IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT [DIVISION 3]

CASE NO. A126680

DANIEL L. BALSAM	)
	)
Appellant and Plaintiff	)
v.	)
DSG DIRECT, INC. *et al.*,	)
	)
Defendants.	)
	)
TROPICINKS LLC,	)
DATASTREAM GROUP, INC. and	)
LEIGH-ANN COLQUHOUN,	)
	)
Respondents and Real Parties in Interest.	)
	)

RESPONDENT'S BRIEF ON THE MERITS

On Appeal from an Order of the Superior Court of the State of California
County of San Francisco, No. CGC-05-441630
The Honorable William Gargano, Commissioner

STATEMENT OF THE CASE

A. INTRODUCTION[1]

Appellant and Plaintiff Daniel Balsam filed this action against DSG Direct, Inc. and Your-Info, Inc. (both Florida corporations) and nineteen other defendants in May 2005, seeking damages under California Business and Professions Code § 17529.5 and the Consumers Legal Remedies Act. After a demurrer was sustained, Appellant filed his

[1] Citations to the record are omitted only from this Introduction. All other references to the record are accompanied by proper record citation.

First Amendment Complaint in October 2006 which included DSG Direct, Inc. ("DSG") and Your-Info, Inc. and sought the same remedies for 213 email messages sent between January 1, 2004 and May 31, 2005.

DSG and Your-Info, represented by Doron Ohel, responded to both complaints but thereafter were not engaged in the litigation other than filing a very brief opposition to a motion to compel. Ohel was granted permission to withdraw as counsel in June 2007 and was never replaced. In February 2008, Appellant was awarded $169,167.00 in damages and an additional $30,000 in attorneys' fees and costs following an uncontested hearing. Appellant collected $2,083.72 by levying on DSG's American Express Payments, but nothing further since DSG and Your-Info were dissolved by the Florida Secretary of State in September 2008.

In July 2009, Appellant sought to amend the judgment against DSG and Your-Info to add Respondents Datastream Group, Inc.; TropicInks, LLC and Leigh-Ann Colquhoun either as successors or by deeming them as one and the same as DSG and Your-Info under the equitable alter ego doctrine. Datastream Group and TropicInks, however, were separate legal entities from the judgment debtors and had observed all requisite corporate formalities. Respondents' asserted that there was no basis for finding them as the successor and/or alter ego of the judgment debtors and it would be a denial of due process to bind them to an action they did not participate in. Respondents' further argued that the State of California had no interest in enforcement of the judgment since it was based on a claim that was clearly preempted by the CAN-SPAM Act of 2003.

After a hearing on the matter, the trial court denied Appellant's motion. This Court should affirm this ruling as it was based on substantial evidence since

(i) there is no basis for finding Respondents to be the successors or alter egos of the judgment debtors; and

(ii) the balance of equities weighs against Appellant.

B. STATEMENT OF FACTS

1. Initial Judgment

Appellant filed this action against DSG Direct, Inc. and Your-Info, Inc. (both Florida corporations) and nineteen other defendants in May 2005, seeking damages under California Business and Professions Code § 17529.5 and the Consumers Legal Remedies Act. (Clerk's Transcript ("CT") 019-035) After a demurrer was sustained Appellant filed his First Amendment Complaint in October 2006 which included DSG Direct, Inc. ("DSG") and Your-Info, Inc. and sought the same remedies for 213 email messages sent between January 1, 2004 and May 31, 2005 on their own behalf (with respect to ink products sold through Evoclicks.com which DSG had acquired) and as a marketer for third parties. (CT 40-43, 44-79, 217).[2]

DSG and Your-Info, through their counsel Doron Ohel, filed answers to both complaints (CT 032-35, 080-095)[3], but after answering the First Amended Complaint their involvement in the case was limited to the following:

(i) a March 13, 2007 Case Management Statement filed by DSG (CT 006 (entry in Register of Actions)); and

(ii) perfunctory Opposition to Appellant's Motion to Compel Responses and to Have Matters Deemed Admitted ("Balsam Motion to Compel") filed on

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[2] The First Amended Complaint also contended that DSG and Your-Info were intertwined and that Leigh-Ann Colquhoun was the President of DSG and Registered Agent for Your-Info. (CT 072-073)

[3] The DSG's and Your-Info's Answer to the initial Complaint was verified by Ms. Colquhoun. (CT 034)

May 23, 2007. (CT 171-179)(counsel spent only two hours to research draft the opposition).[4]

The same day he filed the opposition to the Balsam Motion to Compel, Mr. Oron filed a Motion to be Relieved as Counsel for DSG and Your-Info "due to non-payment of attorney's fees and repeated attempt to refresh attorney retainer," which the court granted on June 29, 2007. (CT 004, 189-190) No other counsel appeared on behalf of DSG or Your-Info, nor did either entity attempt to represent themselves *in pro per.*

After an uncontested hearing in which Appellant presented seven (7) exhibits consisting of headers for seven emails (CT 281), the court found that (i) using multiple domain names to send e-mail violated California Business & Professions Code § 17529.5(a)(2) and (ii) use of the word "free" in a subject line without clearly disclosing the conditions attached violated Business & Professions Code § 17592.5(a)(3) and the Consumer Legal Remedies Act and awarded $169,167 in damages plus fees and costs. (CT 282-83) No finding was made as to whether Appellant relied on any representations made in the email or suffered actual damage.

