SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

Date: 02/03/2010 Time: 08:15:00 AM Dept: C-71

Judicial Officer Presiding: Judge Ronald S. Prager
Clerk: Kathleen Sandoval

Bailiff/Court Attendant: L. Wilks
ERM: Peter Stewart

Case Init. Date: 09/09/2008

Case No: 37-2008-00091291-CU-MC-CTL Case Title: The People of the State of California, by and through the California Corporations Commissioner vs.

Case Category: Civil - Unlimited Case Type: Misc Complaints - Other

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Event Type: Ex Parte

Causal Document & Date Filed:

Appearances:

The Court, having taken the above-entitled matter under submission on 02/01/2010 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER ORAL ARGUMENT: The Court denies Specially Appearing Relief Defendant Applied Digital, Inc.'s motion to quash service of summons for lack of personal jurisdiction, and grants Plaintiff's Motion for Preliminary Injunction.

Initially, the Court overrules Applied Digital's objections to the Declarations of Alex Calero, Dan Schek, and Alan Spitalnick.

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (CCP § 410.10.) The exercise of jurisdiction over a nonresident defendant comports with these Constitutions if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate traditional notions of fair play and substantial justice. (Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 268.)

Under the minimum contacts test, an essential criterion in all cases is whether the quality and nature of defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that State. (Pavlovich at 268.) Personal jurisdiction may be either general or specific. (Id. at 268-269.) Under the circumstances presented in this case, the issue is whether Applied Digital has sufficient contacts with the State of California to establish specific jurisdiction over Applied Digital.

The forum contacts necessary to establish specific jurisdiction involve a nonresident who has "purposefully directed" his or her activities at forum residents, or who has "purposefully derived benefit" from forum activities, or "purposefully availed" himself or herself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. (Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 445.) The requisite forum contact involves a nonresident defendant who deliberately has engaged in significant activities with a State or has created continuing obligations between himself and residents of the forum. (Id.) In such cases the defendant manifestly has

availed himself or herself of the privilege of conducting business in the forum, and because his or her activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him or her to submit to the burdens of litigation in that forum as well. (Id.)

Accordingly, the issue is whether Applied Digital has purposefully availed itself of this forum's benefits and whether the controversy is related to or arises out of a defendant's contacts with the forum. (Vons at 445.)

The Court finds that has sufficient minimum contacts with the State of California such that this Court's exercise of jurisdiction over Defendant is reasonable and fair. More specifically, and as discussed at length at the hearing on this matter on January 29, 2010, and February 1, 2010, Defendant solicited financial investments from individuals residing in California. For instance, through the Declaration of Alan Spitalnick, the objections to which the Court has overruled, Plaintiff has shown that representatives and/or agents of Defendant contacted Mr. Spitalnick, unprompted by Mr. Spitalnick, and offered the opportunity to invest in Defendant Applied Digital.

Mr. Spitalnick asserts in his declaration that he received a call from an individual named Gregory Alexander who asserted he worked for SmartWear Technologies, Inc. It can be reasonably inferred that this call was unprompted, as Mr. Spitalnick states he had never heard of the company prior to that call. (See Declaration of Alan Spitalnick filed on January 6, 2010, ¶¶ 2-3.) Through this phone call, Alexander touted SmartWear's technology and offered Mr. Spitalnick the opportunity to invest in SmartWear via Debenture and Warrant Purchase Agreements. (Id. at ¶¶ 4-13.) He then emailed Mr. Spitalnick numerous documents to review and fill out in order to invest in SmartWear by purchasing debentures. (Id. at ¶¶ 13-19.) He ultimately invested and sent his agreement and funds to SmartWear's address in Jamul, CA. (Id. at ¶¶ 20-21.)

Within approximately one month, Mr. Spitalnick was contacted by Walter Anderson, a second individual representing he worked for SmartWear, who encouraged him to invest more money. (Id. at ¶ 25.) During subsequent conversations, Anderson conveyed to Mr. Spitalnick that SmartWear was being purchased by Global General Technologies, and that Global General was in the process of purchasing Applied Digital Technologies. (Id. at ¶¶ 29-33.) Importantly, Anderson then informed Mr. Spitalnick that he could invest money in Applied Digital and emailed him an offer to purchase convertible debentures in Applied Digital. While Defendant argues this does not prove that Mr. Anderson worked for Applied Digital, the Court considers this unpersuasive and contrary to the reasonable inference otherwise. The documents sent to Mr. Spitalnick direct any investment documents and funds to be sent to Applied Digital's address at 2150 South 1300 East, Suite 500 in Salt Lake City, Utah 84106. (Id. at ¶¶ 32-42.) The Declaration of Van Rainey sets forth a nearly identical set of facts. (See, e.g., ¶¶ 2-4 of the August 4, 2009 Declaration of Van Rainey, filed on January 6, 2010, and see generally the Declaration of Van Rainey signed on May 7, 2009, and filed on January 6, 2010.)

