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

PRESENT: Charles Edward Ramos Justice PART 53

Brainstorms

INDEX NO. 604052/01

MOTION DATE

- v -

MOTION SEQ. NO. 06

USA

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

FILED
OCT 13 2006

is decided in accordance with accompanying memorandum decision and order.

Dated: 10/11/06

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUBMITTED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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BRAINSTORMS INTERNET MARKETING, INC., BRAINSTORMS INTERNET MARKETING, LLC, DAVID BLAISE, CLAIRE BLAISE, RICHARD DRAKE, THOMAS M. FRY, JEAN P. FRY and JEREMY BARBERA,

Index No. 604052/01

Plaintiffs,

-against-

USA NETWORKS, INC. and NETWORKS INTERACTIVE LLC,

Defendants.

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Charles Edward Ramos, J.S.C.:

In motion sequence number 006, plaintiffs Brainstorms Internet Marketing, Inc., Brainstorms Internet Marketing, LLC (collectively "Brainstorms"), David Blaise, Claire Blaise, Richard Drake, Thomas M. Fry, Jean P. Fry and Jeremy Barbera, (Brainstorms and individual plaintiffs collectively "plaintiffs") move for leave to file a first amended complaint against defendants USA Networks, Inc. ("Networks") and USA Networks Interactive LLC ("USANI") (collectively "defendants") in order to add USANI's corporate parent on a corporate veil piercing claim upon the grounds that (1) the amendment is permitted under CPLR 3025(b; (2) the amendment corrects a pleading deficiency identified by the Appellate Division; and (3) is supported by evidence uncovered during discovery.

Background

Brainstorms was an internet marketer and seller of science fiction related products. David Blaise founded the business in 1988, which he owned with his wife, Claire Blaise. Richard Drake

joined the enterprise as chief financial officer. By 1996, Brainstorms had developed a substantial business in merchandise connected to the television show Star Trek, and it began working with Sci-Fi Channel and others. As the business expanded to cover other memorabilia, the company expanded its operation center, leasing property from David Blaise and his wife, and borrowing money from Thomas and Jean Fry and Jeremy Barbera.

In March 2000, Blaise and Drake were approached by Ben Tatta, Senior Vice President of USANI, a division of USA Cable ("Cable") and an affiliate of Networks. Blaise and Drake began negotiations for the purchase of Brainstorms' assets by USANI. However, defendants were not prepared to commit to a full purchase of Brainstorms, and sought to structure the acquisition as a two-step process, whereby USANI would purchase a 16% interest in Brainstorms and have an option to purchase the remainder. This plan was memorialized in a series of agreements, prepared by defendants' counsel and executed by USANI, the Blaises and Brainstorms on June 25, 2000, effective June 23, 2000.

Under the Contribution Agreement, Brainstorms contributed all its assets and liabilities to a newly formed company, Brainstorms Internet Marketing LLC ("BIMLLC"). Under the Membership Interests Option Agreement ("the Option Agreement") USANI provided a capital contribution of $404,040.40 in exchange for its 16% share of the newly formed company, with a four-month option to purchase the remaining 84% for the sum of

$2,121,212.10, by October 23, 2000.

During the option period granted to USANI for the contemplated purchase of the remaining interest in the newly formed company, the operations of BIMLLC would be governed by the terms of another agreement, the Brainstorms Internet Marketing LLC Limited Liability Company Operating Agreement (the "Operating Agreement").

The original complaint alleges that verbal assurances were given by Tatta and Tim Peterman, the Chief Financial Officer at Cable, that the deal was going to close, and that only non-substantive changes remained. The complaint further alleges that Blaise and Tatta attended the meeting at Peterman's office on September 11, 2000, both of them thinking that the deal would go forward to closing at that time, with the final closing and transfer of funds to take place shortly thereafter. The complaint states that Peterman announced at the meeting that the deal would not go through as structured, and that he remained open to restructuring the entire arrangement.

In December 2000, Michael Yorick, Tatta's replacement, confirmed that USANI had no acquisition budget. At this point, Brainstorms was allegedly without funding and without any viable means of finding alternative sources of financing in order to remain in business. Brainstorms closed up its operations and sold off its assets to pay off its existing liabilities.

On August 15, 2002, the summons and complaint were served on defendants. Plaintiffs in their complaint for breach of contract

and breach of fiduciary duty seek damages that they would have been entitled to had the parties completed the sale of Brainstorms to USANI under the Option Agreement and auxiliary related commitments.

By Notice of Motion dated October 26, 2001, Networks, USANI and Cable moved pursuant to CPLR 3211(a)(7), to dismiss the complaint on the grounds that each of the claims alleged failed to state a cause of action. To this end, plaintiffs provided this Court in its opposition with an exchange of emails between Tatta and Blaise. In an order dated October 17, 2002, this Court held that "the allegations of reliance and trust necessary for a finding of a fiduciary relationship are stated in a conclusory fashion" and dismissed the complaint.

By Notice of Appeal dated December 6, 2002, plaintiffs appealed the dismissal to the Appellate Division First Department. The Appellate Division in a decision dated April 27, 2004, reversed in part this Court's prior order of dismissal as to Networks; however, affirmed the dismissal as to defendants which were not signatories to the Option Agreement: USA Networks, Inc. and Cable. In concluding that the contractual relationship between plaintiffs and Cable did not give rise to a fiduciary duty, the Appellate Division stated that:

> The contract claims were, however, properly dismissed as to the remaining defendants, which, were not signatories to the purchase agreement. Plaintiffs' conclusory allegations that USANI was the alter ego of the non-signatory defendants were insufficient to sustain the action as against non-signatories, particularly since they were unaccompanied by allegations supporting the inference that USANI was utilized by the non-signatories for fraud, malfeasance or other

inequity. (See *TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335; *DCA Adv., Inc. v The Fox Group, Inc*, 2 AD3d 173.)

The Appellate Division determined that plaintiffs failed to assert that the various agreements, particularly the Operating Agreement, created a fiduciary relationship though USANI's alleged total control over Brainstorm's operations.

Plaintiffs now move this Court to amend the complaint as to non-signatory defendant: Networks. Plaintiffs request (a) to drop Cable from the action since Cable was a division, and not a subsidiary, of the defendant InterActive Corp., formerly known as USA Networks Inc.[1]; (b) to add Networks to this action as Networks and Cable had been dismissed by Order of the Appellate Division due to inadequacies of the allegations in the original complaint addressed to piercing of the corporate veil between USANI and its parent corporation Networks. Plaintiffs thus allege to have addressed the Appellate Division's concern through further discovery and investigation; and (c) to add substantial detailed specificity to their allegations concerning the "sham" nature of USANI, and its shareholder, Networks pointing to the "alter ego" status, and complete corporate dominance of USANI by Networks.

Plaintiffs argue that new allegations show that USANI as a separate corporation were used to avoid its debt to plaintiffs. Plaintiffs claim that those allegations are now supported by

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[1] Plaintiff need not request to drop Cable from this litigation as Cable was already dismissed by this Court by order dated October 17, 2002.

evidence in paragraphs 12, 18, and 45 through 48 of the amended complaint.

USANI objects to the granting of such leave because plaintiffs' proposed amended complaint is allegedly an attempt to resurrect the same claims which it asserted against a separate party Networks in its initial complaint. Defendants argue that plaintiffs are defying prior court orders to improperly drag Networks into this action simply to have an opportunity to pierce the corporate veil. Defendants further contend that no new claims of significance are alleged and thus this motion should be denied.

Discussion

CPLR 3025(b) states that "[l]eave shall be freely given" to a party to amend or supplement his or her pleading. This Court has wide discretion in deciding whether to grant leave to amend the complaint to add additional allegations. *Madison-Murray Assocs. v Perlbinder*, 188 AD2d 362 (1st Dep't, 1992).

USANI argues that the "law of the case" doctrine precludes plaintiffs' proposed amendments to add defendants. The law of the case provides that "when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of coordinate jurisdiction are concerned." *Martin v City of Cohoes*, 37 NY2d 162, 165 (1975). In *Gilligan v Reers*, 255 AD2d 486, 487 (2nd Dep't, 1998), the Second Department stated that the law of the case addresses final adjudication based on the merits of a case.

> The doctrine of law of the case 'applies only to legal determinations that were necessarily resolved on the merits in the prior decision.' (Citations omitted). In deciding that the application of the governing statutes brought about the automatic dismissal of the Gilligans' original complaint effective January 1, 1993, this Court did not implicitly or explicitly address, much less decide, the question of whether the Gilligans might ever again be permitted to interpose the claims which were contained in that original complaint, either in the context of a separate action, or in the context of an amendment to that pleading. *Id.*

While the Appellate Division's order on defendant's motion to dismiss raises plaintiff's insufficient pleadings to sustain an action for piercing of the corporate veil against non-signatories, it does not adjudicate the rights of the parties on the merits, nor does it dismiss Networks with prejudice. Plaintiffs' complaint was defective. Plaintiffs recourse is to cure its defect in pleadings and better support its piercing of the corporate veil allegations against Networks. This Court will grant plaintiffs request to amend its complaint if it is sufficient.

The Appellate Division cites *TNS Holding, Inc. v MKI Secs. Corp., 92* NY2d 335 (1998) for the proposition that plaintiffs have a heavy burden to show piercing of the corporate veil as against non-signatories to the contract.

> Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.
> Id at 339.

To show that Networks dominated USANI and that such domination resulted in USANI's inability to pay its alleged obligations to plaintiff or otherwise failed to proceed with the

transaction, Brainstorms added five pages of allegations, paragraph 45-48, to the second cause of action of breach of fiduciary duty. The allegations were founded on depositions of Richard Lynn, attorney and alleged[2] Senior Vice President of USANI and Dara Khosrowshahi, former President of Networks from August 1999 to July 2000. Details which Brainstorms added in the amended complaint include: the absence of USANI's capital and own bank accounts; the absence of payment to its employees; the absence of earned funds or filed tax returns records showing any of the profits that USANI made. The most persuasive allegation demonstrating that such domination was used to commit a wrong against the plaintiff which resulted in Brainstorm's alleged injury rests in Lynn's uncertainty as to his own status as an officer. Richard Lynn Deposition, October 28, 2004, p16-19. Lynn admits to not recollecting being an officer of USANI until being presented with a schedule to that effect.

Brainstorm's new allegations support the required inference that USANI was "utilized by the non-signatories for fraud, malfeasance or other inequity." *Brainstorms Internet Marketing, Inc., et al. V USA Networks, Inc.*, 6 AD3d 318 (1st Dep't, 2004).

Prejudice

Networks argues that plaintiffs' proposed amendment, to add it as a new defendant and thus add new allegations to their

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[2] While defendants claim that Lynn is the Senior Vice-President of USANI, plaintiffs in their complaint assert that Lynn lacks knowledge as to his own status and could not recall the performance of any duties as a Senior Vice-President.

complaint, would substantially enlarge the factual and legal parameters of this action, as well as result in additional discovery at a time where substantial discovery has already been completed.

Defendant does not show that it will suffer prejudice as a result of plaintiffs' amended complaint.

> Prejudice is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position. *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 22 (1981).

While allowing plaintiffs to amend the complaint may result in greater discovery, defendant does not show that the new allegations hinders or otherwise unfairly changes its position. Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers, Exhibit B, shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint within 20 days from the date of said service.

Dated: October 11, 2006

J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.