IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARYCLE, LLC, *et al*.	*	
Plaintiff	*	
v.	*	Cv. No. 248514
FIRST CHOICE INTERNET, INC., *et al*. Defendant	*	
	*	

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MEMORANDUM OPINION

The Plaintiffs, MaryCLE, LLC (MaryCLE) and NEIT Solutions, LLC (NEIT) filed suit against the Defendants, First Choice Internet, Inc. (First Choice) and Joseph Frevola (Frevola) for violating Maryland's Commercial Electronic Mail Act (MCEMA). MD. CODE ANN., COM. LAW, § 14-3001 et seq. (2002). Specifically, the Plaintiffs sought to enjoin the Defendants from sending unsolicited, false, and misleading commercial electronic mail messages to its electronic mail accounts and to recover statutory damages from the Defendants for the messages that were sent.

The Plaintiffs' Complaint alleges that the Defendants sent misleading commercial electronic mail to the Plaintiffs at an email address that the Defendants knew or should have known was held by residents of Maryland in violation of the MCMEA. The promotional emails sent by First Choice to MaryCLE's email address were sent from Master Mailings, LLC, First Choice's mail server provider, located in Virginia, to MaryCLE, which maintains its primary place of business and office in Washington, DC. The promotional emails were apparently routed through NEIT Solutions, LLC, an interactive computer service provider that hosts MaryCLE's email accounts and maintains its primary computer servers in Denver, Colorado.

The Defendants filed a Motion to Dismiss or in the alternative a Motion for Summary Judgment on three grounds: (1) The MCEMA violates the dormant Commerce Clause of the United States Constitution; (2) This Court lacks personal jurisdiction over the Defendants; and (3) Plaintiffs improperly filed suit against Defendant Frevola individually. This court grants the Defendants' Motion to Dismiss and holds that the MCEMA does in fact violate the dormant Commerce Clause.

I. Facts.[1]

MaryCLE is a Maryland corporation with its primary place of business in Washington, D.C. It is a consumer protection firm that has successfully collected several settlements from unscrupulous e-mail marketers under the MCEMA. Eric Menhart (Menhart), the president and owner of MaryCLE, has initiated this action on behalf of MaryCLE.

MaryCLE's Internet service provider (ISP) and co-plaintiff in the instant action is NEIT Solutions. NEIT is an ISP because it qualifies as an information service, system, or access software provider that provides or enables computer access by multiple users to a computer service. NEIT's billing, administration, technical support, and most every aspect of its business is handled within the State of Maryland. NEIT hosts MaryCLE's two legally owned domain names: "maryland-state-resident.com" and "marycle.com." All email communications to MaryCLE are routed through web servers, which are administered and leased by NEIT. Even though NEIT is a Maryland Limited Liability Company, their servers are located in a secure Network Operations Center in Denver, Colorado.

Both Defendants, First Choice and Frevola, are located in Carle Place, New York. First Choice is an Internet marketing corporation that markets and promotes products for various

[1] All of the facts were taken directly from the Defendants' Motion to Dismiss and the Plaintiffs' Response to the Motion to Dismiss.

customers through "opt-in" email mailings, promotions, and website advertising programs directed towards a national audience of potential Internet customers. Frevola is the President of First Choice.

First Choice obtains "opt-in" email address lists of potential customers by entering into partnership agreements with companies such as Wow Offers, LLC, (Wow Offers) a company that runs sweepstakes promotions where persons enter their email addresses into a promotion to receive a chance to win a prize while agreeing that their email addresses will be eligible to receive promotional offers from Wow Offers and its partners. Wow Offers also obtains lists of email addresses through "co-registrations," which come from other companies that collect email addresses in a similar manner. In every case, the "opt-in" email address lists used by First Choice are comprised of persons who, according to Wow Offers, have "opted-in" or agreed to receive promotional emails through the sweepstakes or a similar co-registration process.