This evidences that Applied Digital purposefully contacted California residents with offers to invest in Applied Digital through the purchase debentures. Defendant argues that no purchase of Applied Digital securities was ever completed, rendering these contacts insufficient for purposes of the minimum contacts test because they are random and fortuitous and therefore immaterial pursuant to Aquila, Inc. v. Superior Court (2007) 148 Cal.App.4th 556. The Court considers Defendant's argument that any contacts it had with California were random and fortuitous unsupported and unpersuasive. The declarations submitted by Plaintiff evidence an extended and dedicated effort by representatives of SmartWear and Applied Digital to elicit investments from Mr. Spitalnick and Mr. Rainey. These contacts are far from random and fortuitous.

Further evidencing the inapplicability of Aquila is the fact that, had Mr. Spitalnick or Mr. Rainey opted to invest money in Applied Digital, their investment funds would have been funneled directly into California, as it appears Applied Digital's mail was being immediately rerouted to the same Jamul, California address provided to them for SmartWear. (See Exhibit 13 to Spitalnick Declaration; See ¶¶ 4-5, and 7-8 of Declaration of Lauren Scott (executed and filed on October 15, 2009); and see Exhibit 22 to January 6, 2010 Declaration of Alex Calero.) Not only is this further evidence of Applied Digital's contacts with California, it further refutes the argument that Applied Digital's contacts with this State are random and fortuitous.

Finally, Corporations Code § 25008 states, in pertinent part: "An offer or sale of a security is made in this

state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or (if both the seller and the purchaser are domiciled in this state) the security is delivered to the purchaser in this state." The Declarations of Alan Spitalnick and Van Rainey establish Applied Digital extended offers to them to purchase securities in Applied Digital, reinforcing that Applied Digital purposefully solicited business through investments in California.

Plaintiff's evidence establishes that Applied Digital has purposefully availed itself of the benefits of California by soliciting financial investments from California residents within California. Accordingly, based on these points as well as those set forth by the Court at the hearings on this matter, the Court finds Applied Digital has sufficient minimum contacts with California to justify exercising jurisdiction over Applied Digital.

The Court finds that, contrary to Defendant Applied Digital's position, it has been properly served with summons and complaint in this action. On October 1, 2009, the Court permitted Plaintiff's amendment to the complaint in which Plaintiff added Applied Digital as Doe 2. (See Exhibit 1 to January 6, 2010 Declaration of Alex Calero.) The Court finds this amendment properly executed and further finds Plaintiff has established it executed personal service of the Amendment to the First Amended Complaint, Summons on First Amended Complaint, First Amended Complaint, and Notice of Case Assignment on Chris Ponish, President of Defendant Applied Digital Technologies, Inc., on October 8, 2009. (See Exhibit A to November 5, 2009 Declaration of Alex Calero.) Accordingly, Defendant has been properly served in this case.

Regarding Plaintiff's motion for preliminary injunction, the Court grants the motion.

Based on the evidence put forth by Plaintiff, it appears that Applied Digital currently possesses the same technology that SmartWear was using to solicit investors. In other words, the same technology supported the sales of unlicensed securities. This is evident, again, through the declarations of Mr. Spitalnick or Mr. Rainey. Both gentlemen were contacted and encouraged by SmartWear and Applied Digital representatives to invest money in these companies, both of which were manufacturing and marketing radio frequency identification ("RFID") technology chips. (See, e.g., Declaration of Alan Spitalnick, ¶¶ 4-9, and Exhibits 11 and 12 thereto.) Both companies solicited purchases of debentures that were represented as convertible into common stock in the companies based on the RFID technology. (See, e.g., ¶¶ 2-7 and Exhibit 12 to Spitalnick Declaration; and see Spitalnick Declaration and Exhibits generally.)

Indeed, Defendant Applied Technology does not deny that the same technology is being offered as the basis of the investment opportunities. The argument is that SmartWear and Global General did not have the patents to the technology, while Applied Digital either does or is in the process of obtaining the necessary patents. Rather than support Defendant's argument that the injunction preventing Applied Digital from transferring or otherwise compromising this asset, it further implies that Applied Digital is simply another iteration or extension of SmartWear and Global General. Further, as stated above, the evidence indicates Applied Digital used the same address as SmartWear. The evidence also indicates Mr. Spitalnick was referred to a website describing the technology in which he was potentially investing that mentions all three companies – SmartWear, Global General, and Applied Digital – in reference to the technology, or asset, partially at issue in this case. (See Exhibit 11 to Declaration of Alan Spitalnick.)

Taken collectively, the Court finds that it is reasonably probable that Applied Digital possesses the same asset used to support the sales of unregistered securities originally possessed by SmartWear. In order to preserve the status quo, the Court orders Applied Digital not to transfer any assets acquired from SmartWear and/or Global General.

Accordingly, based on the Court's finding that Plaintiff has complied with the necessary requirements to issue a preliminary injunction, the Plaintiff's motion is granted. (Porter v. Fiske (1946) 74 Cal.App.2d 332; see also, S.E.C. v. Unifund SAL (2d Cir. 1999) 910 F.2d 1028; and Corporations Code § 25530.)

IT IS SO ORDERED.