

DC Media Capital, LLC v Sivan
2009 NY Slip Op 30650(U)
March 9, 2009
Supreme Court, New York County
Docket Number: 600378/2007
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **BARBARA R. KAPNICK**

PART 19

Justice

DC MEDIA CAPITAL LLC

INDEX NO. 600378/07

- v -

AVI SIVAN

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED: _____

J.S.C.

add cross-motion as
MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/9/09

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
DC MEDIA CAPITAL LLC d/b/a NEWTEK
MEDIA CAPITAL ,

DECISION/ORDER
Index No. 600378/07
Motion Seq. No. 001

Plaintiff,

- against -

AVI SIVAN, PREM RANCHANDANI, KURT
STREAMS, SHOPFLASH, INC., IGIA, INC.
and JOHN DOE NO. 1 THROUGH JANE
DOE NO. 25, the names of the last
defendants being fictitious, the true
names being unknown, it being intended
to designate the agents of the aforesaid
defendants,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of two sets of lending agreements, the Media, Financing, Security and Assignment ("MFSA") Agreements and the Trust Agreements, between plaintiff DC Media Capital LLC d/b/a Newtek Media Capital and defendant Shopflash, Inc., which is in the business of developing and marketing consumer products for sale through television commercials and longer format "infomercials."

Specifically, on or about January 30, 2006, DC Media entered into a MFSA Agreement with Shopflash, concerning the "Milinex Power Storm" product (a vacuum cleaner). The next day, DC Media entered into a similar MFSA Agreement with Shopflash, concerning the "Pro Seal" product (a tile repair kit).

As part of each Agreement, DC Media entered into Trust Agreements purportedly signed by defendant Avi Sivan ("Sivan"), as guarantor of the MFSA Agreements, which DC Media alleges it later discovered were signed, in fact, by defendant Kurt Streams ("Streams") with the knowledge of Sivan and co-defendant Prem Ranchandani ("Ranchandani").

Defendants Sivan, Ranchandani and Streams were officers of defendant Igia, Inc. ("Igia"), Shopflash's parent company. DC Media alleges that the individual defendants control and dominate Igia and Shopflash as "alter ego" companies.

In essence, the Complaint alleges that DC Media provided financing, pursuant to the Agreements, for Shopflash to purchase media time in connection with the sale and marketing of the products, and to pay third-party vendors.

The Complaint further alleges that: (i) Shopflash defaulted under the Agreements; (ii) DC Media was forced to refund customers and pay all charge-back and other fees to third parties (i.e., return fees) based on products which were never shipped, were defective and/or were returned; and (iii) the individual defendants siphoned off, for their own use and personal gain, substantial amounts of moneys which DC Media had advanced for the purpose of paying the third-party vendors.

Plaintiff's Complaint sets forth claims for fraud against defendants Sivan, Ranchandani, Streams, Igia and the John Doe defendants (collectively, the "Sivan conspirators") (first cause of action); fraud against Sivan (second cause of action); a declaratory judgment (third cause of action); unjust enrichment (fourth cause of action); breach of trust agreements against defendant Sivan (fifth cause of action); RICO violations (sixth cause of action) and RICO conspiracy (seventh cause of action); legal expenses and attorneys' fees against Shopflash and Sivan (eighth cause of action); an accounting (ninth cause of action); an account stated (tenth cause of action); breach of contract against defendant Shopflash (eleventh cause of action), monies had and received (twelfth cause of action) and conversion (thirteenth cause of action).¹ Plaintiff seeks to recover compensatory damages in the amount of \$3,000,000 and punitive damages in an amount not less than \$500,000.

After filing an Answer, defendants now move for an order, pursuant to CPLR § 3211, dismissing twelve of plaintiff's thirteen causes of action on the ground that the Complaint fails to state a

¹ The causes of action are asserted against all the defendants, unless otherwise noted.

