[* 1]

SCANNED ON 12/12/2006

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: [illegible]

PART 56

Index Number : 601630/2006

THOMAS LICENSING, LLC

VS

ATARI INTERACTIVE

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 11/2/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 12 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/12/06

HON. RICHARD B. LOWE, III
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

THOMAS LICENSING, LLC,

Plaintiff,

-against- INDEX NO. 601630/06

ATARI INTERACTIVE, INC., formerly known as
INFOGRAMES INTERACTIVE INC. and
HASBRO INTERACTIVE INC., and
ATARI, INC.,

Defendants.

----------X

HON. RICHARD B. LOWE, III:

Defendant Atari, Inc. moves pursuant to CPLR 3211(a)(1) and 3211(a)(7) for an order dismissing the amended complaint against it.

Background

Plaintiff Thomas Licensing, LLC ("Plaintiff" or "Thomas") brings this action against Atari, Inc. alleging breach of contract and unjust enrichment and seeking an accounting.

The facts as plead in the complaint are as follows: Plaintiff is one of two exclusive U.S. licensees of intellectual property rights in the children's television series "Thomas & Friends" including its feature character, Thomas the Tank Engine.

On June 10, 1999, Thomas' predecessor-in-interest, Britt Allcroft, Inc., entered into a License Agreement with Atari Interactive Inc.'s ("Atari Interactive") predecessor-in-interest, Hasbro Interactive Inc. Pursuant to the License Agreement, Plaintiff alleges that Atari Interactive was granted a license to develop interactive games based upon the "Thomas &

Friends" series and the Thomas character.

Plaintiff further pleads that it entered into a Letter Agreement with Atari Interactive on September 1, 2001 extending the term of the license until December 31, 2005.

Under the agreement, Atari Interactive was to report sales and royalties owed to Thomas , to pay those royalties due and owing, to make minimum guaranteed payments, and to keep financial records which Thomas could audit if it so chose.

In the Spring of 2005, Thomas had auditors perform a Royalty Examination Report of Atari, Inc.'s records which allegedly revealed problems in the record keeping and royalty reporting, including under reported sales, unreported sales, and a failure to make minimum guaranteed payments. Thomas alleges Atari Interactive owes over $1 million in royalties, interest, and other amounts under the License Agreement.

While the agreement at issue is between Thomas and Atari Interactive, Atari, Inc. is a named defendant in this action. Plaintiff alleges that Atari, Inc., dominates and controls Atari Interactive and therefore it may be held liable under an alter ego theory.

Atari, Inc. makes this instant motion to dismiss alleging that even accepting Thomas' allegations as plead in the complaint as true, there are no grounds which support the alter ego theory.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference, allegations consisting of bare conclusory assertions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration (*Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53

[1st Dept 1994].) Pursuant to 3211(a)(1), a dismissal is warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994].)

Choice of Law

The parties dispute which state law should apply to the analysis of the alter ego claim. Plaintiff argues Delaware law should apply because it is the state of Atari, Inc.'s incorporation. Defendant argues New York law applies because there is a contractual choice of law provision in the agreements designating New York law as applicable.

Generally, under New York choice of law principles, "[the] law of the state of incorporation determines when the corporate form" will be pierced (*Netjets Aviation, Inc., v LHC Comm. LLC*, 2006 US Dist LEXIS 38972 (SDNY June 12, 2006). "For choice of law purposes . . .the state of incorporation determines the applicable law" (*O'Donnell v Ferro*, 303 AD2d 567, 568 [2nd Dept 2003])(citing *Katz v Emmett*, 226 AD2d 558, 589 [2 nd Dept 1996]).

None of these general cases are directly on point, however, because they do not address the presence of a choice of law clause in the parties' contractual relationship. Rather, the issue before this court is which state's law applies where the place of incorporation of the entity for whom the plaintiff seeks to pierce the corporate veil, differs from the choice of law provided for in the parties contract.

Defendant cites to a matter where the court, having acknowledged that its research found no case dealing expressly with whether a contractual choice of law provision governs the issue of disregarding a party's corporate form in the event of a breach, concluded that the broadly phrased choice of law provision governed the alter ego question (*Network Enterprises, Inc. v Apba*

Offshore Productions, Inc., 2006 WL 2707335 [SDNY September 20, 2006]). On the other hand, plaintiff presents a case where the court did apparently address the issue and held, "[b]ecause a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away" (*Kalb, Voorhis & Co v American Financial Corporation*, 8F3d 130[2nd Cir. 1993])(citing *Soviet Pan Am Travel Effort v Travel Committee, Inc.*, 756 FSupp 126, 131 [SDNY 1991](applying New York conflict of law principles)).

This court agrees with the court in *Kalb Voorhis* whereby New York conflict of law rules require that Delaware law, the place of Atari, Inc.'s incorporation, should apply to the alter ego analysis.

The law of the jurisdiction having the greatest interest in the litigation [should] be applied and the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict (*Intercontinental Planning, Ltd. v Daystrom, Inc.*, 24 NY2d 372, 382 [1969]). In this matter, the legal issue in conflict is the law regarding the alter ego analysis and whether Atari, Inc.'s corporate veil should be pierced. This is not a general contract issue which would be applicable to interpretation of the governing contract between the parties. As the court in *Kalb Voorhis* recognized, the law of the state of incorporation has the greater interest in determining when a veil should be pierced, "because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability." (*Kalb Voorhis & Co v American Financial Corp.* at 132). Accordingly, Delaware law should be applied.

Alter Ego/Agency claims

Defendant first moves to dismiss the complaint arguing Atari, Inc. is neither a party to the license agreement nor the letter agreement. Because there is no privity between plaintiff and Atari, Inc, the defendant argues the claims must necessarily be dismissed.

