

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY
Civil Division

_____)	
U.S. NEWS & WORLD REPORT, INC.,)	
)	
Plaintiff,)	
)	
v.)	At Law No. 95-1318
)	
RAM AVRAHAMI,)	
)	
Defendant.)	
_____)	

AMENDED MOTION FOR JUDGMENT FOR DECLARATORY RELIEF

COMES NOW the plaintiff, U.S. News & World Report, Inc. ("U.S. News"), by counsel, and for its Amended Motion for Judgment for Declaratory Relief states as follows:

PARTIES

1. Plaintiff U.S. News is a corporation organized under the laws of the State of Delaware with its principal place of business located at 2400 N Street, N.W., Washington, D.C. 20037.

2. Defendant Ram Avrahami ("Avrahami") is a resident of the commonwealth of Virginia and resides at Apartment 110, 1001 N. Randolph Street, Arlington, Virginia 22201.

JURISDICTION

3. This Court has jurisdiction to hear this matter and grant the requested relief pursuant to Virginia Code # 8.01-184.

4. There is a justiciable controversy as to whether the sale, rental, or exchange by U.S. News of a mailing list containing the name Ram Avrahami violates Virginia Code # 8.01-40.

5. That an actual controversy exists is further demonstrated by the filing of a suit by the defendant, entitled Ram Avrahami v. U.S. News & World Report, Inc., Civil Action No. 95-7479, in the General District Court of Arlington County. On February 6, 1996, the Honorable Judge Henenberg dismissed that case on the grounds that the General District Court did not have jurisdiction over the matter. A copy of Avrahami's Motion for Judgment filed in the General District Court is attached to US News' Motion for Declaratory Judgment, as Exhibit A. After the General District Court action was dismissed, Avrahami filed a Bill of Complaint in this Court entitled Ram Avrahami v. U.S. News & World Report, Inc., In Chancery No. 96-203.

BACKGROUND

6. The sale, rental or exchange of mailing lists is a common, standard business practice in the Commonwealth of Virginia and throughout the United States. There are no federal or state laws or regulations which directly prohibit or regulate the sale, rental or exchange of mailing lists.

7. Direct mail, which includes catalogue merchandising, magazine subscription solicitations, and other forms of direct mail solicitations, accounts for approximately \$333.1 billion in sales in the United States in 1994 alone. 18.2 million workers are employed throughout the U.S. economy as a result of direct marketing activities.

8. The United States Government Printing Office routinely engages in the sale or rental of its mailing lists of over 75 publications of the federal government, including the Federal Register, the Code of Federal Regulations, the EPA Journal, and the Federal Aviation Administration's Aviation News. Individuals and businesses may purchase names and addresses from these subscriber lists from the federal government at the rate of approximately \$85.00 per 1,000 names.

9. Various departments and agencies of the Commonwealth of Virginia government, including the State Board of Bar Examiners, make their mailing lists available to businesses and individuals for sale or rental.

10. There is a procedure whereby consumers can elect not to

receive direct mail solicitations. The Mail Preference Service ("MPS"), established by the Direct Marketing Association ("DMA"), is a free service which enables customers to "opt out" of the direct mail marketing process by writing to the MPS. Direct mailers are able to compare their lists against the names on the MPS list and avoid mailing to consumers who have "opted out." The DMA updates the MPS list quarterly, and regularly publicizes its availability through press releases, advertisements and DMA's action reports which are published six times a year and distributed to consumer advocates and reporters.

11. As of 1989, there were approximately 988,000 individuals on the DMA's MPS list. By 1995, there were approximately 3.2 million individuals on the DMA's MPS list. Mr. Avrahami failed to register his name with an Arlington address with the DMA MPS service.

12. The defendant Avrahami was and is aware of the DMA MPS service.

FACTS

13. In or about December of 1994, U.S. News, through its agent, received a mailing list from Consumers Union, the publisher of Consumer Reports, pursuant to a list exchange arrangement between U.S. News and Consumers Union. Mr. Avrahami's name and address were among the 92,500 names and addresses on the list provided by Consumers Union and received by U.S. News' agent. U.S. News did not receive any other information concerning Mr. Avrahami, other than his name and address.

14. Before exchanging its lists with other organizations, Consumers Union compares its list with the DMA MPS list in order to avoid disclosing names of subscribers who have elected to "opt out" of list exchanges or rentals. Consumers Union also includes a section in each issue of Consumer Reports that describes its policies relating to mailing lists and invites subscribers to call or write to the magazine to have their names deleted from mailing lists that are exchanged. Mr. Avrahami failed to contact Consumer Union to request that his name be deleted from mailing lists that are exchanged, and failed to register his name with an Arlington address with the DMA MPS list. Thus, his name was not purged.

