2013 WL 12121519
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United States District Court, S.D. Ohio, Western Division.

CLARKWESTERN DIETRICH BUILDING SYSTEMS LLC d/b/a Clarkdietrich, Plaintiff,
v.
CERTIFIED STEEL STUD ASSOCIATION, INC., et al., Defendants.

Case No. 1:13-cv-818
|
Filed 12/20/2013

Attorneys and Law Firms

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OPINION AND ORDER

Michael R. Barrett, Judge

***1** This matter is before the Court on Plaintiff's Motion to Remand and for an Award of Attorneys' Fees and Costs, and Memorandum in Support ("Motion to Remand"). (Doc. 15). Defendants Ware Industries, Inc. d/b/a Marino\Ware and California Expanded Metal Products Company d/b/a CEMCO have filed responses in opposition (Docs. 28, 29) and Plaintiff has filed a reply (Doc. 30).[1] For the reasons explained below, Plaintiff's Motion to Remand is granted and the case shall be remanded to the Butler County Court of Common Pleas.

I. BACKGROUND

Plaintiff and Defendants are competitors in the metal framing industry. In particular, Defendants compete with Plaintiff's line of nonstructural framing products sold under the trade name ProStud®. This case is based upon Defendants' purported conduct in relation to Plaintiff's ProStud® line of products.

On October 8, 2013, Plaintiff filed this lawsuit against Defendants asserting claims for violations of the Ohio Deceptive Trade Practices Act, O.R.C. §§ 4165.01-4165.04, unfair competition, disparagement, defamation, tortious interference with existing and prospective contracts, civil conspiracy, and breach of contract. (*See* Doc. 12).[2] On November 8, 2013, Defendant Ware Industries, Inc. d/b/a Marino\Ware ("Marino\Ware") filed a notice of removal on the basis of diversity of citizenship under 28 U.S.C. §§ 1332, 1441(b) and 1446. (Doc. 1). Marino\Ware contends that complete diversity of citizenship exists because Telling Industries, Inc. ("Telling"), an Ohio limited liability company, was fraudulently joined as a defendant. (Doc. 1). On November 12, 2013, Plaintiff's filed a motion seeking to remand this case to the state court for lack of diversity jurisdiction. (Doc. 15).

II. ANALYSIS

A. Diversity Jurisdiction

A federal district court has original jurisdiction over controversies between citizens of different states. 28 U.S.C. § 1332(a). Where a civil action between diverse parties originally is brought in state court, it may be removed to federal district court pursuant to 28 U.S.C. § 1441(b). However, under section 1441(b), a civil action is not properly removed on the basis of diversity of citizenship where any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. 28 U.S.C. § 1441(b). In other words, to properly remove an action based on diversity jurisdiction, there must be complete diversity between the parties. *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389-91 (1998); *see also Chase Manhattan Mortg. Corp. v. Smith*, 507 F.3d 910, 916 (6th Cir. 2007); *Coyne ex rel. Ohio v. American Tobacco Co.*, 183 F.3d 488, 492 (6th Cir. 1999). The party seeking removal has the burden of establishing the existence of diversity jurisdiction. *Chase Manhattan Mortg. Corp.*, 507 F.3d at 916 (citing *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 549 (6th Cir. 2006)); *see also Coyne*, 183 F.3d at 493.