Under Delaware law, it is not necessary to show there is fraud in order to pierce the corporate veil. Rather, one must show that the company is in fact a "mere instrumentality or alter ego of its owner" (*Acciaia Speciali terni USA, Inc. v Momene*, 202FSupp 203, 207 [SDNY 2002]). Factors to consider include: whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether various corporate formalities were observed; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder (*Id.* at 207-208)(quoting *United States v Golden Acres, Inc.*, 702 F.Supp. 1097, 1104[D.Del. 1988](applying Delaware law)).

In the complaint, the plaintiff pleads the following: in order to obtain information about the financial reports; Thomas was repeatedly shuffled between representatives of Atari Interactive and Atari, Inc.; Atari Interactive failed to pay royalties at the direction of Atari Inc.; Atari Inc. has stated publicly that it manages Atari Interactive; during the relevant periods, the president, clerk and all of the directors of Atari Interactive were and are senior managers, and in several cases, directors of Atari, Inc.; the president, clerk and all directors of Atari Interactive have their business addresses at Atari, Inc.'s offices; and Atari, Inc. has exercised domination and control over Atari Interactive (*Complaint* ¶ 39-45).

At this stage in the proceeding, where only a cognizable cause of action need be plead, plaintiff has made enough of a requisite showing to allow the causes of action against Atari, Inc. to stand. As alleged in the complaint, Atari Inc. is wrongfully profiting from the sale and

distribution of interactive software based upon Thomas Licensing's intellectual property without paying royalties to Thomas Licensing, and because Atari Inc. is directing Atari Interactive to pay royalties to other licensors while improperly withholding royalties owed to Thomas Licensing (*Id* ¶ 41,53).

Atari, Inc., in opposition submits the affidavit of Arturo Rodriguez, the vice president and controller of Atari, Inc., who affirms that Atari Interactive and Atari, Inc. are separate and distinct entities. He attests that while there may be overlap of principals and shared office space, the two entities are not one and the same. Plaintiff argues, and defendant does not dispute in its reply, that courts must accept the allegations of the complaint as true and affidavits submitted by the defendant are not properly considered to refute the allegations (*Henbest & Morrisey, Inc. v W.H. Agency, Inc.*, 259 AD2d 829, 830 [3d Dept 1999]). Therefore, at this juncture, the plaintiff has raised a sustainable cause of action, and the motion to dismiss for failure to plead its alter ego claim is denied.

Furthermore, for similar reasons, the agency cause of action may stand. Where there is a close connection between the relationship of the two corporations and the cause of action, the agency theory applies (*Sears, Roebuck & Co. v Sears plc*, 744 F.Supp. 1297, 1305 [D. Del 1990]). Relevant factors are similar to those plead in the instant complaint, the extent of Atari Interactive's overlap of officers and directors with Atari, Inc., the division of day to day responsibilities among the entities, and their methods of financing (*Applied Biosystems v Cruachem, Ltd.*, 772 F.Supp. 1458, 1463 [D.Del. 1991]). As plead, the allegations reveal two entities that are closely related. Atari, Inc. manages the day to day operations of Atari, Interactive, the two entities have overlapping board members and directors, and there is an

admission that Atari, Inc. and Atari Interactive have a management agreement between them. Therefore, the agency cause of action will not be dismissed.

Unjust Enrichment Claim

Plaintiff alleges unjust enrichment against Atari, Inc. based on the following theories: Atari, Inc. received and accepted services from Plaintiff's performance of the agreements; Atari, Inc. unjustly benefitted through marketing and distributing the licensed products for Atari Interactive, and Atari, Inc. unjustly benefitted from not paying royalties.

The defendant argues this cause of action must be dismissed and primarily bases his argument on the License Agreement and the Letter Agreement. Defendant argues Atari, Inc. is not a party to the Agreements and therefore received no benefits.

Unjust enrichment is properly plead where it is stated that the plaintiffs have properly asserted that a benefit was bestowed by the plaintiffs and the defendants obtained such benefit without compensating the plaintiff *(Sergeants Benevolent Assoc. Annuity Fund v Rench*, 19 AD2d 107, 111 [1st Dept 2005]).

The benefit bestowed upon Atari Inc. is its use of the illustrations, trademarks, and materials relating to the Thomas the Tank Engine character to design, develop, manufacture, distribute, promote and sell interactive software based upon the character. In return Thomas Interactive was to receive payment of royalties and minimum guaranteed payments. Plaintiff pleads that both Atari, Inc. and Atari Interactive were enriched by their receipt of income from the sale and distribution of these products.

Defendant argues Atari, Inc. had no expectation of payment because it was not a party to the relevant agreements. However, this court has already found that plaintiff has properly plead

its allegation that Atari, Inc. exercised domination and control over the business of Atari, Interactive. Furthermore, an unjust enrichment claim may be plead against a party even in the absence of an agreement (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Therefore, the motion to dismiss the unjust enrichment claim is denied.

Accounting

Defendant also moves to dismiss the cause of action for an accounting. The contractual provisions of the agreement provide plaintiff with the right to inspect Atari Interactive's books. Defendant argues there is no right to an accounting because there is no fiduciary relationship between Thomas and Atari, Inc. While generally the right to an accounting is present only when there is a fiduciary relationship between the parties (*See Saunders v AOL Time Warner, Inc.*, 18 AD3d 216,217 [1st Dept 2005]), the right in this matter was created through the contractual provisions of the relative agreements. Thomas has a right to an accounting with respect to Atari Interactive. Furthermore, because the plaintiff has properly plead its alter ego claim this cause of action may be enforced by Atari, Inc. as well. Therefore, the motion to dismiss this cause of action is denied.

Conclusion

Therefore, based on the foregoing, the motion to dismiss is denied.

Dated: November 30, 2006

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.