6) or, in the alternative, for a more definite statement pursuant to FRCP 12(e). This motion is based upon the memorandum below and the Declarations of Matthew Wojcik and Jeffrey Goldstein.

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II. INTRODUCTION

This action was commenced by Plaintiffs on or about October 10, 2006. (Wojcik Decl. ¶2.) Defendants were not served with the Complaint until approximately four (4) months after the Complaint was initially filed, on or about February 5, 2007. (Wojcik Decl. ¶3.) Impulse and Goldstein were served on or about February 5, 2007. (Wojcik Decl. ¶4.)

Upon information and belief, Omni Innovations, LLC ("Omni") is owned by Mr. James S. Gordon, Jr. ("Gordon"), who also serves as the registered agent for Omni. (Wojcik Decl. ¶5.) Gordon is the plaintiff in a nearly identical action against Defendants filed on or about November 23, 2004 in United States District Court in the Eastern District of Washington.[1] (Wojcik Decl. ¶6.) Upon information and belief, Gordon has filed no less than thirteen (13) other lawsuits against email marketers since 2004. (Wojcik Decl. ¶7.) Gordon is a professional plaintiff, whose tendency to exaggerate the facts has already been noted by this Court.[2] (Wojcik Decl. ¶8.) Gordon, individually, and now through Omni, has developed a scheme that he perpetrates on email marketers. His modus operandi is to file vague and ambiguous pleadings in an attempt to either coerce email marketers into unwarranted monetary settlements or to engage email marketers in protracted litigation, forcing them in incur significant legal fees to their detriment in defense of the frivolous action(s). The present action is yet another example of Plaintiffs' ongoing scheme.

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[1] Currently, there are multiple motions pending in Gordon v. Impulse Marketing Group, Inc., et al., Case No. CV-04-5125, including, but not limited to, a motion for sanctions against the plaintiff and motions to dismiss the action. Clearly, Gordon is attempting to sidestep any potential dismissal in the Eastern District by filing the present action.

[2] In a footnote to his May 24, 2006 Order in Gordon v. Virtumundo, Inc., Case No. CV06-0204JCC, Judge Coughenour, United States District Judge for the Western District of Washington, noted Gordon's "tendency to exaggerate claims in [his] briefing.

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III. ARGUMENT

A. Plaintiffs Fail to State a Claim Against Defendant Goldstein.

Plaintiffs fail to establish the elements necessary in order to pierce the corporate veil. In order to pierce the corporate veil, two separate, essential facts must be established: plaintiff "must demonstrate that the corporate form was used to violate or evade a duty, and [second,] that [the corporate form] must be disregarded to prevent loss to an innocent party." Wash. Water Jet Workers Assoc., et al. v. Yarbrough, 151 Wash. 2d 470, 503 (2004) (citing Meisel v. M & N Modern Hydraulic Press Co., 97 Wash. 2d 403, 409-10 (1982)); see Dickens v. Alliance Analytical Labs, LLC, 127 Wash. App. 433, 440-41 (2005). The first factor typically involves "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's [plaintiff's] detriment. " Meisel, 97 Wash. 2d at 410 (quoting Truckweld Equip. Co. v. Olson, 26 Wash. App. 638, 645 (1980)); see Strandley v. CNS Ins. Cos., 93 Wash. App. 1022 (1998); see also Dole Food Co. v. Patrickson, 538 U.S. 468, 475 (2003) ("The doctrine of piercing the corporate veil is the rare exception, applied in the case of fraud or certain other exceptional circumstances . . . ").

While the Complaint alleges violations of CAN-SPAM, CEMA and the CPA, the Complaint does not contain averments of fraud. With regard to the second factor, "wrongful corporate activities must actually harm the party seeking relief so that disregard is necessary. Intentional misconduct must be the cause of the harm that is avoided by disregard." Meisel, 97 Wash. 2d at 410 (1980); see Strandley, 93 Wash. App. 1022 (1998).

In Water Jet, plaintiff named the owners of a defendant corporation but failed to claim a specific wrongdoing against such owners. The trial court dismissed the claims against the individual owners, finding that plaintiff had an opportunity to submit facts to demonstrate that the

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corporate form had been abused and that piercing the corporate veil was justified and plaintiff failed to do so. Water Jet, 151 Wash. 2d at 503 (2004). On appeal, the Supreme Court of the State of Washington affirmed the trial court's decision, concluding that dismissal of the claims against the individual owners was appropriate based on a failure to state a claim. Id.

The facts in Water Jet parallel those of the case at bar. Plaintiffs simply recite that Goldstein is "an officer, director, and/or majority shareholder of Impulse and as such controls its policies, activities, and practices, including those alleged herein on behalf of Impulse." (Compl. ¶ 4.) "Piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege." Dickens 127 Wash. App. at 440 (2005). Plaintiffs do not allege that Goldstein has abused the corporate privilege, nor have they alleged that Impulse is a sham corporation or that the corporation is an alter ego of Goldstein. Even accepting the allegations contained in the Complaint as true, nowhere in the Complaint do Plaintiffs attempt to incorporate any factual averments or circumstances in support of the two essential burdens of proof required to pierce the corporate veil– specifically, that the corporate form was used to violate or evade a duty and that the failure to hold the individual liable would result in a loss to Plaintiffs. Thus, as in Water Jet, the dismissal of Plaintiffs' causes of action against Goldstein is appropriate based on the failure of Plaintiffs to state a claim.