***2** The "fraudulent joinder of non-diverse defendants will not defeat removal on diversity grounds." *Coyne*, 183 F.3d at 493. "To prove fraudulent joinder, the removing party must present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law." *Id.* A court may pierce the pleadings to consider summary-judgment-type evidence such as depositions and affidavits to determine whether there are undisputed facts that negate the claim. *See Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 433-34 (6th Cir. 2013) (citing *Walker v. Philip Morris USA, Inc.*, 443 Fed.Appx. 946, 952-54 (6th Cir. 2011)). However, the proper standard for evaluating that evidence remains akin to that in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and in fact, is even more deferential to the plaintiff. *Casias*, 695 F.3d at 433; *see also Kent State Univ. Bd. of Trs. v. Lexington Ins. Co.*, 512 Fed.Appx. 485, 489-90 (6th Cir. Jan. 22, 2013); *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 674 (7th Cir. 2009); *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 574 (5th Cir. 2004); *Hartley v. CSX Transp.*, 187 F.3d 422, 424 (4th Cir. 1999). If "there is a colorable basis for predicting that a plaintiff may recover against non-diverse defendants, this Court must remand the action to state court." *Coyne*, 183 F.3d at 493. "The district court must resolve all disputed questions of fact and ambiguities in the controlling ... state law in favor of the non-removing party." *Id.* (internal quotations omitted). Likewise, "[a]ll doubts as to the propriety of removal are resolved in favor of remand." *Id.* As such, the burden on the removing party is a heavy one. *Lexington Ins. Co.*, 512 Fed.Appx. at 489-90; *see also Schur*, 577 F.3d at 764; *Smallwood*, 385 F.3d at 574; *Hartley*, 187 F.3d at 424.

Here, Marino\Ware and CEMCO claim that complete diversity exists because Telling, an Ohio limited liability corporation, was fraudulently joined as a defendant. Marino \Ware contends that "[t]here is no possibility that [Plaintiff] can state a claim under Ohio law against Telling, and Ohio law provides no possibility for recovery on any of the alleged causes of action plead or on the operative facts." (Doc. 1, ¶ 12). Specifically, Marino\Ware contends that the allegations against Telling relate exclusively to a publication disseminated by the CSSA and that the publication "accurately" states that alternative reactive "EQ coatings are not recognized under the IBC or relevant ASTM standards." (Doc. 1, ¶ 13) (citing Complaint ¶¶ 30-39). Marino\Ware argues that the Complaint pleads no facts suggesting that Telling participated in the creation or dissemination of the CSSA publication or that it maliciously worked in concert with any other Defendant concerning the publications. (*Id.*, ¶ 15) (citing Complaint, ¶ 30). Similarly, CEMCO contends that Plaintiff's allegations of conspiracy against Telling are insufficient because they fail to demonstrate how, when, and by what act Telling manifested a conspiratorial objective or common understanding or design. (Doc. 29).

Having reviewed the relevant pleadings, the Court does not find that Telling was fraudulently joined as a defendant in this action. With respect to Telling, Plaintiff specifically has averred:

- "Defendants [Marino\Ware], California Expanded Metal Products Company ('CEMCO') and Telling ... are competitors of ClarkDietrich." (Doc. 12, ¶ 4).

- "Marino\Ware, CEMCO and Telling have intentionally conspired to disparage ClarkDietrich's ProSTUD® products by publishing – either directly or through an association that they control, the Certified Steel Stud Association, Inc. (the 'CSSA') – false, misleading and deceptive statements of fact designed to confuse purchasers into believing that ClarkDietrich's ProSTUD® nonstructural framing products do not comply with the IBC." (Doc. 12, ¶ 5).

- "Through their conspiracy to disseminate false, misleading and deceptive statements disparaging ClarkDietrich and its products, Marino\Ware, CEMCO and Telling intend to unfairly and improperly harm ClarkDietrich's business and to divert sales and profits from ClarkDietrich to themselves by deliberately confusing the marketplace." (Doc. 12, ¶ 6).

***3** • Marino\Ware, CEMCO and Telling "manufacture and sell a ViperSTUD® line of nonstructural framing products that compete with ClarkDietrich's ProSTUD® products." (Doc. 12, ¶ 20).

- "On or about September 26, 2013, Marino\Ware, CEMCO and Telling, acting through their association, the CSSA, disseminated a publication electronically to thousands of industry participants nationwide stating that 'EQ Coatings Are Not Recognized By The Code," and that contractors who use products with an EQ coating will likely incur liability for doing so.... The assertion that EQ coatings are not recognized by the Code is literally false and misleading, as is the assertion that contractors may incur liability for using products with EQ coatings." (Doc. 12, ¶¶ 30-31) (referencing the publication attached as Exhibit A).

- "The defendants' personnel and their officers, agents, employees, licensees, affiliates, corroborators and distributors have continued to communicate to

> customers of ClarkDietrich and others in the industry the false and misleading statements contained in their September 26, 2013 publication, all in an effort to unfairly and improperly harm ClarkDietrich's business and to divert sales and profits from ClarkDietrich to themselves by deliberately confusing the marketplace." (Doc. 12, ¶ 40).