As part of First Choice's partnership with Wow Offers, First Choice received hundreds of thousands of email addresses of persons who had "opted-in" to receive promotional offers, including the email address at issue in this case, ejm@maryland-state-resident.com, which is the email address for MaryCLE and Menhart. Wow Offers obtained MaryCLE's email address when Menhart registered his email address on "idealclick.com," which then provided the email address to Wow Offers.[2] First Choice retained the services of Master Mailings, LLC (Master Mailings), a company that specializes in delivering promotional messages to "opt-in" email address lists, to send the promotional emails to MaryCLE's email address. At no time did Frevola or First Choice actually perform the physical act of sending any promotional emails or mailings to MaryCLE, as the emails were sent through the servers operated by Master Mailings.

[2] MaryCLE alleges that it never knowingly "opted-in" to idealclick.com to receive promotional emails.

MaryCLE began receiving unsolicited e-mail messages from the Defendants to the address ejm@maryland-state-resident.com on September 18, 2003. These messages continued through October 29, 2003 at approximately two per day. The messages were sent by Master Mailings, under the direction of the Defendants, who supplied the lists of email addresses, as well as the information to display in the "from" field, the "subject" field, and the content of each of the messages. Menhart replied to all of the Defendant's e-mails, requesting that the MaryCLE e-mail address be removed from the Defendants' mailing lists. MaryCLE's attempts to contact the Defendants on over 80 occasions were unsuccessful. Menhart eventually visited the "firstchoiceinternet.com" website, where a monitored e-mail address, "joe@firstchoiceinternet.com" was listed, along with a valid telephone number. Menhart left a message for Frevola, sent an email, and mailed two letters, requesting that MaryCLE be removed from First Choice's mailing list. Frevola responded to Menhart's request in a letter and the emails subsequently stopped.

In addition, every promotional email sent to MaryCLE by First Choice through Master Mailings contained an "unsubscribe link." Menhart never utilized the unsubscribe link and thus never "opted-out" of receiving the promotional emails from First Choice.

In order to determine the physical location where an email address is based, the most reliable technique is to plug the IP locator for the email address into an "IP Tracker" such as www.discoveryvip.com/ipaddress.htm, which will then provide the physical location of a computer using a particular email address. In the case of MaryCLE, the IP address of the computer that was used when MaryCLE "opted-in" was 66.171.38.224, which is located in Reston, Virginia, not Maryland.

Currently, there is both federal law and Maryland state law pertaining to unsolicited commercial email. The applicable federal statute known as the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" or "CAN-SPAM Act" was passed by the Senate on November 25, 2003, agreed to by the House of Representatives on December 8, 2003, and signed into law by the President on December 16, 2003. The law, which establishes a federal regulation of spam e-mail, took effect on January 1, 2004. 15 U.S.C.A. § 7701 et seq. (2004). The CAN-SPAM Act preempts existing state anti-spam laws "except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." *Id*. at § 7707(b)(1).

The Maryland General Assembly enacted the Commercial Electronic Mail Act in 2002. The statute makes it illegal to send commercial electronic mail 1) to an Internet domain name of a third party without permission; 2) that contains false information about the origin path of the email; or 3) that has a false or misleading subject line. MD. CODE ANN., COM. LAW, § 14-3002(b)(2). Specifically, the instant case pertains to § 14-3002(b)(2)(iii). This portion of the statute reads "[c]ontains false or misleading information in the subject line that has the capacity, tendency, or effect of deceiving the recipient." It is unclear whether this is an objective or subjective standard or whether the deception is to be determined from the standpoint of the sender or the receiver of the email. Therefore, the language is too vague to be enforced. The law applies if the message is sent from a computer within Maryland; if the sender knows or should have known that the recipient is a Maryland resident; or if the registrant of the domain name will confirm upon request that the recipient is a Maryland resident. *Id*. at §§ 14-3002(b)(1) & 14-3002(c).