2. Motion to Amend Judgment

The bulk of Appellant's First Amended Complaint concerned emails sent by Your-Info and DSG marketing ink products sold through Evoclix.com (a DSG property). (CT 072-73) Daniel Reinertsen, the son of Eric Reinertsen and Leigh-Ann Colquhoun, was the force behind DSG as its key employee and managed the marketing operations at issue in this action. (CT 361) The younger Reinertsen, however, was killed in a

[4] As Appellant indicates in his brief, DSG and Your-Info "repeatedly failed to respond" to his discovery requests. (Appellant Opening Brief ("OB") 6). DSG's opposition to the Balsam Motion to Compel included a declaration signed by Ms. Colquhoun's husband, Eric Reinertsen as an officer of DSG. (CT 176-177)

motorcycle accident on September 22, 2006 at the age of 25. (Request for Judicial Notice, Kelley Decl. at ¶ 2.) The loss of its key employee and devastating grief suffered by the Reinertsen family led to DSG's "steady decline." (CT 361) Your-Info and DSG were dissolved by the Florida Secretary of State in 2008. (CT 317, 320)

Respondent Datastream Group, which was incorporated in Florida in 2000 (CT 326), was distinct from DSG in that it was an internet services company and not an e-commerce company involved in the sale of products. [5] (CT 361) While Datastream Group provided domain name management services to DSG, it was compensated for its services and never commingled any assets with DSG. (CT 361)

On October 8, 2008, two weeks after the second anniversary of her son's death, Ms. Colquhoun launched TropicInks, LLC with her surviving son Jonathan Reinertsen with each acting as managers. (CT 323, 361) While its corporate address is in Bonita Springs, Florida, TropicInks operates out of Sarasota, Florida which is 100 miles north. (CT 361)

In July 2009, Appellant filed its motion to amend the judgment against DSG and Your-Info to add Respondents Datastream Group, TropicInks and Leigh-Ann Colquhoun either as successors or by deeming them as one and the same as DSG and Your-Info under the equitable alter ego doctrine. (CT 294-95) Respondents' asserted that there was

[5] Appellant ridiculously tries to conflate e-mail marketing services with e-commerce (without any authority) as a means to "discredit Respondents' false and misleading claims in their Opposition". (OB 30-32) The term e-commerce, however, means the selling of products or services online. *See* Wikipedia, "E-Commerce" ("[e]lectronic commerce is generally considered to be the sales aspect of e-business"), available at http://en.wikipedia.org/wiki/Electronic_commerce (Appendix 1); U.S. Department of State, *Principles of Entrepreneurship* (November 2007) at Glossary, available at http://www.america.gov/publications/books/principles-of-entrepreneurship.html (defining e-commerce as the "sale of products and services over the Internet") (Appendix 2).

no basis for finding them as the successor and/or alter ego of the judgment debtors and it would be a denial of due process to bind them to an action they did not participate in. (CT 354-57) Respondents' further argued that the State of California had no interest in enforcement of the judgment since it was based on a claim that was clearly preempted by the CAN-SPAM Act of 2003. (CT 357-58)

In their reply, Appellant raised the issue of Respondent's Opposition being filed a day late (although Appellant received a copy of the Opposition via email on the due date to eliminate any possibility of prejudice to Appellant), but never asked for a continuance of any sort. (CT 464-468) At the hearing, the court gave Appellant the option of moving the hearing to a later date but Appellant's declined this offer and elected to proceed with the hearing. (Hearing Transcript ("HT") 2-3) In doing so, Appellant waived any objection it had to the filing of Respondent's Opposition. *Carlton v. Quint*, 77 Cal.App.4th 690, 697-98 (2000) (waiver where party responded, never requested a continuance, appeared at the hearing, argued the merits and never claimed any prejudice).

After the conclusion of the hearing on the matter, the trial court denied Appellant's motion, expressly finding that the Respondents' were neither the successors nor alter egos of the judgment debtors. (HT 6.) Appellant claims that the trial court must have somehow glossed over the moving papers since it had the temerity to reach a conclusion other than that held by Appellant when the court made clear it had read the papers and was familiar with the parties' arguments before reaching its ruling. (HT 2.)