15. U.S. News received the Consumers Union mailing list in

connection with a direct mail campaign developed by U.S. News at or around the beginning of 1995 to solicit subscriptions to the magazine U.S. News & World Report (the "Campaign"). In developing a mailing list for the Campaign, U.S. News obtained mailing lists from a number of sources in addition to the Consumers Union mailing list. In fact, approximately fifty-five different mailing lists were used in developing the mailing list for the Campaign. Consistent with customary practices, U.S. News' agent, Commerce Register, conducted a process commonly referred to as "merge-purge" as part of developing the mailing list for the Campaign.

16. The "merge-purge" process compared the mailing lists obtained by U.S. News through sale, rental or exchange, including the Consumers Union list, against each other to avoid duplicate mailings. Also, as part of the "merge-purge" process, the list was compared against the DMA MPS list and U.S. News' own list of individuals who do not wish to receive promotions in order to ensure that consumers who had "opted out" of direct mail marketing did not receive any mail. As a result of the "merge-purge" process, U.S. News eliminated more than 8,800, or approximately ten percent, of the 92,500 names obtained from Consumers Union. Mr Avrahami's name was not eliminated in the "merge-purge" process since he did not request his name with an Arlington address be included on any of the "opt out" lists.

17. On or about February 15, 1995, Mr. Avrahami received a direct mail promotion from U.S. News which included an offer to subscribe to the magazine U.S. News & World Report as part of the Campaign.

18. On or about March 10, 1995, Mr. Avrahami accepted U.S. News' offer to subscribe, but, incredibly, before sending the subscription order form included with the solicitation back to U.S. News, he affirmatively changed the name on the U.S. News order form in two places from the correct spelling of his name to "Ram Avrahami."

19. On or about March 21, 1995, after accepting U.S. News' offer pursuant to the Campaign, Ram Avrahami was billed by U.S. News for the magazine subscription. Payment was made on behalf of Ram Avrahami in the form of a \$15.00 check payable to U.S. News, and Avrahami became a subscriber to the magazine. As a result, Ram Avrahami of Arlington, Virginia was added to U.S. News' list of subscribers.

20. The defendant Avrahami has never complained about receiving the U.S. News direct mail promotion nor has he questioned how U.S. News received his name. Further, defendant Avrahami has never requested that U.S. News remove his name or that of Ram Avrahami from any mailing list or refrain from renting or exchanging such names with other organizations.

21. On or about March 24, 1995, the Smithsonian ordered a mailing list of 100,000 names and addresses from U.S. News pursuant to a list exchange agreement between U.S. News and the Smithsonian dated March 5, 1995.

22. On or about April 12, 1995, U.S. News caused a mailing list of 100,000 names and addresses to be shipped to the Smithsonian Magazine or its agent by way of a magnetic computer strip. This magnetic computer strip contained the name "Ram Avrahami" with an Arlington, Virginia address; it did not contain the name, Ram Avrahami. U.S. News has never rented, exchanged, or sold the defendant's name to the Smithsonian or any other entity. With respect to the name "Avrahami," there was no other information concerning Avrahami on the magnetic computer strip provided to the Smithsonian, other than his name and address.

23. On or about May 22, 1995, the Smithsonian sent promotional literature to Ram Avrahami of Arlington, Virginia. Based on information and belief, prior to mailing such literature, as both Consumers Union and U.S. News had done, the Smithsonian compared or caused to be compared the list received from U.S. News against the DMA MPS list to eliminate consumers who had elected to "opt out" of such direct mail campaigns. The name "Ram Avrahami" with an Arlington, Virginia address does not appear on the MPS list.

24. Based on information and belief, the Smithsonian Magazine obtained multiple lists in order to engage in the direct mail promotion of which defendant complains. There is a factual issue as to whether the name "Avrahami" was added to the Smithsonian list as a result of being on the U.S. News list or one of the other lists used for the Smithsonian mailing.

25. Mr. Avrahami has not alleged that U.S. News improperly obtained his name and address. Mr. Avrahami subscribed to U.S. News & World Report under a false name pursuant to a direct mail

solicitation similar to the one of which he now complains. Since the filing of his lawsuit, Mr. Avrahami renewed his subscription to U.S. News & World Report. At no time prior to the institution of this lawsuit did Mr. Avrahami request or demand that U.S. News refrain from disclosing his name and address or that of Ram Avrahani to third parties. Furthermore, U.S. News could have contacted the defendant simply by locating his name in the telephone book.