cause of action and plaintiff lacks standing to sue for a declaratory judgment.²

Plaintiff opposes the motion and cross-moves for an order, pursuant to CPLR § 3214(b), lifting the stay of disclosure and/or granting an order of preservation directing defendants to preserve all relevant evidence, including but not limited to,

e-mails, memoranda and other written communications in electronic form, voicemail communications, information databases, including accounting and other financial systems or other specialized databases, word processing documents, spreadsheets and presentation slides, audio and video recordings (including those attached to e-mails), electronic calendars and datebooks, computer assisted drawing and enterprise resource planning databases and other purpose-built systems, temporary Internet files created by browsers and saved Web pages, information remaining in "Delete" folders and recycle bins on all personal computers of defendants Sivan, Ranchandani and Streams, Igia and Shopflash intranet and internet sites, information stored on non-company hardware (including officer and employees' laptops and portable, handheld devices such as memory sticks, portable hard drives and Blackberries), personal data assistant or other portable devices capable of storing data, jump drives, zip drives, USB devices, hard drives, disks, tapes, servers, or any other electronic data storage medium or architecture, back-up systems and data maintained for recovery purposes, off-line storage, and data stores on removable media.

Defendants did not submit any papers in opposition to the cross-motion and failed to appear for oral argument which was

² At this time, defendants are not moving to dismiss the breach of contract claim against defendant Shopflash.

initially scheduled before this Court on February 13, 2008. This Court then rescheduled oral argument on the motion for March 12, 2008, and issued an Interim Order dated February 21, 2008, granting that portion of the cross-motion seeking an order of preservation.

Oral argument on the motion and that portion of the cross-motion seeking an order lifting the stay of disclosure was held on March 12, 2008, at which time this Court issued a directive on the record that plaintiff may serve discovery requests relating to defendant Shopflash only and that Shopflash should respond within 30 days. Discovery was otherwise stayed pending the decision on this motion.

First and Second Causes of Action

The Complaint alleges, in relevant part, as follows:

24. In December, 2005, during a series of discussions between representatives of DC Media and Sivan, Ranchandani, and Streams, which occurred on almost a daily basis i) over the telephone, ii) in face to face meetings, and iii) in writing transmitted by e-mail, fax, and the United States Mail, Sivan, Ranchandani, and Streams, made representations to DC Media (the "Representations"), including, but not limited to, the following:

A. Shopflash and Igia owned and controlled all rights with respect to the Products, including the exclusive right to market and sell the Products;

B. Shopflash and Igia owned and controlled all rights to the direct response telephone advertising program relating to the Products;

C. Shopflash and Igia were capable of offering for sale the Products through direct response telephone advertising, the internet, and telephone calls;

D. Shopflash was a corporation in good standing in all states that it transacted business in, including the State of New York;

E. Shopflash and Igia owned all advertising rights associated with the sale of the Products;

F. Shopflash and Igia were experienced and capable of fulfilling orders of consumer products through direct response telephone advertising, the internet, and telephone calls, and meeting all money back guarantees in a timely manner;

G. Shopflash and Igia were the creators of the Products;

H. Shopflash and Igia had pending trademark applications relating to the Products;

I. Shopflash and Igia owned the informercials relating to the Products;

J. Shopflash was capable of providing, in a timely manner, all reports and merchant account statements, furnished by vendors providing services to Shopflash in connection with the Products and sale thereof, including media buyers, Fulfillment Companies (companies which receive and fulfill the orders for the Products), telemarketing companies, and credit card processors;

K. Igia was capable of providing, in a timely manner, all reports and merchant account statements, furnished by vendors providing services to Igia in connection with the Products and sale thereof, including media buyers, Fulfillment Companies, telemarketing companies, and credit card processors;

L. Shopflash and Igia had the knowledge, skill, ability, and capability to fulfill all customer orders and to respond to customer communications concerning the Products in a satisfactory manner to said customers;

M. Shopflash and Igia would be able to repay DC Media for the funds provided by DC Media;

N. Shopflash and Igia would be able to pay invoices rendered by DC Media, when due and in full;

O. Shopflash and Igia would be able to provide directly to DC Media revenue received from the sale of the Products upon receipt by Shopflash from third parties;

P. Shopflash and Igia would be capable of paying, when due and in full, all invoices rendered to Shopflash or Igia by its vendors, including without limitation, its Fulfillment Companies, telemarketing services, and shipping vendors;

Q. Sivan would execute a Trust Agreement guaranteeing the payment in full to DC Media of any outstanding monies owed to DC Media;

R. Shopflash and Igia already had a large, specific number of goods on hand, confirmed by a physical inventory count purportedly performed by the Sivan Conspirators; and

S. Shopflash and Igia had favorable business relationships with third party vendors critical to the success of Shopflash's business, such as manufacturers, shippers, and fulfillment houses, which received and stored the Products prior to shipment.