Further, ClarkDietrich attached to its motion for remand, an article by Edward Slish, the President of Telling and the treasurer and secretary of the CSSA, in which he promoted the CSSA and described its plans to eliminate confusion on how to define approved EQ coatings. (Doc. 15-2).

Under the Ohio Deceptive Trade Practices Act, a person engages in a deceptive trade practice by, among other things, "[c]aus[ing] a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services" or "disparag[ing] the goods, services, or business of another by false representation of fact[.]" Ohio Rev. Code § 4165.02(A)(3), (A)(10). A "person" includes "an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, limited liability company, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity." Ohio Rev. Code § 4165.01(D). Here, Plaintiff has alleged that Marino\Ware, CEMCO and Telling were the only members of the CSSA, and thus, collectively through the CSSA, had the joint or common interest of disparaging Plaintiff's competing goods, services, or business by a false representation of fact in the CSSA's September 26, 2013 publication and in subsequent communications with Plaintiff's customers. Although Marino \Ware contends in its notice of removal that the statements in the publication were accurate, that is a factual dispute that need not be resolved here. *See Walker*, 443 Fed.Appx. at 952-56.

As for Telling's liability as a member of the CSSA, a member of an association generally will not be held liable based solely on its membership in the association. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).[3] *See also In re Welding Fume Prods. Liability Litig.*, 526 F. Supp. 2d 775, 800 (N.D. Ohio 2007) ("Certainly, trade association membership, alone, cannot be the foundation for liability."). However, a member may be liable for its tortious actions taken while acting on behalf of its association, including personally engaging in, directing, or assisting others in engaging in the tortious conduct. *See Simmons v. Cook*, 701 F. Supp. 2d 965, 989-90 (S.D. Ohio 2010) ("Corporate officers may be held personally liable for Lanham Act violations" if "they personally take part in the infringing activity or direct others to do so.");[4] *Pike Cnty. Advertiser, LLC v. Gannett Satellite*, No. 2:07-cv-1290, 2008 U.S. Dist. LEXIS 102059, at *8 (S.D. Ohio Dec. 8, 2008) (rejecting corporate officer's "fraudulent joinder" argument in deceptive trade practices action, stating "[a]t a minimum, it is unclear what role [the officer] plays in the publication of the [newspaper] in his capacity as president of the entity that publishes that newspaper. If the evidence, after an opportunity for discovery, establishes that [officer] participated in the publication of the offending newspaper, Ohio law recognizes a cause of action against this corporate officer.").[5]

***4** Based on the information before the Court at this time, it is at least unclear as to whether Telling participated in, directed or assisted others in, or ratified the conduct of others in regards to the allegedly false publications and communications such that it should be liable for its conduct as a part of the association. Plaintiff not only has alleged that Telling was one of three founding members that controlled the CSSA, but also that Telling published statements supporting the aims of the CSSA and that its president also served as the Treasurer and Secretary of the CSSA. While Marino \Ware contends that the Court cannot infer that Slish's active participation in the CSSA at one time necessarily means that he was actively involved in the CSSA at the time of the September 26, 2013 publication and provides a declaration of Mr. Slish to contradict such an inference, the Court resolves any doubt in favor of Plaintiff. The declaration of Mr. Slish provided by Marino\Ware that indicates that "in the last year, Telling has never made any statements in any of its advertising or promotional materials about ClarkDietrich or its ProSTUD® products" and "[a]t no time has any officer, director, employee or other representative of Telling participated in the creation, publication, or dissemination of the opinion article released by the Certified Steel Stud Association, Inc. ("CSSA") on or about September 26, 2013," does not preclude Plaintiff from stating a colorable claim against Telling. Not only do those statements not necessarily foreclose the possibility that Telling controlled, authorized or ratified the publications by the CSSA or the actions of its members that are the subject of this lawsuit, but they also are somewhat in conflict with Plaintiff's factual averments as to Telling, as a founding member, controlling the CSSA and participating in furthering the goals of the CSSA. It is not the Court's responsibility at this stage of the litigation to weigh the conflicting factual support. *See Walker*, 443 Fed.Appx. at

952-56. Those factual disputes instead must be resolved in the state court. *See Coyne*, 183 F.3d at 493. Thus, as a whole, there is a reasonable basis for predicting that state law may impose liability on Telling for the ODCPA claim alleged by Plaintiff.