ARGUMENT

A. Standard of Review

Appellant correctly states that the applicable standard of review is "substantial evidence". (OB 13.) This standard requires the reviewing court to resolve "all conflicts

n the relevant evidence 'against the appellant and in support of the order'". *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th 523 , 535 (2000) (citation omitted). The equitable doctrine of alter-ego liability is "an extreme remedy, sparingly used." *Id.* at 495.

> In order to establish alter-ego liability under California law there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone.

Id. at 538.

However, in deciding whether to pierce the veil of a foreign corporation, courts have traditionally relied on the foreign state's law to determine the liability of its shareholders. *See Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (citing Restatement (Second) of Conflicts of Laws § 307 (1971) ("'The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation . . . and to its creditors for corporate debts'"))[6]; *accord* 17 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corps. § 8326 (rev. ed. 2006) ("[L]iability of a shareholder for corporate debts and the extent and character of that liability and the extent and character of that liability are to be determined by the law of the incorporating state . . . .").

With respect to TropicInks, which is a foreign limited liability company, California law expressly provides that

> [t]he laws of the state or foreign country under which a foreign limited liability company is organized shall govern its organization and internal affairs and the liability and authority of its managers and members.

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[6] Appendix 3.

Cal. Corp. Code § 17450 (a).

Florida courts have a very strict test for piercing the corporate veil to collect from a shareholder.

> The rule is that the corporate veil will not be pierced, either at law or in equity, unless it can be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them. . . . In the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the corporation as a means of evading liability with respect to a transaction . . . [a plaintiff] cannot be heard to question the corporate existence but must confine his efforts to the remedies provided by law for satisfying his judgment from the assets of the corporation, if any can be found.

Dania Jai Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1119-20 (Fla. 1984) (quoting *Riley v. Fatt*, 47 So. 2d 769, 773 (Fla. 1950))[7].

Under Florida law, mere failure to observe corporate formalities alone is not enough. Rather, Florida courts require

> proof of deliberate misuse of the corporate form -- tantamount to fraud -- before they will pierce the corporate veil. Thus, absent proof of fraud or ulterior motive by the shareholder, the corporate veil shall not be pierced.

In re Hillsborough Holdings Corp., 166 B.R. 461, 469 (Bankr. M.D. Fla. 1994).[8] What is controlling is the corporation's "subjective motivation, not the effect of [its] actions" in observing or failing to observe corporate formalities. *Id.*

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[7] Appendix 4.

[8] Appendix 6.

In sum, Appellant must set forth

> persuasive evidence that: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant.

Old West Annuity and Life Ins. Co. v. Apollo Group, 2008 WL 2993958 (M.D.Fla., 2008).[9].

In this case, the trial court's judgment should stand. As the trial court found, Respondents are separate and distinct from the judgment debtors and have not acted with an intent to defraud Appellant. More importantly, it would be inequitable to grant the relief requested by Appellant as (i) he is guilty of laches with respect to adding Ms. Colquhoun and Datastream Group to the judgment; (ii) enforcement of the judgment as to Respondents would violate Due Process and (iii) he seeks to enforce a judgment that is contrary to law.

B. Respondents Are Separate and Distinct From the Judgment Debtors

1. Datastream Group

Datastream Group was formed on October 23, 2000 which was prior to any of the judgment debtors. (CT 317, 320, 326) Appellant's argument that Datastream Group is an alter ego of the judgment debtors and/or somehow was part of a conspiracy with DSG, Your-Info, TropicInks and Ms. Colquhoun primarily relies on facts unrelated to

[9] Appendix 7.

Datastream. (OB 27-29) Links between DSG and Your-Info or TropicInks and DSG, have no bearing on the question of whether Datastream is an alter ego of the judgment debtors.

Datastream Group is an internet services company providing services such as domain name management and internet marketing, but is not an e-commerce company (i.e., engage in the sale of products or services). (CT 361) Appellant argues that this statement is misleading as it "suggests its innocence as to the underlying unlawful spams." (OB 29) Datastream Group, however, is innocent with respect to the "underlying unlawful spams" since it was neither the sender nor the advertiser in any of the emails and this is not even an issue at this stage in this case.