B. Plaintiffs Fail to Establish Personal Jurisdiction Over Defendant Goldstein.

Plaintiffs bear the burden of establishing personal jurisdiction over a defendant. See Hirsch v. Blue Cross, Blue Shield of Kan., 800 F.2d 1474, 1477 (9th Cir. 1986); Cognigen Networks v. Cognigen Corp., 174 F.Supp.2d 1134, 1137 (W.D. Wash. 2001) (On defendant's motion to dismiss for lack of personal jurisdiction, it is the plaintiff's burden to show that jurisdiction is proper); Langlois v. Deja Vu, Inc., 984 F.Supp. 1327, 1332 (W.D. Wash. 1997)

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(plaintiff bears the burden of proving that jurisdiction exists as to each out-of-state defendant (emphasis added)). The Ninth Circuit Court of Appeals has held that through the presentation of affidavits and discovery materials, plaintiffs must prove a prima facie case of jurisdiction as to each and every out-of-state defendant. Brand v. Menlove Dodge, 746 F.2d 1070, 1072 (9th Cir. 1986); see also Langlois, 984 F.Supp. at 1332-33 (W.D. Wash. 1997).

In order to exercise personal jurisdiction, a court must find that a defendant has a threshold level of "minimum contacts" with the forum state such that "traditional notions of fair play and substantial justice" are not offended. See Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945); see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). If a defendant has a continuous and systematic presence in the forum state, the court has "general jurisdiction" over the defendant; if the claim arises out of the defendant's forum directed activities, the court may exercise "specific jurisdiction" can be asserted over the defendant within the forum. See Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984). Based upon the allegations contained in the Complaint, it appears that Plaintiffs do not allege that the Court has general jurisdiction over Goldstein.

The determination as to the existence of specific jurisdiction is made by looking to Washington's long-arm statute, RCW § 4.28.185. In order to exercise specific jurisdiction over a non-resident defendant under the Constitution and RCW § 4.28.185, the courts of Washington have applied a three-part test: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. Omeluk v.

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Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995). A defendant purposefully avails himself of the benefits of the forum if he has deliberately "engaged in significant activities within a state or has created 'continuing obligations' between himself and the residents of the forum, and the cause of action arises out of those obligations. Burger King Corp., 471 U.S. 475-76 (1985). Plaintiffs' claims in the Complaint are based upon his faulty assumption that Goldstein initiated emails to accounts residing on the Omni server located in Washington and/or Abbey, a Washington resident. In fact, no emails were initiated by Goldstein individually. (Goldstein Decl. ¶ 6.) Even assuming *arguendo* that an email was sent to Plaintiffs, any such email would have been sent by or on behalf of a corporation, and not by Goldstein. Further, Goldstein is a resident of the State of Georgia, and does not own property, maintain business or personal bank accounts or regularly transact business in the State of Washington. (Goldstein Decl. ¶¶ 3,4,5.) Thus, Goldstein has not purposefully availed himself of the benefits of the forum by engaging in significant activities within the State of Washington or by creating continuing obligations between themselves and Washington State residents. Therefore, Plaintiffs have failed to prove that jurisdiction exists as to each out-of-state defendant. As a result, the Court should decline to exercise personal jurisdiction over Goldstein and should dismiss the Complaint as to Goldstein.

C. Plaintiffs' Complaint Should be Dismissed Pursuant to FRCP 12(b)(6) for Failure to State a Claim.

Initially, it should be noted that Plaintiffs admit that Omni provided and enabled computer access beginning in May 2005. (Compl. ¶ 11.) Yet Plaintiffs go on to allege that from "approximately August 2003 through October 2006 Plaintiffs received emails at the Domains" (Compl. ¶ 14) and that "each of the emails were received by Plaintiff Omni" (Compl. ¶ 25). Clearly, one of Plaintiffs' contradictory statements is false. In light of Plaintiffs' admission in

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paragraph 11 of the Complaint, Omni is only entitled to bring a cause of action based upon emails allegedly received from May 2005 through October 2006.

Plaintiffs have failed to satisfy the basic pleading requirements of FRCP 8(a). The Complaint consists of vague and ambiguous blanket allegations that Defendants initiated "emails" to Omni and Abbey. (Compl. ¶¶ 18, 20, 21, 22, 23.) Plaintiffs fail to identify the number of emails alleged to have been received by each Plaintiff, as well as the email addresses to which such emails were allegedly sent. This is yet another example of Plaintiffs' scheme to file vague and ambiguous pleadings in an attempt to either coerce email marketers into unwarranted monetary settlements or to engage email marketers in protracted litigation, forcing them in incur significant legal fees to their detriment in defense of the frivolous action(s).