Plaintiff also has stated a colorable claim for unfair competition against Telling. Unfair competition extends to unfair commercial practices such as the circulation of false rumors, or publication of statements all designed to harm the business of another. *Water Mgmt., Inc. v. Stayanchi*, 15 Ohio St. 3d 83, 85 (1984). Unfair competition claims are analyzed using the same basic test as deceptive trade practice claims pursuant to Ohio Revised Code § 4165.02. *See Stilson & Assocs., Inc. v. Stilson Consulting Grp., LLC*, 129 Fed.Appx. 993, 994 (6th Cir. 2005); *Procter & Gamble Co. v. Georgia-Pacific Consumer Prods. LP*, No. 1:09-cv-318, 2009 U.S. Dist. LEXIS 72052, at *3 (S.D. Ohio Aug. 3, 2009) ("Analysis ... will also address Plaintiff's claims of unfair competition under Ohio's common law and Ohio Rev. Code § 4165.02(A)(2) and (3), the Ohio Deceptive Trade Practices Act statute, because courts apply the same basic test"). As with claims under the ODCPA, one who induces another to engage in unfair competition may be liable for the unfair competition. *See William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 530-31 (1924); *see also Simmons*, 701 F. Supp. 2d at 989-90; *Pike Cnty. Advertiser, LLC*, 2008 U.S. Dist. LEXIS 102059, at *8. For the same reasons set forth as to the ODCPA claim, the Court finds the allegations sufficient to state at least a colorable claim that Telling and/or the other defendants had sufficient involvement in the association to control or influence others to commit the alleged acts of unfair competition.

As for the civil conspiracy, Plaintiff also has alleged sufficient facts to state a colorable claim against Telling. A civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Avery v. City of Rossford*, 145 Ohio App. 3d 155, 165 (6th Dist. 2001). "An underlying unlawful act is required before a party can prevail on a civil conspiracy claim." *Id.* The conspiracy claim must be pled with some degree of specificity, and vague or conclusory allegations which are unsupported by material facts will not be sufficient to state a claim." *Id.* Vague or conclusory allegations of misconduct alone also may be insufficient to overcome a claim of fraudulent joinder. *Miner v. Hirschbach Motor Lines, Inc.*, No. 1:05CV0703, 2005 U.S. Dist. LEXIS 11249, at 3 (N.D. Ohio June 7, 2005) (citing *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 392-93 (5th Cir. 2000); *In re Baycol Prods. Litig.*, MDL No. 1431, 2004 U.S. Dist. LEXIS 28068 (D. Minn. May 17, 2004)). However, in *Miner*, the allegations in the Complaint were simply that the defendant engaged in " 'negligence, including, but not limited to, designing, operating and/or maintaining the toll roadway.' " *Miner*, 2005 U.S. Dist. LEXIS 11249, at *2. Nothing in the complaint alleged any specific negligence, and indeed, the district court determined that the conclusory allegation came close to violating Federal Rule of Civil Procedure 11(b)(3), which requires allegations and other factual contentions to have evidentiary support or to be likely to have evidentiary support after a reasonable opportunity for further discovery. *Id.*

***5** Plaintiff's averments are more developed than the single conclusory statement in *Miner*. Plaintiff specifically has averred how Telling was involved in alleged conspiracy (i.e., as one of three controlling members of the CSSA), the purpose of the conspiracy (i.e., to injure the business of Plaintiff, who is a competitor of Defendants, and to divert profits to those defendants instead), and at least one purported unlawful act of the conspiracy (i.e., through the CSSA, Telling, along with the other defendants, published the September 26, 2013 publication containing purportedly false statements about Plaintiff's products).