What is at issue is whether Datastream Group is the *alter ego* of the judgment debtors and the fact that (i) its business operations differ from the judgment debtors and (ii) that Datastream Group has a separate identity is very relevant. Datastream operates out of Bonita Springs, Florida which is 100 miles away from Sarasota where TropicInks operations are based and 275 miles away from Gainesville where the judgment debtors operated. (CT 361) While Appellant makes much of the fact that Datastream Group was the registrant for DSGDirect.com, this was part of its domain name services for which it was compensated by DSG. (CT 361) In a similar case, a court refused to amend a judgment for Balsam merely because a party provided services to the judgment debtor. *Balsam, v. Angeles Technology, Inc.*, Case Number C 06-4114 JF (HRL) (N.D. Cal. 2008).("the mere receipt of revenue [for website management] by Belvedere does not

demonstrate that Belvedere is the alter ego of one or more of the Judgment Defendants").[10]

Appellant simply offers no evidence, let alone persuasive evidence that Datastream Group (i) dominated or controlled the judgment debtors; (ii) used the corporate form fraudulently or (iii) that its actions caused Appellant injury. More importantly, Appellant offers no evidence that Datastream Group acted deliberately to perpetrate a fraud on him. *John Daly Enterprises, LLC v. Hippo Golf Co., Inc.*, 646 F. Supp. 2d 1347 (S.D. Fla. 2009) (Florida courts require "proof of deliberate misuse of the corporate form) (emphasis in the original)[11].

2. *TropicInks*

Respondent does not dispute that there are similarities between the operations of the judgment debtors and TropicInks, but there is one key difference: Dan Reinertsen was the judgment debtors' key employee, while TropicInks was formed two years after his death by Ms. Colquhoun and her surviving son Jonathan Reinertsen. (CT 323, 361) Amazingly, this is of no significance to Appellant.

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[10] Appendix 8.

[11] Appendix 9.

Appellant's insensitivity to this issue is excusable, however, since the thought of a parent burying a child is hard for anyone to comprehend as it seems to violate the laws of nature. Others have spoken to this point far more eloquently:

> *There's no tragedy in life like the death of a child.* Dwight D. Eisenhower[12]

> *A wife who loses a husband is called a widow. A husband who loses a wife is called a widower. A child who loses his parents is called an orphan. But...there is no word for a parent who loses a child, that's how awful the loss is!* Jay Neugeboren[13]

Literature on grieving generally recognizes that, as in dying, there are also stages of grief. The National Cancer Institute identifies four stages of grief or bereavement:

1. Shock and numbness: Family members find it difficult to believe the death; they feel stunned and numb.
2. Yearning and searching: Survivors experience separation anxiety and cannot accept the reality of the loss. They try to find and bring back the lost person and feel ongoing frustration and disappointment when this is not possible.

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[12] "Dwight D. Eisenhower", S9.com available at http://www.s9.com/Biography/Eisenhower-Dwight-David. (Appendix 10)

[13] National SIDS Resource Center, *The Death Of A Child - The Grief Of The Parents: A Lifetime Journey* available at http://www.athealth.com/consumer/disorders/parentalgrief.html (quoting Neugeboren, J. *An Orphan's Tale*. New York: Holt, Rinehart & Winston. 1976 at 476) (Appendix 11).

3. Disorganization and despair: Family members feel depressed and find it difficult to plan for the future. They are easily distracted and have difficulty concentrating and focusing.
4. Reorganization.

National Cancer Institute, *Bereavement, Mourning, and Grief* available at http://www.cancer.gov/cancertopics/pdq/supportivecare/bereavement/Patient/allpages#Section_28.[14]

The reorganization phase often occurs in the second year of bereavement, as at this stage

> Some people are ready to begin making new plans. They are ready to identify their individual goals, hopes, fears and dreams. People are often ready to move forward and long for a pathway out of the darkness.

Brook Noel & Pamela D. Blair, Ph.D, *I Wasn't Ready to Say Goodbye: Surviving, Coping & Healing After The Sudden Death of a Loved One* (2008) at 206.[15] Although for grieving parents the emotional impact of the loss is intensified, such that while a grieving spouse recovery process may take three to five years, parental grief can last anywhere from ten years to a lifetime. *Id.* at 136.

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[14] Appendix 13.

The National District Attorneys Research Institute identifies five stages: (i) shock; (ii) awareness of law; (iii) guilt; (iv) healing and (v) renewal. The final stage occurs when the survivor is ready "to accept the reality of their reconfigured life [and] are learning to live without the child and they begin to once again incorporate new activities into their lives". Susanne M. Walters and Al Killen-Harvey, L.C.S.W, *Those Left Behind: Crisis Intervention in Child Fatality Cases* (2008), 17 The American Prosecutors Research Institute Update, No. 4 (2004) (Appendix 12). Sudden or unexpected deaths "may overwhelm the coping abilities of a person, making normal functioning impossible." *Id.*

[15] Appendix 14.

