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November 28, 2005

By Hand

COPY

Clerk of Court
District Court Department (Small Claims Session)
Boston Municipal Court, Brighton Division
52 Academy Hill Road
Brighton, MA 02135-3396

Re: Jonathan Kamens v. Benchmark Brands, Inc. Docket No. 200508SC000261

Dear Sir/Madam:

Please find the following enclosed for docketing and filing in the above referenced matter:

DEFENDANT'S AMENDED ANSWER AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The trial in this action is scheduled for November 30, 2005. Please do not hesitate to contact me should you have any questions.

Best regards,

Michelle Gonnam

Enclosure

cc: Mr. Jonathan Kamens

DEFENDANT BENCHMARK BRANDS' AMENDED ANSWER AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Re: Jonathan Kamens v. Benchmark Brands, Inc.
Docket No. 200508SC000261

Benchmark, Brands, Inc. (Benchmark) engages in direct to consumer sales of health, fitness and leisure products for the lower leg. Benchmark sells its products through a mail order catalog and from its website. FootSmart is a wholly owned subsidiary of Benchmark.

The Plaintiff, Jonathan Kamens, filed a complaint against Benchmark, alleging that he received e-mails advertisements from Benchmark. (See Complaint, attached at Ex. 1.) He alleges that he requested Benchmark to stop sending these advertisements and that he received some further e-mails, which have since ceased. Mr. Kamens' complaint appears to allege (1) that the e-mail advertisements violate the federal CAN-SPAM Act, 15 U.S.C. § 7701 et. seq. ("the Act"), and (2) that Benchmark breached an alleged contract between it and Mr. Kamens.

Benchmark previously filed an answer in this matter. The Court declined to accept Benchmark's answer, which requested that the Court accept its answer as its appearance in the action. Benchmark now requests that the Court accept this motion as both its amended answer and its motion to dismiss. Uniform Small Claims Rule 5 ("The court may at any time allow any claim or answer to be amended as justice may required.").

For the reasons stated below, Benchmark requests that the Court:

(1) pursuant to Mass. R. Civ. P. 12(b)(6), dismiss Mr. Kamens' claim under the CAN-SPAM Act because (a) he has apparently dropped the claim, and (b) as a matter of law, an individual may not bring a claim under the Act;

(2) pursuant to Mass. R. Civ. P. 12(b)(6), dismiss Mr. Kamens' breach of contract claim because (a) as a matter of law, there was no acceptance or consideration, and thus no valid contract; and (b) Mr. Kamens represented to Benchmark that it would not pursue this action if Benchmark apologized, stopped sending him e-mails, and paid for his filing fees, all of which Benchmark did; or

(3) pursuant to Mass. R. Civ. P. 12(b)(2), dismiss Mr. Kamens' complaint for lack of personal jurisdiction over the Defendant.

Acentech, Inc. v. Cecconi, 1994 Mass. App. Div. 44 (Mass. App. 1994) (motion to dismiss pursuant to Massachusetts Rules of Civil Procedure may be brought in small claims action); G.L. c. 218, § 21 (small claims actions shall be determined by substantive law).

In the alternative, Benchmark requests that the Court transfer the claim to the Court's regular civil docket pursuant to G.L.c. 218, §24 and Uniform Small Claims Court Rule 4.

Regardless of the outcome of this case, Benchmark requests that the Court make clear that a final judgment as to this action precludes Mr. Kamens from bringing any future lawsuits based on the same set of facts.

CAN-SPAM ACT

Mr. Kamens' claim under the federal CAN-SPAM Act, 15 U.S.C. §7701 et. seq. (attached at Ex. 2), should be dismissed for two reasons: (1) Mr. Kamens has apparently dropped this claim, and (2) the Act does not allow an individual to bring a lawsuit claiming that the Act has been violated.

This Court need not even reach the question of whether of Mr. Kamens states a valid claim under the CAN-SPAM Act because Mr. Kamens has indicated to Benchmark that he recognizes that the CAN-SPAM Act does not allow an individual to sue for its

violations, and therefore he does not intend to pursue this claim at trial. Mr. Kamens represented to Benchmark that, despite the language of his complaint, he does not intend to pursue this claim at trial, stating: "Please note that I am not attempting to pursue private action under the CAN-SPAM act." (See Mr. Kamens' blog, attached at Ex. 3.)

As Mr. Kamens appears to have recognized, the CAN-SPAM Act does not allow an individual who claims to be the victim of illegal "spam" to sue under the Act. The Act does not expressly provide that an individual may sue for violations of the statute. The Act does expressly provide for enforcement through the Federal Trade Commission, States' Attorney Generals, and Internet Service Providers, 15 U.S.C. § 7706, thereby precluding enforcement of the statute by anyone else, including allegedly aggrieved individuals. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1973) (remedies expressly provided for in statute are exclusive remedies); *Botany Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.").