Because Congress has specifically reserved, to the States, the right to control fraudulent or misleading commercial e-mail, this Court's findings primarily focus on the Maryland statute as opposed to the federal law.

II. Issues Before this Court.

This Court was presented with three issues in the Defendants' Motion to Dismiss or in the alternative Motion for Summary Judgment: (1) Whether the MCEMA violates the dormant Commerce Clause of the United States Constitution; (2) Whether this Court has personal jurisdiction over either Defendant; and lastly (3) Whether Joseph Frevola was properly named as a Defendant individually?

III. Analysis.

A. ***The Dormant Commerce Clause***:

Article I of the Constitution gives Congress the power to regulate commerce "among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause is more commonly referred to as the Commerce Clause. Congress typically utilizes this power by enacting legislation, however, even when Congress "has not acted either affirmatively to regulate an interstate activity or specifically to bar States from doing so," the courts may find certain state and local laws unconstitutional if they unduly burden interstate commerce under the dormant Commerce Clause. *Medstar Health v. Maryland Health Care Comm'n*, 376 Md. 1, 45 (2003). Today, when a law is challenged under the dormant Commerce Clause, a two step process is utilized to determine whether a violation has occurred. First the Court examines whether the statute is constitutional on its face by determining if it discriminates against persons in other states. If so, the statute is typically declared unconstitutional. If the statute is facially neutral, then the Court utilizes a balancing test as the second step in its evaluation of the statute. The Court must then determine whether the

interstate burden imposed by the law outweighs the local benefits.[3] Again, if this is the case, the law is usually deemed unconstitutional.

Several courts have examined their respective state statutes pertaining to the Internet under the dormant Commerce Clause and found their statutes to be unconstitutional. *See American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2nd Cir. 2003); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004). In *PSINet, Inc.*, the Fourth Circuit held that a Virginia statute, which regulates the transmission of harmful material to minors over the Internet, violated the dormant Commerce Clause. The Court noted that "[s]everal courts have struck down state statutes similar to Virginia['s] … as unduly burdensome on interstate commerce because they, in effect, restrict commercial electronic materials in all states, not just the state in which the statute was enacted." 362 F.3d at 239.

Similarly, in *American Libraries*, the District Court of New York held that a New York statute was violative of the dormant Commerce Clause because it unduly burdened interstate commerce. Furthermore, the court stated that:

> The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have "addresses," they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic

[3] Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (noting that "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.").

> clues and, even where an Internet address provides such a clue, it may be misleading.

969 F.Supp. at 170-71.

Lastly, in *American Booksellers*, Vermont's statute which regulated sexually explicit materials on the Internet was held invalid as it violated the dormant Commerce Clause. The court found that Vermont's statute "has 'projected its legislation' into other States, and directly regulated commerce therein," in violation of the dormant Commerce Clause. 342 F.3d at 104 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)).

The Plaintiffs assert that their claim does not fall within the purview of the above-mentioned cases, but rather is in congruence with both the Washington[4] and California[5] Courts that have held that their states' anti-spam statutes are valid. In *State v. Heckel*, 24 P.3d 404 (Wash. 2001), the Attorney General for the State of Washington filed suit against an Oregon resident, Jason Heckel, for violating a Washington anti-spam statute. Heckel's emails allegedly "contained misleading subject lines and false transmission paths." *Id*. at 406. Although the trial court found that Washington's statute violated the dormant Commerce Clause, the Washington Supreme Court found that the statute was not discriminatory on its face because it "applies evenhandedly to in-state and out-of-state spammers" and that its local benefits outweighed any burden on interstate commerce. *Id*. at 409, 411. The court found that "the only burden the Act place[d] on spammers [wa]s the requirement of truthfulness, a requirement that does not burden commerce at all but actually facilitates it by eliminating fraud and deception." *Id*. at 411.