Appellant sees only a nefarious intent in the creation of TropicInks and going through the effort of establishing a new entity, rather than attempt to revive the defunct DSG. (OB 24) Appellant claims that his "rights were destroyed by the very creation of TropicInks". (OB 25) Appellant is assuming that judgment debtors were viable entities that Respondents' simply shut down to escape liability, but offers no evidence to support this contention.

Appellant grossly distorts the facts by stating that "Colquhoun, the sole officer of DSG Direct and Your-Info, caused both companies' corporate status with the State of Florida to dissolve by failing to failure to file annual reports"; and that "dissolving the old companies and starting the new company allowed Colquhoun and her new company to avoid paying 99% of the judgment". (OB 8, 25) Appellant also suggests the timing of the dissolution was in light of his attempt to execute on the judgment, but the fact that both entities were dissolved two months after his attempt to execute was determined not by Ms. Colquhoun but by the Florida legislature. *See* Fla. Stat. § 607.1420(1)(a) (the Department of State may administratively dissolve a corporation if the "corporation has filed to file its annual report . . . by 5 p.m. Eastern Time on the third Friday in September").[16]

As depicted in Figure 1, Appellant conveniently ignores several keys facts with respect to the deterioration of DSG and Your-Info, including:

(i) the judgment debtors were in default almost *two years before entry of judgment*, as their last filing with the Secretary of State was April 2005; (CT 317, 320);

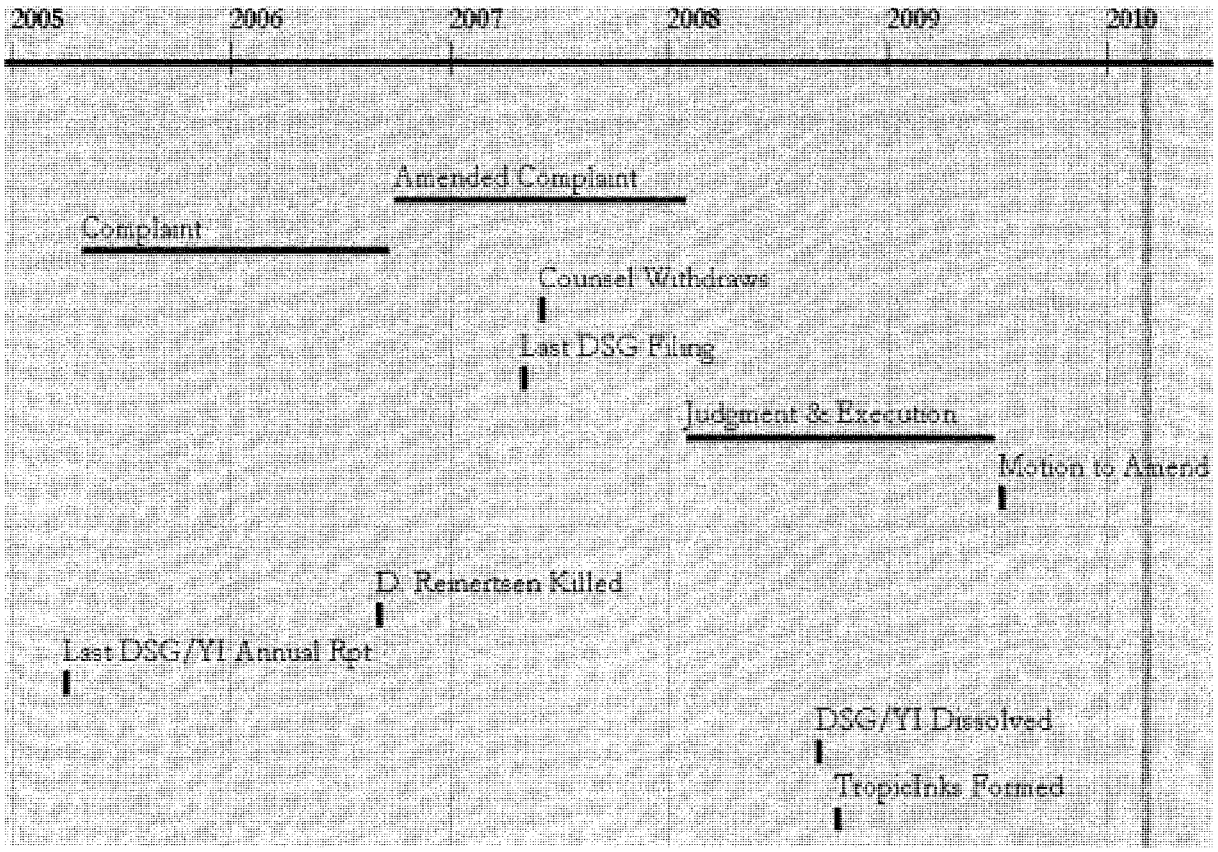
(ii) the death of Dan Reinertsen in September 2006 led to the judgment; debtors' steady decline (CT 361);

[16] Appendix 15.

