UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

KRISHNA PATEL, VIJAY PATEL, and ACTAX SOLUTIONS, INC.,	)	
Plaintiffs,	)	
v.	)	**No. 3:13-0701**
	)	**Judge Sharp**
TERRELL D. HUGHES, JR., and TRX SOFTWARE DEVELOPMENT, INC. ,	)	
Defendants.	)	

MEMORANDUM

Pending before the Court in this copyright infringement action is the fully briefed Motion to Dismiss filed by Defendants Terrell D. Hughes, Jr., and TRX Software Development, Inc. (Docket No. 15). After setting forth the applicable standard of review, the Court will consider the parties' arguments in the order presented by Defendants.

I. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). As further explained in Twombly,

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology,

> Inc., 40 F.3d 247, 251 (7th Cir. 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level . . .

550 U.S. at 555. "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555).

II. CLAIMS AGAINST MR. HUGHES

Defendants argue that the complaint as to Mr. Hughes should be dismissed in its entirety because none of the claims assert that he committed any wrongdoing and, even if they did, there is no allegation that Mr. Hughes is the alter ego of Defendant TRX. In response, Plaintiffs argue that "[t]he complaint sets forth myriad fact alleging that Doug Hughes participated in the tortious acts against Plaintiffs," and "pleading a cause of action to pierce the corporate veil is unnecessary at this stage in the litigation[.]" (Docket No. 19 at 3).

Defendants are correct that Mr. Hughes is not specifically named in any of the seven counts of the Complaint. In fact, all of the counts reference only TRX – they do not even reference Defendant*s* in the plural.

However, the Complaint does allege that Mr. Hughes "is the founder, owner, chief executive officer, president, and registered agent for TRX," and that he and TRX also operate or control various other entities. (Complaint, Docket No. 1 ¶¶ 5 & 6). The Complaint also contains a host of allegations against Mr. Hughes, including, but not limited to, that he:

> (1) met with Plaintiff Vijay Patel "and discussed using Mr. Hughes's company to market and sell or license copies of SalestaxExact, AccountExact, and TaxExact in

the United States on behalf of AcTax Solutions";

(2) "signed a 'Product Distribution Agreement' to sell private label versions of AccountExact and ClientExact under the TRX name";

(3) negotiated with others "for the sale of various software products including TaxExact to TRX";

(4) sent a Letter of Intent "to AcTax Solutions on behalf of TRX regarding the sale of TaxExact to TRX";

(5) signed a Software Maintenance Agreement for Tax Exact that "specified payment of $20,000 per month to AcTax Solutions for updating TaxExact for new software versions and tax code changes" and demanded that Mr. Patel sign it the day it was presented;

(6) was required "to pay $30,000 per month for eight years to purchase TaxExact in conjunction with the Software Maintenance Agreement" and "understood that signing both the Software Maintenance Agreement and the Asset Purchase Agreement was needed in order to complete the transaction so that AcTax Solutions could draw on the full payment of $50,000 per month to get the software updated";

(7) sent a "binding 'Letter of Intent' to AcTax Solutions reaffirming his desire to buy TaxExact on behalf of TRX";

(8) explained to AcTax Solutions "that he could not pay the $30,000 per month according to the proposed terms Asset Purchase Agreement," and claimed "the Software Maintenance Agreement was unenforceable without the accompanying Asset Purchase Agreement";

(9) "announced that he was changing the payment plan" and "instead of paying $30,000 per month to AcTax Solutions for the next eight years, he would pay $3,500 minimum per month for the next eight years, with the difference to be paid each year on June 15";

(10) "demanded that I-Link transfer control of the domains taxexact.com and taxexactpro.com TRX and announced that he would no longer pay any money to Vijay Patel"; and

(11) "sent AcTax Solutions a proposed second draft of the Asset Purchase Agreement" that "reflected the terms previously declared by Doug Hughes, unilaterally reducing the monthly payment from $30,000 per month to $3,500 per month."

(Id. ¶¶ 23-25, 29-31, 33-36, 38 & 40).

Presumably, the acts attributed to Mr. Hughes were done on behalf of TRX and "[it] follows that a corporate director, officer or employee, if acting within the scope of their authority for the interests of the corporation should not be held liable because their action is treated as that of the corporation." Rennell v. Through the Green, 2008 WL 695874, at * 8 (Tenn. Ct. App. Mar. 14, 2008) (citing Cambio Health Solutions, LLC v. Reardon, 213 S.W.3d 785, 789 (Tenn. 2006)). However, a "corporation's separate identity may be disregarded or 'pierced' . . . upon a showing that it is a sham or a dummy or where necessary to accomplish justice." Oceanics Sch., Inc. v. Barbpour, 112 S.W.3d 134, 140 (Tenn. Ct. App. 2003). "When piercing the corporate veil, a court may disregard the corporate entity in order to impose liability against a related entity, such as . . . a controlling shareholder, where the two entities are in fact identical or indistinguishable[.]" Pamperin v. Streamline Mfg., Inc. 276 S.W.3d 428, 438 (Tenn. Ct. App. 2008). "'Furthermore, an alter ego claim is not by itself a cause of action. Rather, it is a doctrine which fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his or her own business, and such liability arises from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation.'" Regions Bank v. JP Realty Partners, Ltd., 912 F. Supp.2d 604, 616 (M.D. Tenn. 2012) (quoting In re RCS Eng'g Prod. Co., Inc., 102 F.3d 223, 226 (6th Cir. 1996)).

In their reply brief, Defendants acknowledge that a claim for alter ego liability need not be pled as a stand-alone count, but argue that Plaintiffs have failed to demand the veil be pierced and "have pointed to no facts demonstrating" the corporate veil should be pierced. Instead, Plaintiffs allegedly "focus[] on Mr. Hughes actions in this capacity as an agent of TRX." (Docket No. 20 at

8). They also quote Oceanic Schools in both their opening and reply brief for the proposition that "[t]he party wishing to pierce the corporate veil has the burden of presenting facts demonstrating that it is entitled to this equitable relief." Oceanics Sch., 112 S.W.4d at 140.

No doubt, the circumstances under which a corporate veil will be pierced are "rare," Pamperin, 276 S.W.3d at 436, and "[t]o pierce the corporate veil . . the plaintiff must show that a shareholder exercised complete control over a subsidiary and used that control to commit fraud or a wrong," Cambio, 213 S.W.3d at 790. But the time for "making that showing," or "presenting fact demonstrating" entitlement to that relief, is not at the pleading stage.

That said, Rule 8 of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). This requirement is "intended to give the defendant fair notice of what the claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555 (quoting Conley, 355 U.S. at 47).

As the Complaint is presently drafted, and notwithstanding the numerous allegations against Mr. Hughes, there is no *claim* against him and no suggestion as to the grounds for holding him liable. In fact, in their response brief, Plaintiff acknowledge that they "have not yet sought to pierce the corporate veil," but "explicitly reserve their right to do so, either by subsequent motion or by amending the pleadings." (Docket No. 19 at 4 n.5). While that may be possible in theory, in practice there are no claims against Mr. Hughes that he must defend.

The Motion to Dismiss as to Mr. Hughes will be granted. However, because Plaintiff request leave in their response brief to amend their Complaint if necessary, and because "[t]he court should freely give leave when justice so requires," Fed. R. Civ. P. 15(a)(2), Plaintiffs will be afforded an opportunity to file an Amended Complaint to allege actual claims against Mr. Hughes.

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