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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
MAY 06 2005
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

STEPHEN SOTELO, individually and on)
behalf of all persons similarly situated,)
)
Plaintiff,)
)
vs.)
)
)
DIRECTREVENUE, LLC,)
DIRECTREVENUE HOLDINGS, LLC;)
BETTERINTERNET, LLC; BYRON UDELL)
& ASSOCIATES, INC., D/B/A/)
ACCUQUOTE, AQUANTIVE, INC., and)
JOHN DOES 1-100,)
)
Defendants.)

Case No. 05 C 2562
Judge Gettleman

DEFENDANT DIRECTREVENUE HOLDINGS, LLC'S MEMORANDUM
OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS PURSUANT TO RULE 12(B)(2)

Pursuant to Fed. R. Civ. P. 12(b)(2), defendant DirectRevenue Holdings, LLC ("DR Holdings" or "Defendant") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint filed by plaintiff Stephen Sotelo ("Sotelo" or "Plaintiff") for lack of personal jurisdiction.

I. PRELIMINARY STATEMENT

The Complaint against DR Holdings should be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(2). DR Holdings is a Delaware limited liability company with its principal place of business in New York, New York. DR Holdings does not conduct business in Illinois, and is not engaged in any of the allegedly unlawful business practices described in the Complaint. The mere fact that defendant is the parent of defendants DirectRevenue, LLC and

BetterInternet, LLC is not a sufficient basis for exercising personal jurisdiction over DR Holdings. Accordingly, DR Holdings should be dismissed from this action pursuant to Fed. R. Civ. P. 12(b)(2).

II. STATEMENT OF FACTS

DR Holdings is a Delaware limited-liability company that maintains its principal place of business at 107 Grand Street, 3rd Floor, New York, New York 10013. DR Holdings is the parent of defendant Direct Revenue LLC (“DR”), which in turn is the parent of defendant BetterInternet, LLC (“BI”). (See Declaration of DR Holdings CEO Joshua Abram, attached hereto as Exhibit A, ¶¶ 2, 3).

The only allegation in the Complaint that is specifically addressed to DR Holdings is that, “Upon information and belief, Defendant [DR Holdings] is a holding company for [BI] and [DR].” (Complaint ¶ 3).

Plaintiff attempts to conflate DR Holdings with the other defendants by directing its allegations at “DirectRevenue,” which is defined to include DR Holdings, DR, and BI. (Complaint ¶ 3). But DR Holdings does not engage in any of the allegedly unlawful business activities that are described in the Complaint. (Abram Dec. ¶ 4).

Indeed, DR Holdings – which is not registered to do business Illinois – does not have any connections whatsoever to Illinois. (Abram Dec. ¶ 8). DR Holdings does not:

- Distribute “spyware” or “pop-up advertising” on the Internet;
- Maintain any websites that are accessible to consumers in Illinois;
- Conduct any business in Illinois;
- Maintain any offices, facilities, or personnel in Illinois;
- Maintain any bank accounts in Illinois;

- Transact business with any Illinois corporations;
- Maintain any clients in Illinois;
- Contract to provide services in Illinois.

(Abram Dec. ¶¶ 5-7).

III. ARGUMENT

A. THE COMPLAINT AGAINST DR HOLDINGS SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

The Complaint against DR Holdings should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. “A federal district court exercising diversity jurisdiction has personal jurisdiction ... only if a court of the state in which it sits would have such jurisdiction.” *RAR, Inc. v. Turner Diesel*, 107 F.3d 1272, 1275-76 (7th Cir. 1997) (internal quotations and citation omitted). Under Illinois law, Illinois state courts may exercise jurisdiction on any basis permitted by the Illinois Constitution and the Constitution of the United States. 735 ILCS § 5/2-209(c).¹

“The Plaintiff ... has the burden of demonstrating the existence of personal jurisdiction.” *RAR*, 107 F.3d at 1276, citing *McIlwee v. ADM Industries, Inc.*, 17 F.3d 222, 223 (7th Cir. 1994). To meet its burden, Plaintiff must demonstrate that (1) the nonresident defendant has the requisite “minimum contacts” with the forum state (Part III.A.1 below); and (2) the exercise of jurisdiction over the defendants is “fair and reasonable under the circumstances” and “that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” (Part III.A.2 below). See *Hollinger Int’l, Inc. v. Hollinger Inc.*, No. 04 C 0689, 2005 WL 589000, at *17-8 (N.D. Ill. 2005); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102

¹ Although “the Illinois due process guarantee is not necessarily co-extensive with federal due process protections[...],” the case law on the subject is “scant” and “Illinois courts have given little guidance

(1987); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); U.S. CONST. amend. XIV.