(iii) evidence of the judgment debtors' deterioration can be found in the fact that less than a year after the tragedy their counsel withdrew in this matter due to lack of payment and was never replaced (CT 004, 189-190); and

(iv) the impact of the economic climate at that time.

Figure 1: Balsam-DSG Direct Timeline



Ms. Colquhoun explains, however, that after two years of "grief and devastation" following her son's motorcycle accident, she and her surviving son formed TropicInks "and we began to refocus our efforts." (CT 361). This is entirely consistent with the reorganization stage of grief, as this decision was based on choosing a pathway out of the darkness for both mother and son and had little to do with the business of DSG (except maybe to the extent that TropicInks offered a fresh start, without daily reminders associated with DSG).

Under Cal. Corp. Code § 17450 (a), Florida law governs this question and thus Appellant cannot rely on the effects of the decision to create TropicInk but must demonstrate that TropicInk was formed with an intent to defraud him. *In re Hillsborough Holdings Corp.*, 166 B.R. at 469. Balsam tries to suggest such an intent by noting that TropicInks was formed "less than two weeks" after the Florida Secretary of State dissolved judgment debtors for failing to file annual statements. (OB 8-9) As discussed above, these events, however, cannot be linked because the dissolution was not triggered by any action on Respondents' part but rather was due to inaction that predates the judgment as the judgment debtors failed to file any annual reports after 2005 (317, 320)

The formation of TropicInks is more about choosing life and hope for the surviving family members, than anything even remotely to do with Appellants. Given that the court must resolve conflicts in evidence against Appellant and in support of the order, *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th at 535, this court cannot find that TropicInks was formed with the specific intent to defraud Appellant. *In re Hillsborough Holdings Corp.*, 166 B.R. at 469 .

3. Ms. Colquhoun

Appellant, relying on nothing more than his imagination, contends that the judgment debtors, Datastream Group and TropicInks are "just shells for Colquhoun" who

is "the 'Ma Barker' mastermind behind the unlawful spamming racket and money-making enterprise." Such scurrilous accusations say more about Appellant's myopic view of the world, than it does about this case.

The "Ma Barker" analogy is a fitting analogy, however, since the idea of Ma Barker as a criminal mastermind is itself a fiction as there is "there is no evidence that she was ever an active participant in any of the crimes themselves or involved in planning them".[17] Similarly, Appellant

(i) does not explain how "Ma Barker" could dominate the operation of the judgment debtors or TropicInks while in Bonita Springs 100 to 275 miles away (CT 361);

(ii) ignores the fact that TropicInks is co-owned and managed with her son Jonathan Reinertsen (361);

(iii) ignores the fact that her husband Eric Reinertsen also was an officer of DSG (CT 176-177) and was listed as the client (as Officer and Agent for the judgment debtors) when counsel withdrew (193);

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[17] Wikipedia, *Ma Barker*, available at http://en.wikipedia.org/wiki/Ma_Barker . (Appendix 16) Alvin Karpis, the gang's second most notorious member, later stated that:

> The most ridiculous story in the annals of crime is that Ma Barker was the mastermind behind the Karpis-Barker gang. . . . She wasn't a leader of criminals or even a criminal herself. There is not one police photograph of her or set of fingerprints taken while she was alive . . . This view of Ma Barker is corroborated by notorious bank robber Harvey Bailey, who knew the Barkers well. He observed in his autobiography that Ma Barker "couldn't plan breakfast" let alone a criminal enterprise.

(iv) assumes that the judgment debtors were "money making enterprises" when all evidence suggests that were not (see Section II.B.2 supra); and

(v) assumes that the only events that happened on this earth between the date of the underlying judgment and today are that the judgment debtors were dissolved and he has not been paid.

Appellant also has presented no evidence of Ms. Colquhoun's domination of these entities other than his cartoonish "Ma Barker" speculation. In addition, Appellant must not only show that the effects of Respondents' actions impaired his interest, but that these actions were done for the purpose of injuring Appellant. *John Daly Enterprises, LLC v. Hippo Golf Co., Inc.*, 646 F. Supp. 2d at 14 (no support for the proposition that Defendant and Hippo Holdings operated or failed to observe their separate corporate identities for the purpose of injuring Plaintiffs). This means that if there is an alternative and legitimate justification for a shareholder's actions, Appellant must also prove that these actions were committed with an intent to defraud him *rather than* for the legitimate purpose. *Ally v. Naim*, 581 So.2d 961, 963 (Fla.App. 3 Dist. 1991).[18]

This Appellant cannot do, since as explained more fully in Section II.B.2, there is no connection between the dissolution of the judgment debtors and the formation of TropicInks. Instead the record demonstrates that launch of TropicInks was of act of courage and hope of a grieving family and had nothing to do with any concerns about a serial plaintiff three thousand miles away.