Although Marino\Ware contends that the allegations are insufficient to suggest a conspiracy because they show nothing more than mere participation in a trade association, the caselaw on which it relies does not demonstrate that the allegations are entirely insufficient at this early stage of the litigation. In two of the cases upon which Marino\Ware relies, the courts did not dismiss the claims until summary judgment, after they had received evidence as to whether the members acted independently of the trade association. *See Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544-45 (2d Cir. 1993). Similarly, another case reached its conclusion on an injunction after receiving testimony and additional evidence. *See Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 374 (7th Cir. 1990). The remaining two cases also are distinguishable. For one, neither involved one of three founding members of the trade association whose President was an officer of the trade association that published allegedly false statements about a competitor's product. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567, n. 12 (2007); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295-96 (11th Cir. 2010). Further, unlike here, the allegations were found to show parallel conduct of competitors suggestive of independent action rather than any actual agreement. *Twombly*, 550 U.S. at 592 n. 10, 567 n. 12; *Am Dental Ass'n*, 605 F.3d at 1295.

The averment of joint conduct by the three founding members through the CSSA and its publication colorably suggests at this stage of the litigation more than mere parallel conduct among trade association members. While other averments as to the defendants (presumably including Telling) continuing to communicate false information to its customers through the CSSA or individually are less specific, Plaintiff has satisfied at least the basic elements of a conspiracy claim. While it is possible that weakness in the claim will later be exposed, the allegations set forth by Plaintiff at this stage are, as a whole, sufficient to provide a colorable basis for a civil conspiracy claim against Telling.

Therefore, for the reasons stated above, the Court is unable to find with the requisite degree of certainty that Plaintiff has failed to state a colorable claim against Telling.

B. Nominal Party

A nominal party is one who " 'is not an indispensable party to the controversy.' " *State ex rel. Ackerman v. Hamilton Twp.*, No. 1:13-cv-80, 2013 U.S. Dist. LEXIS 94717, at *9 (S.D. Ohio July 8, 2013) (quoting *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182, 190, 44 S. Ct. 266, 68 L.Ed. 628 (1924)); *see also Maiden v. North American Stainless, L.P.*, 125 Fed.Appx. 1, 3 (6th Cir. 2004). " 'There is no prescribed formula for determining whether a party is indispensable.' " *State ex rel. Ackerman*, 2013 U.S. Dist. LEXIS 94717, at *9 (quoting *Soberay Mach. & Equip. Co. v. MRF Ltd.*, 181 F.3d 759, 765 (6th Cir. 1999)). A nominal party's citizenship may be disregarded in determining jurisdiction. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L.Ed. 2d 425 (1980). "However, all parties who have an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or without leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience, are considered indispensable." *State ex rel. Ackerman*, 2013 U.S. Dist. LEXIS 94717, at *9 (citing *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U.S. 77, 80, 41 S. Ct. 39, 65 L.Ed. 145 (1920)).

***6** Marino\Ware's argument that Telling is a nominal party fares no better than its fraudulent joinder claim. Indeed, it is based on arguments already considered above – that Telling, according to the declaration of Slish, has not created, published or disseminated the allegedly wrongful statements and cannot be held liable based on its mere membership in a trade association. Marino\Ware contends that due to its lack of involvement, Plaintiff's real claims are against Marino\Ware and CEMCO. However, for the same reasons set forth above, those arguments are rejected here and the Court declines to find that Telling is a nominal party to this litigation.

C. Attorneys' Fees and Costs

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Paul v. Kaiser Found. Health Plan*, 701 F.3d 514, 523 (6th Cir. 2012) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005)). "The objective reasonableness standard, however, does not require a showing that the defendant's position was 'frivolous' or 'without foundation.' " *Kent State Univ. Bd. of Trs. v. Lexington Ins. Co.*, 512 Fed.Appx. 485, 489 (6th Cir. Jan. 22, 2013) (citing *Martin*, 546 U.S. at 138-39). Rather, the "appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Martin*, 546 U.S. at 140.