1. MINIMUM CONTACTS

A plaintiff may demonstrate that a defendant had sufficient “minimum contacts” with the forum state by establishing the existence of “general jurisdiction” or “specific jurisdiction.” *Hyatt Int’l Corp. v. Coco*, 302 F.3d 707, 713-14 (7th Cir. 2002), *citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 415 n.8 (1984). The exercise of “general jurisdiction is proper only when the defendant has ‘continuous and systematic’ contacts with the state in question.” *Id.* “Specific jurisdiction,” which is more limited, “exists for controversies that arise out of or are related to the defendant’s forum contacts.” *Id.*

a) General Jurisdiction

The exercise of general jurisdiction is permitted only where the defendant has ‘continuous and systematic general business contacts’ with the forum.” *RAR, Inc.*, 107 F.3d at 1277. In such cases, “the court may exercise personal jurisdiction over the defendant even in cases that do not arise out of and are not related to the defendant’s forum contacts.” *Hyatt Int’l*, 302 F.3d at 713. However, “contacts only add to the quantum for personal jurisdiction when purposefully directed at the forum or its residents.” *Recycling Sciences Int’l, Inc. v. Soil Restoration and Recycling LLC*, No. 00 C 0311, 2001 WL 289868, at *4 (N.D. Ill. Mar. 15, 2001), *quoting Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1359 (Fed. Cir. 1998). “Contacts that are random, fortuitous, or attenuated do not count in the minimum contacts calculation.” *Id.*, *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

(continued . . .)

as to how state due process protection differs from federal protection in the context of personal

The level of contact with the forum state necessary to establish general jurisdiction is “quite high.” See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir. 1990).

In this case, DR Holdings does not have any contacts – let alone “continuous or systematic” contacts – with the forum state sufficient to justify the exercise of general jurisdiction. DR Holdings is a Delaware limited-liability company with its principal place of business in New York, New York. DR Holdings does not conduct any business in Illinois, and does not maintain any offices, facilities, bank accounts, or personnel in Illinois. Moreover, DR Holdings does not directly engage in any of the Internet activities that are alleged in the Complaint. (Abram Dec. ¶¶ 5-8).

The only allegation that is specifically addressed to DR Holdings is that, “Upon information and belief, Defendant [DR Holdings] is a holding company for [BI] and [DR].” (Complaint ¶ 3). However, the fact that DR Holdings is the parent company of BI and DR, without more, is not a basis for exercising personal jurisdiction over DR Holdings. See *Androphy v. Smith & Nephew, Inc.*, 31 F. Supp. 2d 620, 622 (N.D. Ill. 1998) (finding that “holding company which neither transact[ed] business nor contract[ed] to provide products or services in Illinois” was not subject to personal jurisdiction in Illinois); *Levy v. Chubb Corp.*, No. 00 C 5698, 2001 WL 204793, at *3 (N.D. Ill. March 1, 2001) (finding that court did not have general jurisdiction over a holding company based on the acts of its subsidiary absent additional evidence that holding company “control[led]” the subsidiary). There are no other facts in the complaint that would support the exercise of personal jurisdiction over DR Holdings.

Therefore, there is simply no factual basis upon which to find that Defendant’s contacts with this forum were sufficiently “continuous and systematic” to meet the constitutional

(continued . . .)

jurisdiction.” *RAR, Inc.*, 107 F.3d at 1276.

requirements of due process. Accordingly, dismissal of this action is proper pursuant to Fed. R. Civ. P. 12(b)(2).

b) Specific Jurisdiction

“Specific jurisdiction” refers to jurisdiction over a defendant in a suit “arising out of or related to the defendant’s contacts with the forum.” *RAR, Inc.*, 107 F.3d at 1277. For specific jurisdiction to exist, plaintiff must establish that (1) the defendant purposefully availed itself of the privilege of conducting activities in the forum state; and (2) the claim arises out of or is related to those activities. *See Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 834 (N.D. Ill. 2000).

Plaintiff’s claims could not have arisen out of Defendant’s forum-related activities because DR Holdings does not directly engage in any of the types of business activities that are described in the Complaint. DR Holdings does not distribute software or advertising over the Internet, and it does not maintain any websites that are accessible to consumers in Illinois. (Abram Dec. ¶¶ 4-5).

Moreover, Plaintiff’s allegation that DR Holdings is the parent of BI and DR is insufficient to support the exercise of personal jurisdiction over DR Holdings. Absent “evidence that justifies piercing the corporate veil” or evidence that “the subsidiaries were acting as the parent’s agent,” the activities of a subsidiary will not establish jurisdiction over a foreign parent. *Salon Group, Inc. v. Salberg*, 156 F. Supp. 2d 872, 876 (N.D. Ill. 2001). “[T]ies between a parent and a subsidiary [that] are nothing more than the normal incidents of such a relationship” will not support the exercise of jurisdiction over the parent. *Id.* Here, there are no allegations in the Complaint – nor any evidence whatsoever – that would justify piercing the corporate veil or finding that BI and DR were acting as the agent for DR Holdings.