[18] Appendix 17.

C. *The Balance of Equities Weigh in Favor of Respondents*

1. *There Is No Legal Basis For Adding Parties to a Judgment Based on Facts Known Prior to Judgment*

Appellant should not be permitted to amend a judgment to add parties based on facts known to him at least two years before entry of judgment. Specifically, before the judgment:

(i) Appellant alleged in the First Amended Complaint that DSG and Your-Info were intertwined and that Leigh-Ann Colquhoun was the President of DSG and Registered Agent for Your-Info. (CT 072-073);

(ii) Appellant should have been aware that Datastream Group was the registrant for DSGDirect.com and shared a corporate address with the judgment debtors (which is his principal basis for claiming alter ego status with respect to Datastream Group) as this was in the public domain; and

(iii) Appellant also was on notice that the judgment debtors were having financial difficulties and may not be able to satisfy a judgment with the withdrawal of their counsel for nonpayment.

The only significant set of facts upon which appellant relies that were not known prejudgment were with respect to the subsequent launch of TropicInks.

In a similar case, where plaintiff sought to amend a judgment against a doctor to add his professional corporation, the court noted that where the doctor

was openly conducting business as a professional corporation without any irregularities and Plaintiff was aware of the existence of the corporation before judgment, "there was no legal basis" for permitting an amendment to the judgment to subsequently add the professional corporation. *Jines v. Abarbanel,* 77 Cal. App. 3d 702, 717 (1978).

The same is true in this case. Many of the facts upon which Appellant bases his claim were fully known or capable of being known well before judgment. Appellant also was on notice that the judgment debtors might not be able to satisfy the judgment well before entry of judgment and thus had ample opportunity to bring Ms. Colquhoun and Datastream Group into the litigation prior to judgment, yet Appellant made the strategic decision not to do so . As a result, as the court held in *Jines*, there is no legal basis for adding Ms. Colquhoun or Datastream Group now.

2. Amending the Judgment Would Violate Due Process

Appellant completely misstates the law in arguing that amending the judgment would not violate due process. First, he makes the circular argument that amending a judgment to add alter ego liability does not violate due process since by definition the alter ego and the judgment debtor are one and the same. (OB 43) Then he claims that *Gotlieb v. Kest*, 141 Cal. App. 110 (2006), cited by Respondents in opposing the motion, supports the Motion to Amend Judgment since it has a very similar fact pattern -- leaving out the crucial detail that in *Gotlieb* the motion was denied. *Id.* at 156

Appellant does not cite a single case where, as in this case, an uncontested judgment was amended. As the court explained in *NEC Electronics Inc. v. Hurt* , 208 Cal. App. 3d 772 (1989), in distinguishing *Dow Jones Co. v. Avenel,* 151 Cal.App.3d 144 (1984) upon which Appellant heavily relies, that in *Dow Jo*nes

> the underlying action was contested and therefore the alter ego's interests were effectively represented by the defense presented by the corporate defendant. By contrast . . . where the judgment was [uncontested] . . . the alter ego's interests were not represented in the underlying action and . . . adding them as additional judgment debtors would violate due process.

NEC Electronics Inc. v. Hurt , 208 Cal. App. 3d at 780.

Appellant also argues that the fact that the judgment debtors did not participate in the action is "hardly Balsam's fault," missing the point that neither is it Respondents' fault. There was no need for any of the Respondents to intervene in the action as Datastream Group was a separate entity and Ms. Colquhoun had no risk as she was not named in the action individually -- so neither could have reasonably expected to be bound by the judgment in that action. *NEC Electronics Inc. v. Hurt* , 208 Cal. App. 3d at 780; *Gotlieb v. Kest*, 141 Cal. App. At 156. In addition, TropicInk was formed after the judgment and thus had no ability to protect its interests.

As the California Supreme Court held in *Motores De Mexicali,* amending a judgment under such circumstances without allowing a party to litigate "any questions beyond their relation to the allegedly alter ego corporation would patently violate" the Respondents' Constitutional right to due process. *Motores De Mexicali v. Superior Court,* 51 Cal.2d. 172, 176 (1958).

3. *The Underlying Judgment is Inconsistent With the Law*

Appellant asserted two basis for liability against the judgment debtors:

(i) using multiple domain names to send e-mail violated California Business & Professions Code § 17529.5(a)(2); and

(ii) use of the word "free" in a subject line without clearly disclosing the conditions attached violated Business & Professions Code § 17592.5(a)(3) and the Consumer Legal Remedies Act ("CLRA").