26. When Mr. Avrahami receives a direct mail solicitation he likes, he subscribes. When he receives one he doesn't like, rather than deposit it in the trash can, he files suit.

RELIEF

27. U.S. News did not rent, sell, or exchange any list containing the defendant Avrahami's name and, therefore, could not have violated Virginia Code # 8.01-40 or committed common-law conversion.

28. Moreover, Virginia Code # 8.01-40 was not intended to prevent the sale, rental or exchange of mailing lists. The Virginia privacy statute was intended to provide a cause of action to individuals whose names and likeness are commercially used in promoting the sale of products or services without their consent.

29. The mere sale, rental or exchange of mailing lists does not violate or state a claim under Virginia Code # 8.01-40.

30. The sale, rental or exchange of mailing lists for use in mail solicitations does not give rise to a claim based on invasion of privacy.

31. The sale, rental, or exchange of mailing lists does not give rise to a claim based on common-law conversion.

WHEREFORE, Plaintiff U.S. News & World Report, Inc. asks that this Court issue an Order granting its request for declaratory relief specifying that (1) the selling, renting and exchanging of mailing lists containing the name Ram Avrahani does not violate Virginia Code 8.01-40; (2) that the inclusion of the name Ram Avrahani in a mailing list for direct mail solicitation is not an appropriation of one's name or likeness that gives rise to a claim under Virginia Code 8.01-40 or the common law; and (3) that the

sale, rental, or exchange of mailing lists does not violate or state a claim under Virginia Code #8.01-40 or common-law conversion.

DATED: April 1,1996

Respectfully submitted,
U.S. NEWS & WORLD REPORT, INC.
By Counsel

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/S/
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U.S. NEWS' MOTION FOR LEAVE TO FILE AN
AMENDED MOTION FOR JUDGMENT FOR DECLARATORY RELIEF

Plaintiff U.S. News & World Report, Inc. ("U.S. News"), hereby moves this Court, pursuant to Rule 1:8 of the Rules of the Supreme Court of Virginia, for leave to file an Amended Motion for Judgment for Declaratory Relief, which is attached hereto at Tab 1. The grounds for this motion are set forth in the attached Memorandum in support.

DATED: April 1, 1996

Respectfully submitted,
U.S. NEWS & WORLD REPORT, INC.
By Counsel

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MEMORANDUM IN SUPPORT OF U.S. NEWS' MOTION FOR LEAVE TO FILE AN AMENDED MOTION FOR JUDGMENT FOR DECLARATORY RELIEF

Plaintiff, U.S. News & World Report, Inc. ("U.S. News") submits this memorandum in support of its motion, pursuant to Rule 1:8 of the Rules of the Supreme Court of Virginia, for leave to file an amended Motion for Judgment for Declaratory Relief.

BACKGROUND

From the time he filed suit against U.S. News in General District Court, defendant Ram Avrahami ("Avrahami") has presented himself as a victim of direct mail marketing, because, he claims, he did everything he could do to stop unsolicited direct mail from being sent to him -- to no avail. Avrahami waged a media campaign claiming that despite his Herculean efforts, mail just kept coming, wasting his time: He had to take it out of his mailbox and put it in the trash can. As has been well-documented by the media, Avrahami claims that he requested that his name be removed from mailing lists and was ignored. U.S. News has recently discovered, however, that Avrahami's claims are false. Instead of being a victim, Avrahami is nothing more than a trickster, who carefully engineered a lawsuit.

At the core of defendant Avrahami's dispute with U.S. News is a war against direct mail marketing. For legal purposes, Avrahami grounds his claim as a violation of his property rights. Specifically, he claims that by "renting" a mailing list allegedly containing his name to the Smithsonian, U.S. News violated Virginia's privacy statute, # 8.01-40, which prohibits commercial exploitation of a person's name and likeness in advertising or for purposes of trade, and committed common-law conversion. However, U.S. News has discovered that Avrahami engineered this law suit by affirmatively changing his name to an incorrect spelling on the U.S. News' subscription order form. After this false name was exchanged, Avrahami cried foul, and filed suit against U.S. News in the General District Court of Arlington County, Virginia. Thereafter, he immediately began trying his "case" against U.S. News in the media.<1/>

By its Motion for Declaratory Judgment, U.S. News seeks a declaration that the sale, rental, or exchange of mailing lists does not violate Virginia Code # 8.01-40. This privacy statute prohibits the commercial exploitation of an individual's name or likeness by using it in advertisements or for the purposes of trade without written consent.