In order to survive a motion to dismiss under FRCP 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Roe v. Nev., 332 F. Supp. 2d 1331, 1339 (D. Nev. 2004) (citing Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434 (6th Cir. 1988). Although factual allegations set forth in the complaint "taken as true and construed in the light most favorable to [p]laintiffs", the Ninth Circuit has elaborated on this rule, explaining that "courts should only accept as true the well-pleaded facts, and ignore 'legal conclusions,' 'unsupported conclusions,' 'unwarranted inferences,' unwarranted deductions,' 'footless conclusions of law' or 'sweeping legal conclusions cast in the form of factual allegations.'" Id. (emphasis added) (citing Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996); quoting W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).

Plaintiffs' entire Complaint consists of precisely those "facts" that courts in the Ninth Circuit have suggested they should ignore–sweeping legal conclusions that Defendants have

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violated CEMA, the CPA and/or CAN-SPAM, cast in the form of factual allegations. There are virtually no "well-pleaded" facts for the Court to accept as true. More specifically, Plaintiffs rely upon the unsupported conclusions that Defendants "initiated emails" and that the emails violated CAN-SPAM, the CPA and/or CEMA. Here, each email constitutes a separate cause of action that must be properly plead. Plaintiffs fail to identify each alleged email and to specify how each alleged email violated any provision(s) of CAN-SPAM, the CPA and/or CEMA.

Plaintiffs have failed to properly state a claim under any of the statutory provisions pursuant to which they attempt to bring this action. Instead, Plaintiffs have deliberately crafted a pleading consisting entirely of vague, unsupported and sweeping legal conclusions cast in the form of factual allegations. As a result, in line with previously cited Ninth Circuit authority, Plaintiffs' Complaint should be dismissed under FRCP 12(b)(6).

D. If the Complaint is not Dismissed, Plaintiffs Should be Required to Provide a More Definite Statement Pursuant to FRCP 12(e).

With the filing of the present Complaint, Plaintiffs continues their pattern of filing deliberately vague and ambiguous pleadings. "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in the pleading will further the economical disposition of the case, the party receiving the pleading may move for a more definite statement before serving a responsive pleading." CR 12(e); see FRCP 12(e) (emphasis added). Although notice pleading requires only that the complaint contain a short and plain statement showing that the plaintiff is entitled to relief (CR 8(a); FRCP 8(a)), this does not dispense with the necessity, as occasion may require, for a statement of certain details which would enable each defendant to more readily prepare and file a responsive pleading. Fed. Proc. § 62:421 (2006). In fact, unless

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facts are "simply and concisely stated in lucid fashion, and support [plaintiff's] conclusion" the action fails. Washburn, et al. v. Moorman Mfg. Co., 25 F.Supp. 546, 546 (S.D. Cal. 1938).

Nowhere in the Complaint do Plaintiffs simply and concisely state in lucid fashion the facts supporting, *inter alia*, the number of emails alleged to have been sent by specific Defendant(s) to specific Plaintiffs or Plaintiffs' belief that Defendants are responsible for sending the alleged emails to Plaintiffs. As outlined in Part III.C *infra*, Plaintiffs' Complaint is intentionally replete with vague, ambiguous, and cumulative allegations. As a result, Plaintiffs' action should fail under the court's analysis in Washburn. However, if the Court does not dismiss the action, Plaintiffs should be required to provide a more definite statement.

In order to interpose a responsive pleading and to further the economical disposition of the case, if necessary following this motion to dismiss, Defendants require, at a minimum, the following additional details: the number of emails alleged to have been sent to each Plaintiff by each Defendant in violation of each separate and distinct provision of CEMA, CPA and CAN-SPAM; the manner in which each email is alleged to have violated any subsection of the aforementioned statutes (e.g., deceptive subject line, etc.); and to what specific email addresses each email is alleged to have been sent.

In sum, if Plaintiffs' action is not dismissed, Plaintiffs should be required to state for each and every email: 1) the email address to which it was sent; 2) the date on which it was sent; 3) the specific ways in which the email is alleged to violate any provision of any statute and the factual basis or bases for such a conclusion; 4) the factual basis upon which Plaintiffs base their conclusion that the email was sent or initiated by or on behalf of Impulse and/or Goldstein.

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IV. CONCLUSION

For the reasons above, Plaintiffs' Complaint should be dismissed in its entirety or, at a minimum, Plaintiffs should be required to provide a more definite statement pursuant to FRCP 12(e).

DATED this 4th day of May, 2007.

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/s/ Matthew R. Wojcik

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CERTIFICATE OF SERVICE

I hereby certify that on the date noted below I electronically filed the document entitled Defendants' Motion To Dismiss Plaintiffs' Complaint Pursuant to FRCP 12 (b)(2)(6) or, in the Alternative, For A More Definite Statement Under FRCP 12(e) in accordance with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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DATED this 4th day of May, 2007.

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