

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 10/07/2016

TIME: 01:30:00 PM

DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor

CLERK: Anthony Shirley

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: R. Lopez

CASE NO: **37-2015-00008210-CU-NP-CTL** CASE INIT.DATE: 03/11/2015

CASE TITLE: **SHARP vs STOCKTIPS.COM [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Non-PI/PD/WD tort - Other

EVENT TYPE: Demurrer / Motion to Strike

MOVING PARTY: AWeber Communications

CAUSAL DOCUMENT/DATE FILED: Demurrer To George Sharp's First Amended Complaint,
08/09/2016

APPEARANCES

Scott Braden, specially appearing for counsel JENNIFER RAKERS NINO, present for Defendant(s).
ETHAN T BOYER, counsel, present for Defendant(s).

The Court hears oral argument and MODIFIES AND CONFIRMS the tentative ruling as follows:

Sharp v. Stocktips.com, Case No. 2015-8210

Oct. 7, 2016, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

In the present case, as before,* Sharp sues defendants for violations of the California Restrictions on Unsolicited Commercial E-mail Advertisers Law (Cal. Bus. & Prof. Code 17529.5). Plaintiff alleges that all defendants participated in a scheme to disseminate spam emails containing false and misleading information to encourage plaintiff and other members of the public to purchase publicly traded penny stock of the defendants. According to the complaint, plaintiff has become well-known as a crusader against this sort of thing. Instead of just deleting the emails and/or placing the senders in his spam filter, Sharp filed this lawsuit in which he alleges that the defendants engaged in fraudulent and deceptive actions by initiating the sending of numerous unlawful spam emails on behalf of themselves and other defendants between late 2013 and March of 2015. ROA 1. Plaintiff seeks statutory damages exceeding \$200,000.00.

The case has been slow to gain traction. See ROA 28, 39, 52, 69, 97, 109. It is set for a sixth CMC today. Plaintiff claims this is the result his inability to joint all the defendants because of defendants' unwillingness to disclose the identities of those responsible for the spam emails containing false and

misleading information.

A demurrer was calendared and then vacated. ROA 16, 21. Plaintiff scheduled and then rescheduled a motion to compel. ROA 40-42. That motion never went forward. See ROA 44. Defendant Tiger Oil (Tiger) sought a protective order preventing plaintiff from deposing plaintiff's PMK beyond an additional 12.5 hours. ROA 60. The court granted the motion in part on March 25, 2016. ROA 69. After several amendments to the complaint (adding Doe defendants – ROA 71-78, 92), plaintiff filed (by stipulation) his first amended complaint. ROA 91, 93. Defendants Tiger Oil and Empire Stock Transfer have answered the FAC. ROA 100, 101. Defendant Coastal Integrated Services has not answered the FAC, but it did answer the original complaint after it was added as Doe 1. ROA 19, 23.

Most recently, plaintiff filed two motions to compel directed at defendant Coastal Integrated Services. ROA 85-90. [One of the motions was inexplicably filed twice; ROA 87 is the same as ROA 89, and ROA 88 is the same as ROA 90.] Plaintiff sought responses from Coastal Integrated Services as to his first document demand, and further responses from Coastal Integrated Services as to his second document demand. Neither motion was opposed. On August 5, 2016, the court granted the motions. ROA 110.

Presently, a newly added defendant (AWeber Systems, Inc., Doe 5) demurs to the FAC. ROA 106. The demurrer is founded upon three arguments: AWeber is immune under 47 U.S.C. § 230, which preempts state regulation; Bus. & Prof. Code § 17529.5(b)(1)(D) provides a safe harbor for email service providers that are only involved in the routine transmission of the email advertisement over their computer networks; and forty-eight of the seventy-two emails upon which Mr. Sharp bases his complaint are barred by the one year statute of limitations under Cal. Bus. & Prof. Code § 17529.5. Plaintiff filed opposition. ROA 119. Defendant filed reply. ROA 128. The court has reviewed the papers.

2. Applicable Standards.

A. The court is mindful that plaintiff represents himself. However, his status as a party appearing *in propria persona* does not provide a basis for preferential consideration. "A party proceeding *in propria persona* 'is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys.' Indeed, 'the *in propria persona* litigant is held to the same restrictive rules of procedure as an attorney.'" [Citation.] *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247. In accordance with the precedent established by the California Supreme Court in *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985, appellate courts have held that the pleadings and motions filed by a self-representing litigant in the trial court are subject to the standards generally applied by California courts in civil litigation. *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284-1285 [self-representing litigants are not exempt from statutes or court rules governing procedure].