(Compl., ¶ 24.)

Defendants argue that plaintiff's fraud claims fail to comply with the specificity requirements of CPLR § 3016(b) because the Complaint fails to make out specific allegations of fraud as to each individual defendant.

Plaintiff, however, contends that the Complaint alleges with sufficient specificity the time, place, and manner by which Sivan, Ranchandani and Streams made the allegedly false representations to

plaintiff, namely, in December 2005, on a daily basis, over the telephone, in face to face meetings, and in writing transmitted by e-mail, fax and mail. Plaintiff contends that further details of how defendants conspired and schemed to defraud DC Media will be evidenced in the discovery and trial stage of this action.

Moreover, in its opposition papers, plaintiff also submits the Affirmation of Anita Jaskot, Esq. (the "Jaskot Affirmation"), dated October 23, 2007, which annexes bank statements pertaining to the business accounts of defendant Igia. Plaintiff contends that the bank statements show several questionable wire transfers between the defendants, supporting plaintiff's claim that defendants fraudulently transferred money out of the corporate accounts for their own use and were "alter egos" of each other.

In reply, defendants contend that the only transfers between the Igia account and bank accounts whose owners are identified on the statements were, in fact, "wires in" to the Igia account and came from personal loans made by defendants Sivan and Ranchandani to the corporation. Defendants further contend that the bank statements fail to support plaintiff's fraud or alter-ego claims because the statements do not identify the owners of the bank accounts receiving the funds that plaintiff alleges were fraudulently transferred out from the Igia account.

"The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury.'" *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995) (quoting *Channel Master Corp. v. Aluminum Ltd. Sales Corp.*, 4 N.Y.2d 403, 407 (1958)). Allegations of fraud must be pleaded with particularity in order to inform the defendant of the circumstances constituting the wrong. *Goldfine v. DeEsso*, 309 A.D.2d 895, 897 (2nd Dep't 2003). However, the pleading requirements of CPLR § 3016(b) should not be so strictly applied "as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud' (citation omitted)." *Lanzi v. Brooks*, 43 N.Y.2d 778, 780 (1977).

Corporate officers and directors may be held individually liable on a fraud claim "if they participated in or had knowledge of the fraud, even if they did not stand to gain personally' (citation omitted)." *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 55 (2001) (plaintiff alleged facts sufficient to permit a jury to "infer [the individual defendant's] knowledge of or participation in the fraudulent scheme"). *Id.*

The Court of Appeals interpreted the pleading requirements of CPLR § 3016(b) as they apply to fraud allegations against corporate

individuals in *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486 (2008), *aff'g* 40 A.D.3d 366 (1st Dep't 2007), and held that:

[t]he very nature of the [fraudulent] scheme, as alleged, gives rise to the reasonable inference - rebuttable though it may later prove to be - that the officers, as individuals and in the key positions they held, knew of and/or were involved in the fraud. [citation omitted] Although plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery.

Id. at 493.

In coming to its conclusion, the Court relied on the lower court's reasoning that "one can readily deduce, given the corporate positions and titles of the individual defendants, that these individuals actually operate the day-to-day business of [the] corporate defendant, and consequently were involved in or knew about the alleged fraudulent concealment of most of the lease."

Id. at 491.

Here, the Court finds that plaintiff has alleged facts sufficient, at this early juncture, to permit a reasonable inference that the individual defendants either made the alleged fraudulent representations, or were aware and/or involved in the fraud, even though the bank records submitted by plaintiff do not show the names of the owners of the receiving accounts.

Defendants next argue that the fraud claims should be dismissed as duplicative of plaintiff's cause of action for breach of contract because the allegations simply relate to the performance under the agreement, or pertain to facts not material to the alleged fraud or not relied upon by plaintiff.³

However, a simple reading of the Complaint reveals that several of the alleged misrepresentations are actionable as elements of plaintiff's fraud claim as they are not "promissory" in nature, and plaintiff has sufficiently alleged that they were material to the fraud and relied upon by plaintiff. See e.g., *Compl.*, ¶¶ 24(A), (B), (E), (G), (H), (Q), (R), and (S).

Accordingly, that portion of the motion seeking to dismiss the fraud claims is denied.