(CT 282-83) Both claims, however, are contrary to the federal CAN-SPAM Act of 2003 (15 U.S.C. §§ 7701-7713) and Proposition 64.

The CAN-SPAM Act of 2003 was enacted in response to California's enactment of Section 17529 banning all unsolicited commercial email ("UCE") and preempts state laws "that expressly regulates the use of electronic mail to send commercial messages," but excludes state laws only "to the extent [the state law] prohibits falsity or deception in any portion of a commercial electronic mail message". 15 U.S.C. §§ 7701(b) (1); 7704(5), 7707(b) (1).

California subsequently amended Section 17529.5 to permit recovery of a civil penalty for email advertisements that (i) "contains or is accompanied by a third-party's domain name without the permission of the third party;" (ii) "contains or is accompanied by falsified, misrepresented, or forged header information;" or "has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message." Business & Professions Code § 17529.5. The revised Section 17529.5 allows recipients of emails violating the Section to bring a private action and recover

their actual or "[l]iquidated damages of one thousand dollars ($1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars ($1,000,000) per incident," plus reasonable attorneys fees and costs.."[19]

Appellants claim that use of multiple domain names was a*ctionable under Section 17529.5 was rejected in Kleffman v. Vonage Holdings Corp.*, which cited the CAN-SPAM Act's legislative history stressing that "State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted." *Kleffman v. Vonage Holdings Co*rp., No. 07-2406, 2007 WL 1518650 (C.D. Cal. May 23, 2007) (CT 415-420).

The Ninth Circuit cited *Kleffman* with approval in rejecting a similar claim by Plaintiff's counsel under Washington state law. *Gordon v. Virtumundo Inc.*, 575 F.3d 1040, 1063 (9th Cir. 2009) (CT 365-412).[20] The court stressed that "to the extent such a content or labeling requirement may exist under state law, it is clearly subject to preemption". *Id.* at 1064,

Appellant's remaining claims may be preempted as well since the CAN-SPAM Act only permits state law causes of action based on common law fraud

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[19] Distinguishing between solicited and unsolicited commercial email has nothing to do with prohibiting "falsity or deception in any portion of a commercial electronic mail message." The harm to consumers from fraudulent emails is the same regardless of whether or not the email was sent with consent. Consequently, Section 17529.5(b)'s attempt to draw distinctions between solicited and unsolicited commercial email (i) can only be for a purpose other than prohibiting "falsity or deception" in commercial emails which by definition is outside the scope of the CAN-SPAM preemption exception; and (ii) constitutes an express regulation of "the use of electronic mail to send commercial messages" which is preempted by CAN-SPAM.

[20] Appendix 17.

which requires a showing of reliance and actual damages which are not present here. *Hoang v. Reunion.Com, Inc., Inc.*, No. 08-3518, 2008 U.S. Dist. LEXIS 85187, *4-6 (N.D. Cal. Oct. 6, 2008) (finding that CAN-SPAM only allows state causes of action based on common law fraud and dismissing section 17529.5 complaint that does not allege reliance and damages).[21]

A similar analysis is required for Appellants CLRA claims, since Proposition 64 altered standing for CLRA claims to require injury in fact and lost money or property other than litigation costs as a result. *Buckland v. Threshold Enterprises*, 155 Cal.App.4th 798, 809, 815 (2007). The judgment in this case, however, simply ignores this requirement and awarded Appellant damages without any demonstration of reliance or harm on Appellant's part.[22]

As a result, amending the judgment would reward Appellant for misleading the court and give him a windfall he is not entitled to receive.

CONCLUSION

Appellant's arguments rely heavily on mischaracterization of facts, false assumptions and a misreading of the law. A review of the chronology of this case makes it plain that Respondents are neither successors nor alter egos in this matter as the trial court found. In addition, amendment of the judgment in this matter would be contrary to principles of equity because Appellant could have added Datastream Group and Ms. Colquhoun prior to the judgment but chose not to.

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[21] Appendix 17. *But see Asis Internet Servs. v. Vistaprint USA, Inc.*, 617 F. Supp. 2d 989 (N.D. Cal. 2009) (section 17529.5 is not preempted, even though it does not require showing of reliance or damages).

[22] In addition, under CCP Section 340(a), Appellant would be subject to a one-year limitation for civil penalties and thus any email prior to May 2004 would be barred.

Amending the judgment would also violate Respondents' due process rights and give Appellant an unwarranted windfall since the judgment is contrary to law.

Accordingly, for the reasons stated herein and based on the record in this matter, the judgment of the trial court should be upheld.

Respectfully submitted,

DATED: March 3, 2010

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