There being no factual basis upon which to find that Plaintiff's claims arise out of DR Holdings' activities in the forum state, the claims against DR Holdings should be dismissed in their entirety pursuant to Fed. R. Civ. P. 12(b)(2).

2. Reasonableness

"If the court finds that it has either specific or general jurisdiction, the court must still ensure that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Hollinger*, 2005 WL 589000, at *18. "Under this determination, the court examines: (1) the interest of the state in providing a forum to the plaintiff; (2) the interest of the state in regulating the activity involved; (3) the burden of defense in the forum on the defendant; (4) the relative burden of prosecution elsewhere on the plaintiff; (5) the extent to which the claim is related to the defendant's local activities; and (6) the avoidance of a multiplicity of suits or conflicting adjudications. *Id.*, citing *Asahi*, 480 U.S. at 115 and *Burger King*, 471 U.S. at 472-73, 476-77. "Because no one factor is dispositive, this Court must balance all of the factors." *Id.* (citations omitted). "However, the most important factors to consider are the interests of the forum and the relative convenience of the defendant in litigating in that forum." *Id.* (citations omitted).

The exercise of jurisdiction over DR Holdings would not be reasonable. Illinois has no interest in keeping DR Holdings in this forum as DR Holdings does not have any connections to this state. As discussed above, DR Holdings does not conduct any business in Illinois or maintain any offices, facilities, bank accounts, or personnel in Illinois. Moreover, it would not be convenient for DR Holdings – a Delaware company with offices in New York, New York – to litigate in Illinois. A multiplicity of suits or conflicting adjudications is unlikely, as DR Holdings does not engage in any of the allegedly unlawful practices described in the

Complaint. Significantly, the claim bears no connection to any of DR Holdings' "local activities," because DR Holdings has not engaged in any activities whatsoever in Illinois. (Abram Dec. ¶¶ 5-8).

Because personal jurisdiction over Defendant is lacking, Plaintiff's claims against DR Holdings should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2).

IV. CONCLUSION

For all of the foregoing reasons, the Complaint filed by Plaintiff Stephen Sotelo should be dismissed in its entirety as against Defendant Direct Revenue Holdings, LLC pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

Dated: May 6, 2005

DIRECTREVENUE HOLDINGS, LLC,
DEFENDANT,

By: _____



One of its attorneys

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

STEPHEN SOTELO, individually and on behalf
of all persons similarly situated,

Plaintiff,

v.

DIRECTREVENUE, LLC, DIRECTREVENUE
HOLDINGS, LLC, BETTERINTERNET, LLC,
BYRON UDELL & ASSOCIATES, INC. D/B/A
ACCUQUOTE, AQUANTIVE, INC., and JOHN
DOES 1-100,

Defendants.

Case No. 05 C 2562

**DECLARATION OF
JOSHUA ABRAM**

JOSHUA ABRAM declares, under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Chief Executive Officer of Defendant DirectRevenue Holdings, LLC (“DR Holdings”).
2. DR Holdings is a Delaware limited-liability company that maintains its principal place of business at 107 Grand Street, 3rd Floor, New York, New York 10013.
3. DR Holdings is the parent company of defendant DirectRevenue, LLC, which, in turn, is the parent company of defendant BetterInternet, LLC.
4. DR Holdings does not engage in any of the Internet-related business activities that are alleged in the Complaint.

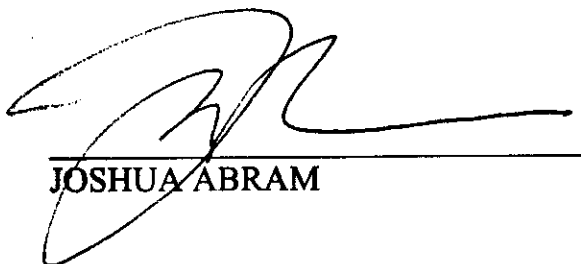
5. DR Holdings does not **distribute** “spyware” or “pop-up advertising” on the Internet, and it does not maintain any **websites** that are accessible to consumers in Illinois.

6. DR Holdings does not maintain any offices, facilities, bank accounts, or personnel in Illinois.

7. DR Holdings does not conduct any business in Illinois. It does not transact business with any Illinois corporations, maintain any clients in Illinois, or contract to provide services in Illinois.

8. DR Holdings is not **registered** to do business Illinois.

Dated: New York, New York
May 4, 2005



JOSHUA ABRAM