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[4] *See* State v. Heckel, 24 P.3d 404 (Wash 2001) (holding that a Washington statute was valid and not violative of the dormant Commerce Clause).

[5] *See* Ferguson v. Friendfinders, Inc., 94 Cal.App. 4th 1255, 115 Cal. Rptr.2d 258 (1st Dist. 2002) (holding that a California anti-spam statute was not unconstitutional).

In *Ferguson v. Friendfinders, Inc.*, 94 Cal.App. 4th 1255, 115 Cal. Rptr.2d 258 (1st Dist. 2002), Mark Ferguson, a California resident, brought suit against a California resident, two California businesses, and others for allegedly violating a California statute that prohibits sending unsolicited commercial emails that are deceptive and misleading. Like *Heckel*, the California trial court found that the statute was unconstitutional because it violated the dormant Commerce Clause. The California Court of Appeals, however, reversed the trial court, finding that the California statute is only applicable to "individuals and entities that (1) do business in California, (2) utilize equipment located in California, and (3) send [unsolicited commercial email] to California residents." *Id*. at 1264.

The instant case does not stand on all fours with *Heckel* or *Ferguson*. In *Heckel*, the Washington Attorney General brought an action against an Oregon resident for actions that took place within the State of Washington. In *Ferguson*, a California resident filed suit against other California residents for actions which took place in California. In contrast, the Defendants, in the case at bar, are New York residents and the Plaintiff is a Maryland corporation. Even though the Plaintiff Corporation is registered in Maryland, its primary place of business and office are located in the District of Columbia. The Defendants had no contact with the State of Maryland because their emails were sent from New York, routed through Virginia and Colorado, and finally were received in Washington, D.C. Thus, the holdings in *Heckel* and *Ferguson* do not apply to the instant set of facts because here the Plaintiffs are asking the court to apply Maryland law to a situation which never occurred in Maryland.

This Court follows the reasoning of the Virginia, New York, and Vermont Courts and holds that Maryland's Commercial Electronic Mail Act is unconstitutional as it violates the dormant Commerce Clause. Under the MCEMA, a party may be subject to damages in

Maryland for sending commercial email that "[i]s from a computer in the State or is sent to an electronic mail address that the sender knows or should have known is held by a resident of the State." MD. CODE ANN., COM. LAW, § 14-3002(b). On its face, this language does not discriminate against residents from other states, rather this is a question of fact. However, when the language is applied to the case at bar it does violate the dormant Commerce Clause because the law crosses state boundaries to reach persons who open their email in other states.

The statute does not provide that the email must be received in Maryland, instead the statute pertains to situations where an email sender in one states sends an email to a Maryland resident living or working in another state. Thus, the statute, as applied in this case, seeks to regulate the transmission of commercial email between persons in states outside of Maryland, even when the email never enters Maryland, as long as the recipient is a Maryland resident. Therefore, First Choice and Frevola's Motion to Dismiss is granted on the constitutional grounds that the MCEMA is violative of the dormant Commerce Clause.

B. ***Personal Jurisdiction***:

In light of the fact that this Court finds the Maryland statute unconstitutional, the question of personal jurisdiction does not have to be addressed. However, this Court finds it necessary to address this subject to further substantiate the Defendants' Motion to Dismiss.

Maryland's long arm statute allows a court to exercise personal jurisdiction over a person who "causes tortious injury in the State by an act or omission in the State" or "causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from … the State." MD. CODE ANN., CTS. & JUD. PROC., §§ 6-103(b)(3) – (4). This Court cannot exercise personal jurisdiction over the Defendants under Section 6-

103(b)(3) because the Defendants did not engage in an act or omission in Maryland nor did they cause tortuous injury within the State of Maryland. In *Zinz v. Evans and Mitchell Industries*, 22 Md.App. 126 (1974), the Maryland Court of Special Appeals found that Maryland did not have personal jurisdiction over a Georgia corporation and vice-president who wrote and mailed a letter from Georgia that was received in Maryland. Similarly, in the instant case, the Defendants sent emails from New York to Maryland residents residing in Washington, D.C. Even if the Plaintiffs opened some of their email in Maryland, Section 6-103(b)(3) would still not permit this Court to exercise personal jurisdiction over the Defendants in accordance with *Zinz*.