Third Cause of Action

In the third cause of action, plaintiff seeks a judgment declaring that "all incidents relating to the MFSA Agreements and Trust Agreements, were obtained as a result of fraud, in bad faith,

³ Defendants, however, concede that the representation that "Shopflash was a corporation in good standing in all states that it transacted business in, including the State of New York," was not promissory in nature and was not true. (*Compl.*, ¶ 24(D))

and through deception, and any obligations to Shopflash are void and of no force and effect." (Compl., ¶ 102.)

Defendants argue that there is no justiciable controversy of any kind presented in the Complaint which may properly be the subject of a declaratory judgment action, because plaintiff has not alleged that it has been or will be damaged or aggrieved in any way by anything that defendants have done or are about to do and plaintiff has no legal standing to seek declaratory relief.

Plaintiff argues that this argument flies in the face of the plain, express allegations set forth in the Complaint.

Even though the Court has determined that plaintiff has adequately plead its fraud claims, the cause of action for a declaratory judgment determining the issues which are at the core of this dispute is unnecessary and duplicative of plaintiff's other claims. Accordingly, that part of the motion seeking to dismiss the third cause of action for declaratory relief is granted.

Fourth and Twelfth Causes of Action

Defendants argue that the fourth cause of action for unjust enrichment and the twelfth cause of action for monies had and received in the amount of \$3,000,000.00 should be dismissed because

the Complaint alleges that plaintiff paid the money to third-party vendors, to customers for refunds and to Shopflash to pay verified invoices and office expenses. Thus, defendants argue that these payments cannot be said to have been received by defendants, jointly and severally.

However, plaintiff contends that all of the defendants benefitted from the monies DC Media provided to Shopflash and Igia, which were intended as financing, but which were used by defendants in order to benefit themselves otherwise. Plaintiff claims to have ✓ suffered extensive economic damage as a result ^{of} ~~as~~ a large outstanding debt that is still owed under the agreements.

Since plaintiff has submitted bank statements suggesting certain questionable wire transfers and there has been only minimal discovery, it is not clear which, if any, of the defendants actually received the monies and whether or not they used any of it for their own personal gain.

Accordingly, it is premature for this Court to grant defendants' motion as to the fourth and twelfth causes of action.

Fifth Cause of Action

Defendants next argue that the fifth cause of action for breach of personal guarantee agreements should be dismissed because

the Trust Agreements that are the subject of this claim contain no financial guarantees by Sivan of Shopflash's obligations to plaintiff and were not signed by Sivan.

Plaintiff, however, contends that the Trust Agreements provide that Sivan, as guarantor of the Agreements, was also bound by the Agreements, and that if an event of default occurred under the Agreements as a result of Sivan's fraud or malfeasance, Sivan would be held liable for any outstanding indebtedness owed to DC Media, including legal expenses, disbursements and attorneys' fees incurred by DC Media with respect to its rights under the Agreements and Trust Agreements. Plaintiff also contends that Streams signed Sivan's name on one or both of the Trust Agreements with the knowledge of Sivan and Ranchandani.

In reply, defendants argue that: (i) the Trust Agreements were signed by Streams in his name, and not in Sivan's name; and (ii) the Trust Agreements guarantee performance by a company named "Amden Corporation," and not Shopflash.

However, the Trust Agreements begin by stating "I, Avi Sivan, as CEO of Shopflash . . ." and the name printed below the signature line is "Avi Sivan." As it remains to be determined who actually signed the Trust Agreements and on whose behalf, and whether the reference to "Amden Corporation" in the last paragraph of the Trust Agreements is a typographical error, it would be premature to

dismiss the claim for breach of personal guarantee at this juncture.

Sixth and Seventh Causes of Action

Defendants argue that plaintiff's sixth and seventh causes of action for RICO violations and RICO conspiracy, respectively, based upon the predicate acts of mail fraud and wire fraud should be dismissed on the grounds that: (i) plaintiff has failed to comply with the pleading requirements of Rule 9(b) of Fed.R.Civ.Pro., which is even more stringent than CPLR §3016[b]; and (ii) the seventh cause of action must be dismissed for the additional reason that the Complaint fails to allege a conspiracy under RICO § 1962(d).

Plaintiff argues that the Complaint sets forth sufficient detail, including the time, place and person responsible for each statement, the content of such statements or omissions and their effect on plaintiff, that defendants gained DC Media's money as a result of the fraud, and identifies the purpose of the mailing within the defendants' fraudulent scheme.