Here, the Court finds that an award of attorneys' fees and costs is not appropriate. While Defendants did not ultimately succeed in avoiding remand and they should have been cognizant of the demanding standard for fraudulent joinder, their basis for removal was not, in this Court's view, objectively unreasonable. The factual insufficiency of a plaintiff's claim may be a basis for removal based upon fraudulent joinder. *See Walker v*, 443 Fed.Appx. at 952-56. Indeed, it may be reasonable to remove a case "where state law is unsettled, but the evidence in the record does not support liability of the nondiverse defendant." *Lexington Ins. Co.*, 512 Fed.Appx. at 492 n. 2; *see also Casias*, 695 F.3d at 434 (resolving ambiguities in state law and upholding removal based on defendant's "limited involvement" in the alleged tortious actions). The core argument in favor of removal was that the factual allegations were insufficient to show Telling was involved in any of the tortious acts alleged by Plaintiff. Having reviewed the allegations made by Plaintiff as to Telling, the Court agrees that they are not as well-developed as those against other Defendants. Given that there is no definitive line as to when allegations are sufficient to show control, ratification, or furtherance of a tortious act by a member of a trade association, it was not objectively unreasonable to believe that a court could find that those allegations against Telling failed to sufficiently connect Telling to a conspiracy or to any other unlawful conduct.

While the Court is mindful that the removal was filed in the midst of preparations for a preliminary injunction hearing in state court and does not condone such actions when taken to prolong the litigation or avoid an adverse ruling, it does not find in this case that the action warrants the imposition of costs and attorney's fees. Indeed, the parties have expedited briefing of this motion with an eye towards moving the case forward. As such, attorney's fees and costs will not be awarded in this instance.

III. CONCLUSION

***7** Consistent with the foregoing, the Motion to Remand (Doc. 15) is **GRANTED IN PART** and **DENIED IN PART**. This matter shall be **REMANDED** to the Butler County Court of Common Pleas; however, attorney's fees and costs shall not be awarded.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2013 WL 12121519

Footnotes

1 Defendant Telling Industries, LLC has filed a motion to dismiss (Doc. 26), and the parties have agreed to extend time to respond until after the decision on the motion to remand. In any event, the Court must first determine whether it has jurisdiction to hear the case before ruling upon the merits. *See Sinochem Intern. Co. Ltd. v. Mayalsia Intern. Shipping Corp.*, 549 U.S. 422, 430-31 ("[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits."); *see also Banks v. Unknown Named Fed. Judges*, No. 13cv1763, 2013 U.S. Dist. LEXIS 142881, at *5 (N.D. Ohio Oct. 2, 2013) ("[B]efore reaching the merits of a case, federal courts are obliged to ensure they enjoy subject matter jurisdiction.")

2 Plaintiff does not bring the breach of contract claim against Telling.

3 The Supreme Court recognized that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed [unlawful acts]. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920. Nevertheless, "the question whether an individual may be held liable for damages merely by reason of his association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited." *Id.* at 920 n. 56.

4 The Lanham Act is the ODCPA's federal counterpart. *Mulch Mfg. Inc. v. Advanced Polymer Solutions, LLC*, No. 2:11-cv-00325, 2013 U.S. Dist. LEXIS 73437, 55-56 (S.D. Ohio May 23, 2013) (citing *Corrova v. Tatman*, 164 Ohio App.3d 784, 788, 2005 Ohio 6877, 844 N.E.2d 366 (Ohio Ct. App. 2005); *Clark v. Walt Disney Co.*, 642 F. Supp.2d 775, 785 (S.D. Ohio 2009)). Thus, caselaw on the Lanham Act is instructive in cases involving the ODCPA. *Id.*

5 *See also Roberts v. RMB Enters.*, 197 Ohio App. 3d 435, 449 (12th Dist. 2011) ("[A] corporate officer can be held personally liable for tortious acts he or she has committed and, under such circumstances, a plaintiff need not pierce the corporate veil to hold individuals liable who have personally committed such acts. A corporate officer, however, may not be held liable merely by virtue of his status as a corporate officer. Rather, [t]he true basis of liability is the officer's violation of some duty owed to the third person which injured such third person.

In other words, the evidence presented must indicate that the corporate officer specifically directed the particular act to be done, or participated, or co-operated therein.") (internal citations and quotations omitted).

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