Moreover, even if an individual could bring a cause of action, Benchmark has not violated the Act, nor has Mr. Kamens sufficiently alleged that Benchmark has not substantially complied with any of the Act's provisions.

BREACH OF CONTRACT

Mr. Kamens appears to allege that Benchmark entered into a contract with him and thereafter breached that contract. Pursuant to Mass. R. Civ. P. 12(b)(6), the Court should dismiss this claim for failure to state a claim upon which relief may be granted, because, as a matter of law, no valid contract was formed.

Mr. Kamens has attempted to construct a breach of contract claim based on the following alleged facts:

1. As a former customer of Benchmark Brands, Mr. Kamens received electronic advertisements that he would have preferred not to receive;

2. Mr. Kamens responded via e-mail that he no longer wished to receive e-mail communications from Benchmark;

3. Kamens included in this e-mail a statement that if Benchmark continued to send him unsolicited e-mails he would bill Benchmark at the rate of $1,000 per e-mail, and that if Benchmark responded in any way to his email, it would amount to an acceptance of Mr. Kamens' purported right to charge $1,000 per e-mail received;

4. Benchmark sent an electronic response indicating that it would remove Kamens from its e-mail list; this computer-generated response did not make any mention of Kamens' threat to charge Benchmark $1,000 for each additional e-mail; and

5. Mr. Kamens continued to receive email from Benchmark following Benchmarks' electronic indication that it would remove Mr. Kamens from its email list.

Mr. Kamens has not alleged a valid breach of contract claim because no valid contract was formed. The essential elements of a contract, "bargained-for exchange -- offer, acceptance and consideration," are lacking here. *Quinn v. State Ethics Comm'n*, 401 Mass. 210, 216 (Mass. 1987).

First, there is simply no valid acceptance here. Neither the computer-generated response reproduced in Mr. Kamens' blog, nor any of the subsequent e-mail advertisements sent to Mr. Kamens can constitute legally cognizable acceptance. In order for an acceptance to be legally valid, a Court must find that the party intended to enter into a binding agreement. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) (holding that in determining the parties' intentions, the Court must look for a

"manifestation or expression of assent . . . by word, act, or conduct which evinces the intention of the parties to contract"); *Lumhoo v. Home Depot USA, Inc.*, 229 F. Supp. 2d 121, 161 (E.D.N.Y. 2002) (the Court considers the totality of parties' acts, phrases and expressions, along with "the attendant circumstances, the situation of the parties, and the objectives they were striving to attain").

The words, actions, and circumstances surrounding this correspondence compel the conclusion that Benchmark rejected any purported "offer" by Mr. Kamens. The automatic and computer-generated nature of the "response" and subsequent e-mails vitiates any possible conscious intent on the part of Benchmark Brands to enter into a contract. The absence of any reference to the terms of Mr. Kamens' e-mail precludes a finding of a "meeting of the minds." *Rosenfield v. United States Trust Co.*, 290 Mass. 210, 216, 195 N.E. 323 (1935) (failure to agree on material terms may be evidence that parties do not intend to be presently bound).

Second, consideration to support an agreement by Benchmark to pay $1,000 to Mr. Kamens for each subsequent e-mail is entirely lacking. Mr. Kamens' having his computer continue to accept Benchmark's emails cannot constitute adequate consideration. Continuing to "accept" merely maintained the status quo on his side. *Fienberg v. Adelman*, 260 Mass. 143, 144 (Mass. 1927) (holding that plaintiff's allowing defendant to enter store and make repairs not adequate consideration where defendant already had the right to do so); *Crocker v. Whitney*, 10 Mass. 316, 322 (Mass. 1813) (there is no consideration where there is no loss to the plaintiff, or no benefit to the defendant).

Because no valid contract was formed, Mr. Kamens' claim for breach of contract fails as a matter of law. *Liberty Mutual Ins. Co. v. Murad*, 1992 Mass. App. Div. 163, *2 (Mass. App. 1992) (Under Massachusetts law, lack of a valid contract giving rise to a contractual relationship precludes a breach of contract claim.).

Not only does Mr. Kamens' breach of contract claim fail as a matter of law, Mr. Kamens effectively agreed to drop this suit, and should be held to his word. After filing the above referenced small claims suit against Benchmark, Mr. Kamens sent an e-mail to Benchmark which contained a link to his blog, in which he stated that, as an alternative to the small claims suit,

> Benchmark could put a stop to this madness at any time simply by apologizing, stopping spamming me and everyone else they're spamming, offering concrete proof that they've done so, and reimbursing me for the filling fee on my small claims case.

(See Ex. 3.)

Alan Beychok, the President of Benchmark, responded with a letter via e-mail and U.S. mail to Mr. Kamens, thanking him for his e-mail of October 11, 2005 with the imbedded link to his blog comments about Benchmark. (See Ex. 3.) The letter stated:

> I would like to accept the offer contained in the posting on your blog. That is, Benchmark apologizes for our internal miscommunication that resulted in your continuing to receive unsolicited e-mail from us following your request that we cease. I have personally seen to it that it will not happen again. As you proposed, I have also enclosed a check to reimburse you for your filing fees in the Small Claims Court.

Id. Mr. Beychok enclosed a check to reimburse Mr. Kamens for his filing fees. In addition, although Kamens did not request it, Benchmark offered to send Kamens $100.00 worth of Benchmark products of his choice. *Id.* Benchmark then stated that it

would appreciate it if he would notify the Small Claims Court that the matter had been resolved. *Id.*

Despite Mr. Kamens' representation that he would forgo this suit if Benchmark complied with his demands, and despite Benchmark's compliance, Mr. Kamens has refused to drop this suit.

PERSONAL JURISDICTION

Pursuant to Mass. R. Civ. P. 12(b)(2), Benchmark moves to dismiss this action for lack of personal jurisdiction over the defendant. Benchmark is a Tennessee corporation with its principal place of business in Atlanta, Georgia. Benchmark also maintains a distribution facility in Memphis Tennessee. Benchmark has no presence in the State of Massachusetts. Benchmark maintains a website that can be accessed by internet users from any State.

As the plaintiff, Mr. Kamens bears the burden of establishing that the Court has personal jurisdiction over Benchmark under both the Massachusetts long-arm statute, G.L. c. 223A, § 3, and the due process clause of the U.S. Constitution.[1] *Sterilite Corp. v. Spectrum Int'l, Inc.*, 1997 U.S. Dist. LEXIS 11151, *3-4 (D. Mass. 1997); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 50 (1st Cir. 2002) (burden of proof is on the plaintiff to establish sufficient facts to support a prima facie case authorizing personal jurisdiction over the defendant under both the Massachusetts long-arm statute and the due process clause of the Constitution). In making out his prima facie case, Mr. Kamens cannot rest upon the mere allegations in his complaint; he "must

[1] To meet this burden, Mr. Kamens must satisfy two criteria: that Benchmark engaged in activities cognizable under a specific section of the Massachusetts long arm statute and that the exercise of jurisdiction would be consistent with traditional due process requirements of fair play and substantial justice. *A.I. Credit Corp. v. Barmack, Inc.*, 1993 Mass. App. Div. 92 (Mass. App. 1993).

go beyond the pleadings and show affirmative proof" that personal jurisdiction exists *Id.* at 381.

Even assuming that Mr. Kamens could make out a prima facie case for jurisdiction under the long-arm statute, Benchmark cannot constitutionally be subjected to suit in a Massachusetts court. The constitutional touchstone of the determination of whether an exercise of personal jurisdiction comports with due process is whether the defendant purposely established minimum contacts in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Although the constitutional analysis of personal jurisdiction may be based on either specific or general jurisdiction, this motion assumes that any assertion of jurisdiction would be based on specific jurisdiction.[2]

Minimum contacts on a theory of specific jurisdiction requires plaintiff to demonstrate three factors: (1) the cause of action arises out of or relates to the defendant's contacts with the forum state; (2) the defendant purposively availed itself of the privilege of conducting activities within the forum state, thereby making the defendant's involuntary presence before the state's courts foreseeable; and (3) the exercise of jurisdiction is reasonable, that is, comports with fair play and substantial justice. *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992); *Greineder v. Drs. Foster & Smith, Inc. et al.*, 8 Mass. L. Rep. 194 (Mass. Sup. Ct. 1997).

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[2] General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when defendant has engaged in "systematic and continuous activities in the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hal*, 466 U.S. 408, 414-16 (1984). In the absence of general jurisdiction, a court may exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework." *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Penn. 1997).

The allegations here arise from a series of alleged e-mail advertisements sent by Benchmark to Mr. Kamens, and correspondence between the parties related to those e-mail advertisements.

The contacts here - sending e-mail advertisements combined with a series of correspondence about such e-mails – are insufficient to warn Benchmark that it could "reasonably anticipate being haled into court" in Massachusetts. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 287 (1980). Mere solicitation of business in Massachusetts is insufficient to establish personal jurisdiction. *Thurman v. Chicago, M. & S. P. R. Co.*, 254 Mass. 569, 575 (Mass. 1926) (suggesting that solicitation of business may be enough if the cause of action is founded on business coming out of that solicitation); *Wilson v. Holiday Inn Curacao N.V.*, 322 F.Supp. 1052, 1054 (D. Mass. 1971) (Massachusetts has regularly required more than mere solicitation of business).

The correspondence between the parties relating to the dispute surrounding the e-mails also does not give rise to jurisdiction. As courts have recognized, "subjecting [a defendant] to jurisdiction in Massachusetts on these grounds provides a disincentive for parties to ever attempt to seek information or reconcile claims through written communications." *Sterilite Corp. v. Spectrum Int'l, Inc.*, 1997 U.S. Dist. LEXIS 11151, at *15.

Similarly, "the mere existence of a website does not show that a defendant is directing its business activities towards every forum where the website is visible; as well, given the omnipresence of Internet websites today, allowing personal jurisdiction to be premised on such a contact alone would 'eviscerate' the limits on a state's jurisdiction over out-of-state or foreign defendants." *Jennings v. AC Hydraulic A/S*, 383 F.3d 546,

549-50 (7th Cir. 2004); *Island Oasis Frozen Cocktail Co. v. Fla. Bulk Sales, Inc.*, 17 Mass. L. Rep. 393, *2-3 (Mass. Sup. Ct. 2004).

The asserted contacts here are insufficient to meet the constitutional standard, and it is unreasonable in this case to subject Benchmark to suit in Massachusetts. For these reasons, dismissal pursuant to Mass. R. Civ. P. 12(b)(2) is appropriate.

REMEDIES

Mr. Kamens has requested $2,000 in damages plus court costs, presumably based on his breach of contract claim. Even if a contract could arise under these far-fetched circumstances, Mr. Kamens has a duty to mitigate his damages, which he has both admitted that he could have done, and that he failed to do. Mr. Kamens, referring to his small claims court claim in a letter to Benchmark that he posted on his blog, stated:

> I'm not in this for the money. I'm trying to get you to stop spamming not just me, but others as well. This is why I did not simply tell my email filters to discard your spam.

Based on (1) Mr. Kamens' admission that he could have mitigated his damages by preventing the delivery of e-mail from Benchmark at any time but simply chose not to, and (2) his representation to Benchmark that he is not pursuing this litigation for any reason other than preventing Benchmark from sending him and others "spam" in the future, Benchmark respectfully requests that this Court limit the remedies that may be sought by Mr. Kamens to injunctive relief prohibiting Benchmark from sending him any further e-mail advertisements and reimbursement filing fees.[3]

[3] If Mr. Kamens is allowed to request monetary damages, Benchmark requests that in the event this case is transferred to the regular civil docket, his request for damages be limited to the $2,000 requested in his complaint. Mr. Kamens has chosen to seek relief in the Small Claims Court. The Small Claims Court is an alternative to ordinary civil litigation. By making the choice to litigate this matter in Small Claims Court, Mr. Kamens should be limited to the $2,000 cap on damages, regardless of the forum in which the case is ultimately heard.

Benchmark further requests that the Court make clear that a final judgment as to this action precludes Mr. Kamens from bringing any future lawsuits based on the same set of facts. Benchmark believes this to be necessary because after filing this smalls claims suit against Benchmark, Mr. Kamens indicated in his blog his intent to sue Benchmark Brands in small claims court for subsequent spam e-mails received by him after he requested that they cease, stating that otherwise, "I'll go through several iterations of sending benchmark Brandes (sic) and invoice for subsequent spam, sueing (sic) them and getting a default judgment, to build up a sizable unpaid debt which I will then sell to a collection agency." (See Ex. 3.)

Mr. Kamens would be unable to pursue further claims against Benchmark for subsequent e-mails received, regardless of the outcome of this case. Under the doctrine of claim preclusion, a valid, final judgment bars further litigation of all matters that were or should have been adjudicated in the action. *See Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275, 279-280 (Mass. 1933), and cases cited. The doctrine attempts to avoid piecemeal litigation and is "based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit." *Foster v. Evans*, 384 Mass. 687, 696 n.10 (Mass. 1981).

If Mr. Kamens were to bring another small claims court action based on subsequent e-mails, Benchmark would, obviously, argue that the action is precluded based on the doctrine of claim preclusion. However, in light of Mr. Kamens' unfamiliarity with the doctrine of claim preclusion, Benchmark requests the Court to address the issue now, to conserve the time and resources of both the parties and the Court.

CONCLUSION

For the reasons stated above, Benchmark requests that the Court dismiss Mr. Kamens' complaint for failure to state claims for which relief may be granted, or for lack of personal jurisdiction, or, in the alternative, transfer the claim to the Court's regular civil docket.

November 28, 2005

RESPECTFULLY SUBMITTED,
BENCHMARK BRANDS, INC.
By his attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by mail/hand on November 28, 2005