After receiving defendant Avrahami's name from the publisher of Consumer Reports, U.S. News sent Avrahami a direct mail promotion, requesting that he subscribe to U.S. News' magazine. U.S. News has now learned that instead of subscribing with his correct name, Ram Avrahami, the defendant purposely changed the name on the direct mail solicitation in two different places to read Ram Avrahani. Thus, Avrahani became a subscriber to U.S. News' magazine. Thereafter, the name Ram Avrahani was exchanged with the Smithsonian, not the defendant's name, Ram Avrahami. The alleged rental, sale, or exchange of his name is the act of which defendant Avrahami complains, and is the factual support for his claim that his property rights were violated.

By Amending the Facts to Reflect Avrahami's
Trickery, the Substantive Cause of Action
Does not Change and Avrahami Is Not Prejudiced

Rule 1:8 of the rules of the Supreme Court of Virginia provides that "[l]eave to amend shall be liberally granted in furtherance of the ends of justice." It is within the sound discretion of the trial court to grant leave to amend. *Roberts v. Roberts*, 223 Va. 736, 742, 292 S.E.2nd 370, 373 (1982). The general rule is that amendments will be permitted where they seek determination of the same subject matter of the controversy originally pleaded, *Vines v. Vines*, 244 Va. 185, 418 S.E.2nd 890, 893 (1992), and where no prejudice will occur by allowing the amendment. *Kole v. City of Chesapeake*, 247 Va. 51, 439 S.E.2nd 405, 409 (1994) (finding trial court abused its discretion in failing to allow filing of amended bill where no prejudice shown); *Dillow v. Stafford*, 181 Va. 483, 25 S.E.2nd 330, 332 (1943).

In this case, U.S. News seeks to amend its Motion for Declaratory Judgment to reflect the newly-discovered facts that the defendant submitted a false name to U.S. News, Ram Avrahani, when he became a subscriber to the magazine. Thus, contrary to Avrahami's allegations, his name, Ram Avrahami, was never added to U.S. News' list of subscribers and was not exchanged with the Smithsonian. By amending U.S. News' Motion for Declaratory Judgment to reflect these new facts, the substantive cause of action remains the same. U.S. News' Amended Motion for Judgment for Declaratory relief seeks the same relief as the original pleading: A declaration that the sale, rental, or exchange of mailing lists does not violate Virginia Code # 8.01-40.

Further, Avrahami will not be prejudiced by allowing U.S. News to amend its pleading. This case is still in the early stages of litigation -- Avrahami is just now filing his Grounds of Defense, and no discovery, other than Mr. Avrahami's deposition, has occurred. Compare Griffin v. Raines, 212 Va. 627, 186 S.E.2nd 10 (1972) (no abuse of discretion in overruling motion to amend where evidence had already been taken at trial and each side had rested). Thus, no duplication of effort or timing issues exist in this case.

Moreover, it is Avrahami's own trickery with the facts that had necessitated this amendment. Avrahami represented in his Motion for Judgment filed in the General District Court that U.S. News "rented" Avrahami's name to the Smithsonian. Avrahami, however, failed to disclose that he knew that he had subscribed to U.S. News' magazine under a false name, Ram Avrahani, and that it was this false name that the Smithsonian received. His entire action against U.S. News was premised on this trickery. Thus, Avrahami cannot claim any prejudice in allowing U.S. News to amend its Motion for Declaratory Judgment to reflect these facts, of which he is, and has been, aware.

CONCLUSION

For the foregoing reasons, plaintiff U.S. News & world Report, Inc. respectfully requests that this court grant U.S. News leave to file the attached Amended Motion for Judgment for Declaratory Relief.

DATED: April 1, 1996

Respectfully submitted,
U.S. NEWS & WORLD REPORT, INC.
By Counsel

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/S/

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<1/> For example, in the General District Court action, Avrahami

attempted to file a Motion for Summary Judgment in derogation of the Rules. U.S. News first learned of "Plaintiff's Motion for Summary Judgment" in a phone call from a New York Times reporter who had already received a faxed version. Once she reported back to Avrahami's counsel that U.S. News had not received a copy of the motion, Avrahami's counsel was kind enough to forward a copy to counsel. Avrahami's priorities are obvious. The motion was filed, apparently knowing there is no such provision in the rules, for the purposes of generating additional press attention for Avrahami and his cause. Even though U.S. News has obvious access to the media, it has chosen not to engage in a battle of press releases, preferring instead to try this matter in the courtroom.