Additionally, under Section 6-103(b)(4), this Court cannot exercise personal jurisdiction over the Defendants because the Defendants do not regularly conduct business, engage in persistent conduct or derive revenues from Maryland. Therefore, under the Maryland long arm statute, personal jurisdiction over the Defendants cannot be established.

Courts can also exercise personal jurisdiction under the Fourteenth Amendment of the Due Process Clause. This clause requires that personal jurisdiction only be exercised over a defendant who has "certain minimum contacts with [the court] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945). The court has already determined when it can exercise jurisdiction in cases involving the Internet. In *ALS Scan, Inc. v. Digital Serv. Consultants, Inc*., 293 F.3d 707 (4th Cir. 2002), the Fourth Circuit held that a

> State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within

> the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Id. at 714. The court found that Maryland did not have jurisdiction over a non-resident defendant corporation that had advertised its services to Maryland residents on the Internet. Similarly, the Defendants did not intentionally direct their emails to the Plaintiffs in Maryland because the Defendants did not even know, and had no ability to know, where the Plaintiffs would actually open the email. The email addresses of MaryCLE are connected to a computer registered in Virginia, MaryCLE's principal place of business is in Washington, D.C. and MaryCLE is a registered Maryland corporation. The Defendants had no way of knowing whether MaryCLE would receive its email in Virginia, D.C., Maryland, or any other state for that matter. Thus, the Defendants did not "purposely" direct their emails to Maryland residents.

C. ***Individually***:

The Plaintiffs sued First Choice and Frevola, in his individual capacity as president of First Choice. The Defendants assert that Frevola cannot be sued personally for the actions of First Choice and this Court agrees.

In order for an officer of a corporation to be found personally liable, the court must find that the officer took part in the commission of a tort by the corporation. However, an officer who does not take part in the commission of a tort can only be held personally liable if he "specifically directed the particular act to be done or participated or co-operated therein." Shipley v. Perlberg, 140 Md.App. 257, 265-66, 780 A.2d 396, 400 (Md.App. 2001) (quoting Levi v. Schwartz, 201 Md. 575, 583, 95 A.2d 322 (1953)). Even if First Choice did commit a tort against the Plaintiffs by sending unsolicited commercial email, Frevola should not be held

personally liable because he did not specifically direct First Choice to send an email to MaryCLE or to any Maryland residents.

Under Maryland law, this Court cannot hold that Frevola is a proper party to this action. The Plaintiffs do not allege in their Amended Complaint that Frevola purposely directed or participated in any alleged misconduct. Therefore, Frevola should be dismissed from the suit.

III. Conclusion.

This Court finds that Maryland's Commercial Electronic Mail Act is unconstitutional as if violates the dormant Commerce Clause when applied to the case at bar. Even if the statute was found to be constitutional, this Court does not have personal jurisdiction over either Defendants, as they are New York residents and do not have any minimum contacts with the State of Maryland, as required by the Due Process Clause of the Constitution. Lastly, the Defendant, Joseph Frevola, should not have been named as a party to this action because, as president of the corporation he can only be held personally accountable if he participates or directs the corporation to act in a tortuous manner.

Dated: _____

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DURKE G. THOMPSON, JUDGE
Circuit Court for Montgomery
County, Maryland

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	*	

* * * * * * * * * * * * *

ORDER

It is by the Circuit Court for Montgomery County, Maryland, this _____ day of December, 2004, so

ORDERED, that Defendants' Motion for Dismissal be, and hereby is, GRANTED.

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DURKE G. THOMPSON, JUDGE