Civil RICO claims are subject to heightened pleading requirements. *Besicorp Ltd. v. Kahn*, 290 A.D.2d 147, 151 (3rd Dep't 2002) (RICO claims are "the litigation equivalent of a thermonuclear device"). "The elements that must be pleaded to

state a civil RICO claim are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Podraza v. Carriero*, 212 A.D.2d 331, 335 (4th Dep't 1995) (quoting *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985)); see 18 U.S.C. § 1962(c). A plaintiff must establish the four elements as to each individual defendant. See *United States Fire Ins. Co. v. United Limousine Serv.*, 303 F.Supp.2d 432, 451 (S.D.N.Y. 2004).

Here, the Court finds that plaintiff's allegations, while sufficient to support plaintiff's fraud claims, do not satisfy the elements required to plead RICO claims as they fail to specify the individual misconduct attributable to each defendant.

Moreover, a "pattern of racketeering activity" requires at least the commission of two acts of racketeering activity. 18 U.S.C. § 1961(5). Section 1961(1) of the federal statute enumerates the different predicate offenses which constitute "racketeering activity," including, *inter alia*, mail fraud and wire fraud. See 18 U.S.C. § 1961(1).

Here, the alleged racketeering activity engaged in by defendants includes the mailing or transmission of: financial projections relating to the products, and other business of Shopflash or Igia; assumptions on inventory relating to the products; returns reports relating to the business of Shopflash and

Igia; reports relating to product orders and fulfillment of outstanding orders; documentation relating to the financial status of Igia and Shopflash; and documentation relating to the ownership of the products. (Compl., ¶ 116.)

However, the Complaint fails to assert whether the documents allegedly mailed or transmitted were false or how they otherwise contributed to defendants' alleged fraudulent scheme. Thus, the RICO claims are dismissed for plaintiff's failure to adequately allege the requisite predicate acts.

Eighth cause of action

Defendants argue that plaintiff's eighth cause of action for legal expenses and attorneys' fees, pursuant to Paragraph 13 of the MFSA Agreements, should be dismissed as against defendant Sivan because only plaintiff and defendant Shopflash are parties to the MFSA Agreements.

In opposition, plaintiff argues that this portion of the motion should be denied because, under the Trust Agreements, Sivan agreed to guarantee the repayment of any outstanding indebtedness, including attorneys' fees, in the event of fraud or malfeasance on his part.

Since the Trust Agreements are an integral part of the MFSA Agreements, and Sivan may be found liable for the alleged breach of the agreements by Shopflash if plaintiff were successful in proving malfeasance, that portion of the motion seeking to dismiss plaintiff's claim for legal expenses and attorneys' fees as against Sivan is denied.

Ninth Cause of Action

Defendants next argue that plaintiff's ninth cause of action for an accounting as against the individual defendants and Igia should be dismissed because none of these defendants had a confidential, fiduciary or contractual relationship with plaintiff.

In addition, defendants argue that plaintiff has no right to an accounting because under the MFSA Agreement plaintiff controlled all of the payouts of funds and because revenues derived from the relationship with Shopflash were paid to a bank account solely controlled by plaintiff. Thus, defendants argue that plaintiff has all of the resources to account within its own possession and control.

Plaintiff argues that it is entitled to seek an accounting from all of the defendants because the bank statements annexed to the Jaskot Affirmation show transfers of monies among the various defendants which support plaintiff's claim that the defendants were

all "alter egos" of each other. Plaintiff further argues that Shopflash had a contractual relationship with plaintiff and Sivan had a fiduciary and contractual relationship with plaintiff.

However, plaintiff concedes that, under the MFSA Agreements, it has a right to seek an accounting from Shopflash. In view of the fact that Shopflash is not seeking to dismiss the claim for an accounting at this time, this portion of the motion is granted as to individual defendants Sivan, Streams and Ranchandani and defendant Igia only.

Tenth cause of action

Defendants argue that plaintiff's tenth cause of action for an account stated should be dismissed as against the individual defendants and Igia because only plaintiff and Shopflash were parties to the MFSA Agreements, and only Shopflash received statements of account from plaintiff.

Plaintiff argues that this branch of the motion should also be denied because plaintiff has alleged that the defendants are "alter egos" of each other.

However, this claim may be pursued only against Shopflash, which is not moving to dismiss it at this time, because Shopflash was a party to the prior agreements, *i.e.*, the MFSA Agreements,

from which the claim for an account stated derives. See *Shea & Gould v. Burr*, 194 A.D.2d 369, 370 (1st Dep't 1993).