B. A demurrer may only be sustained if the complaint fails to state a cause of action under any possible legal theory. *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 810 (2005); *McCall v. PacifiCare of Cal., Inc.*, 25 Cal.4th 412, 415 (2001); *Aubry v. Tri-City Hospital Dist.*, 2 Cal.4th 962, 967 (1992). Moreover, "[r]egardless of whether a request therefor was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion." *Roman v. County of Los Angeles*, 85 Cal.App.4th 316, 322 (2000). The courts of appeal give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." *Aubry*, 2 Cal. 4th at 967; *accord, Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1126 (2002). Courts must liberally construe the pleading with a view to substantial justice between the parties. CCP § 452; *Kotlar v. Hartford Fire Ins.*

Co., 83 Cal.App.4th 1116, 1120 (2000).

3. Appendixes of Authorities.

AWeber filed a Notice of Lodgment attaching non-California authorities and a federal statute. ROA 130. The court asks the parties to forebear from routinely lodging copies of authorities in the future. These are ordinarily available to the court on Westlaw. The court will advise counsel if it needs a lodgment of non-California authorities. Counsel are encouraged to review the not-so-recent amendments to CRC 3.1113(i) in this regard.

4. Discussion and Ruling.

Plaintiff's opposition includes more than 30 pages of extrinsic evidence. The extrinsic evidence is disregarded. The evidentiary objection to the extrinsic evidence is deemed moot. A demurrer only challenges defects on the face on the pleading or matters that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. Extrinsic evidence is improper. *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881. Plaintiff failed to request judicial notice.

AWeber's demurrer to plaintiffs' complaint is sustained with leave to amend.

AWeber's first argument is that it is immune under 47 U.S.C. § 230.

In order to claim Section 230 immunity, a defendant must establish: (1) the defendant is a provider or user of an interactive computer service; (2) the cause of action treats the defendant as a publisher or speaker of information; (3) the information at issue was provided by another information content provider. *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830.

Plaintiff fails to alleged facts to overcome AWeber's immunity argument.

Plaintiff alleges that AWeber is an email and social media marketing provider that manages email lists for its clients and disseminates customer created emails to those lists. (FAC ¶10). Plaintiff also alleges that various users access AWeber, including the other defendants. These facts are in accordance with the broad definition of interactive service provider under Section 230. Therefore, Plaintiff fails to allege that AWeber is not an interactive service provider and thus does not fall under Section 230 immunity.

Secondly, plaintiff alleges that AWeber collaborated with the other defendants to participate in a "pump and dump" scheme intended to defraud unsuspecting victims. Plaintiff fails to make specific allegations as to how AWeber collaborated with the other defendants. By attempting to associate AWeber to the emails without pleading sufficient facts underlying this contention, plaintiff seeks to hold AWeber liable for the actions of third parties, thus meeting the second element for Section 230 immunity.

Lastly, plaintiff alleges that between December 9, 2013 and June 23, 2014 he received at least 72 emails soliciting him to purchase common stock from defendants TIGER and COASTAL. Plaintiff, however, fails to allege that AWeber contributed to the substance of the emails or that AWeber did anything beyond simply disseminating them.

AWeber's second argument is also meritorious. AWeber falls within the immunity granted by Bus. & Prof. Code § 17529.5(b)(1)(D), the same statute under which plaintiff brings his cause of action. This Section grants immunity from a cause of action under Bus. & Prof. Code § 17529.5 to electronic mail

service providers involved in the routine transmission of email advertisement over its computer network. Because plaintiff has failed to allege that AWeber has done more than transmit the emails, AWeber fits neatly within the meaning of this Section.

Finally, because plaintiff filed his complaint in March 2015, and forty-eight of the seventy-two emails upon which he bases his complaint were received from December 2013 to January 2014, his action as to these emails is barred by the one-year statute of limitations. Cal. Code Civ. Proc. § 340(a).

Plaintiff has expressly requested leave to amend, and it is ordinarily an abuse of discretion to deny such a request unless the inability to state a valid cause of action is clear. In this respect, plaintiff has the burden to show in what manner plaintiff can amend the FAC and how the amendment will change the legal effect of the pleading. *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349. Plaintiff makes no real effort to comply with this requirement. However, the court grants plaintiff 10 days leave to amend the FAC. While this is a cautious decision by the court, it is justified by *Connerly v. State of California* (2014) 229 Cal.App.4th 457, holding that a party responding to a demurrer can even wait until the case reaches the Court of Appeal to suggest a theory change justifying leave to amend.

Accordingly, the demurrer is sustained with 15 days leave to amend.

*See *Sharp v. Cuba Beverage Company*, Case No. 2011-090093; *Sharp v. IDO*, Case No. 2012-10157; *Sharp v. Xumanii*, Case No. 2013-00048310.

IT IS SO ORDERED.



Judge Timothy Taylor