Thirteenth Cause of Action

Finally, defendants argue that the thirteenth cause of action for conversion of the \$3,000,000.00 must be dismissed because plaintiff has alleged that it paid out a portion of that amount to third-party vendors of Shopflash at various times and in various amounts.

In opposition, plaintiff argues that DC Media provided funding for the sale of the products to both Shopflash and Igia, and that such monies were transferred to Sivan, Streams and Ranchandani without authorization.

Since plaintiff has made a claim that defendants made and received unauthorized transfers of plaintiff's funds, has made a demand for said money and the defendants have failed to return it, the conversion claim survives defendants' motion to dismiss.

This constitutes the decision and order of this Court.

Dated: March 9, 2009



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

At ~~an~~ IAS Part 12 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, Rm. 341, New York, New York, on February 21, 2008.

PRESENT: HON. BARBARA R. KAPNICK,
JUSTICE.

DC MEDIA CAPITAL, LLC, D/B/A/ NEWTEK MEDIA CAPITAL,

Plaintiff,

- against -

AVI SIVAN, PREM RANCHANDANI, KURT STREAMS, SHOPFLASH, INC., IGIA, INC., and "JOHN DOE No. 1" through JANE DOE No. 25," the names of the last defendants being fictitious, the true names being unknown, it being intended to designate the agents of the aforesaid defendants,

Defendants,

Index No.: 600378/2007
Motion Sequence No. 001

INTERIM
ORDER

Upon reading and filing the ~~attorney's statement~~ ^{Affirmation} of Anita Jaskot, ^{Esq.} dated October 25, 2007, and the exhibits annexed thereto, in support of plaintiff's cross-motion (the "Cross-Motion") for i) an order, pursuant to CPLR § 3214(b), lifting the stay of disclosure in effect by virtue of the CPLR 3211 motion (the "Motion") of defendants Sivan, Ranchandani, Streams, Shop/flash, Inc., and IGIA, Inc. (the "Denominated Defendants"), and ii) an order of preservation directed to the Denominated Defendants, and the ~~attorney's statement~~ ^{Repl. Affirmation} of Anita Jaskot, dated November 14, 2007,

in further support of the Cross-Motion; and

There being no papers in opposition to the Cross-Motion ~~received~~ filed; and

The Motion and Cross-Motion having been scheduled by the Court for oral argument on February 13, 2008, and counsel for the Denominated Defendant's ^{having failed to appear} ~~not appearing~~, and plaintiff's counsel appearing, and the Court re-scheduling argument on the Motion to March 12, 2008, ^{at 2:15 p.m.} and upon the application of plaintiff's counsel to grant the Cross-Motion; it is,

ORDERED, ^{that} ~~that the Cross-Motion is granted, and it is further~~ ^{that} ~~portion of the Cross-Motion seeking an order of preservation is granted;~~

ORDERED, that, pursuant to CPLR § 3214(b), the stay of disclosure is hereby lifted, and disclosure may proceed; and it is further

ORDERED, that the Denominated Defendants are directed to preserve all material and relevant evidence, including, but not limited to, paper records, audio, video, and digital recordings, and electronic, digital, and/or computer generated records, e-mails, memoranda, and other written communications in electronic form, voice mail communications, information databases (including accounting and other financial systems or other specialized databases), word processing documents, spreadsheets and presentation slides, audio and video recordings attached to e-mails, electronic calendars and date-books, computer assisted drawing and enterprise resource planning databases and other purpose-built systems, temporary Internet files created by browsers and saved Web pages, information remaining in "Delete" folders and recycle bins on all personal computers of each of the Denominated Defendants, intranet and internet sites, information stored on non-company hardware (including officer and employees' laptops and portable, handheld devices, such as memory sticks, portable hard drives and Blackberries), personal data assistant or other portable devices capable of storing data, jump drives, zip drives, USB devices, hard drives, disks,

tapes, servers, or any other electronic data storage medium or architecture, back-up systems, and data maintained for recovery purposes, off-line storage, and data stores on removable media..

That portion of the cross-motion, seeking an order lifting the stay of disclosure shall be addressed during the oral argument ENTER of the motion at March 12, 2008 at 2:15.



J.S.C.

**BARBARA R. KAPNICK
J.S.C.**

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK