IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Yoshiki Okada and Electric Online, Inc. Plaintiff, v. [Yang Sheng, and John Does>>>>>] Defendant	)	Case No. 1:18-cv-01338-LO-TCB **Motion to Intervene**

In Re: Zhang.com, Fde.com, Wok.com, Tang.com, Jol.com, Nnn.com, Eol.com, Wtv.com, and Olp.com

Intervenor Mark Thompson's Motion to Intervene

Mark Thompson ("Mr. Thompson") respectfully moves pursuant to Federal Rule of Civil Procedure 24 to intervene as a plaintiff in this action. This case involves a dispute over ownership of several domain names. (Dkt. No. 1.) Plaintiff Yoshiki Okada, along with or through his company Plaintiff Electric Online, Inc. (collectively "Mr. Okada"), are the rightful owners of the domain names at issue in this case. Intervenor Mr. Thompson was negotiating with Mr. Okada for the purchase of the domain name www.nnn.com prior to this lawsuit. During these negotiations, Mr. Thompson learned that a number of his domain registrations had been hacked and stolen, among them the domain name www.nnn.com. Intervenor Mr. Thompson offered to finance litigation to recover the domain names in exchange for the ability to purchase the www.nnn.com domain name for a specified price once ownership had been restored to Plaintiffs. Mr. Okada agreed, this action was filed, and Intervenor Mr. Thompson

began financing the litigation.

Mr. Okada had been litigating this matter through May 2019 when, inexplicably, Mr. Okada's counsel withdrew and Mr. Okada ceased participating in this litigation, prompting an OSC re dismissal with prejudice, which Mr. Thompson only learned of the day before the hearing, June 20, 2019. Because Intervenor Mr. Thompson has a contractual right to purchase the www.nnn.com domain name in exchange for financing this litigation, Mr. Thompson has a vested interest in this action that would be harmed if he were not afforded the opportunity to intervene into this case. Indeed, if the case is dismissed with prejudice, it would compromise Mr. Thompson's ability to protect his rights and interests in connection with the disputed domain name www.nnn.com and recoup his investment into this action to obtain the www.nnn.com domain name. Therefore, Mr. Thompson respectfully moves to intervene.

Memorandum of Law in Support of Mark Thompson's Motion to Substitute or Intervene

Mr. Thompson respectfully submits this Memorandum of Law in support of his Motion to Substitute or Intervene in this action. Mr. Thompson moves to intervene as of right pursuant to Federal Rule of Civil Procedure 24 to avoid potential prejudice to his rights and interests.

Background

Mr. Thompson has bought a number of domain names and was interested in purchasing the domain name www.nnn.com. (Declaration of Mark Thompson in Support of Motion to Intervene ("Thompson Decl."), ¶ 2.) Based on research he conducted, he determined the owner of the www.nnn.com domain name is an individual named Yoshiki Okada. (Thompson Decl., ¶ 3.) He contacted Mr. Okada in April 2017 to inquire about purchasing the www.nnn.com domain name, at which time Mr. Okada said www.nnn.com was not available for purchase.

(Thompson Decl., ¶ 3.) Weeks later Mr. Thompson noticed that www.nnn.com was advertised for sale on the domain page itself, so he inquired in May 2017 about the domain name through the provided contact email on the ad. (Thompson Decl., ¶ 4.) He negotiated and arrived at an agreed upon price with the Seller, who appeared to be in China. (Thompson Decl., ¶ 4.) However, the Seller's requirements of money transfer were not customary as they wanted to use alternative escrow procedures, so Mr. Thompson did not complete the sale. (Thompson Decl., ¶ 4.) Suspicious, Mr. Thompson hired a domain investigator who confirmed the domain name appeared to be stolen. (Thompson Decl., ¶ 5.) Mr. Thompson ceased communications with the Chinese sellers. (Thompson Decl., ¶ 6.)

Mr. Thompson then contacted Mr. Okada and his attorney about the domain name, both of whom confirmed the www.nnn.com domain name, along with a number of other domain names, had been stolen from Mr. Okada. (Thompson Decl., ¶ 7.)

Mr. Thompson offered to finance this litigation with the understanding that once ownership of the domain was returned to Mr. Okada (their rightful owner), he would be able to purchase the www.nnn.com for a price the parties had established. (Thompson Decl., ¶ 8 and Ex. A.) Thus, both Mr. Okada and Mr. Thompson had reached an agreement under which Mr. Thompson would purchase the www.nnn.com domain name for an agreed-upon price once the domain name www.nnn.com had been transferred back to Mr. Okada. (Thompson Decl., ¶ 8 and Ex. A.)

Mr. Okada agreed to these terms and both Mr. Okada and Mr. Thompson hired counsel together at Esqwire to represent their interests in the dispute. (Thompson Decl., ¶ 9 and Ex. B.) Mr. Okada, through counsel, filed a complaint in this court on October 25, 2018 alleging that

ownership of certain domain names was improperly transferred to one or more unknown third parties without his consent, in violation of the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. (Dkt. No. 1, ¶¶ 1–2.)

Since no party appeared to answer the complaint, the clerk entered default on November 27, 2018. (Dkt. No. 9.) On November 29, 2018, Mr. Okada filed a motion for default judgment and memorandum of law in support thereof. (Dkt. Nos. 10, 11.) The Court held a hearing on the motion for default judgment on December 7, 2018 and requested additional briefing from Mr. Okada. (Dkt. No. 13.) Mr. Okada submitted additional briefings on December 20, 2018 (Dkt. No. 15), March 26, 2019 (Dkt. No. 17), and April 5, 2019 (Dkt. No. 18).

Then, counsel for the domain name www.olp.com entered an appearance and filed a motion to set aside the entry of default as to olp.com. (Dkt. Nos. 23, 24.) The Court granted that motion on May 3, 2019. (Dkt. No. 33.) Soon thereafter, on May 20, 2019, Mr. Okada's counsel filed a motion to withdraw as attorney. (Dkt. No. 38.) That motion was granted. (Dkt. No. 47.) A hearing on www.olp.com's motion to dismiss for failure to state a claim is currently scheduled for June 28, 2019. (Dkt. No. 45.) To Mr. Thompson's knowledge, Mr. Okada has not retained new counsel. (Thompson Decl., ¶ 11.)

Mr. Okada was not present at the Court-scheduled pretrial conference held on June 7, 2019. (Dkt. No. 48.) As such, the Court issued an order to show cause, which requires Mr. Okada to appear on June 21, 2019 to show cause why this case should not be dismissed with prejudice ("OSC Hearing"). (Dkt. No. 50.) Mr. Thompson did not learn about the Court's

order to show cause until the afternoon of June 20, 2019—the day before the hearing—and he does not expect Mr. Okada to appear for the OSC Hearing. Mr. Thompson is currently exploring with Mr. Okada a possible assignment of all the domain names at issue in this case so that he may substitute in. (Thompson Decl., ¶ 11.) Until that occurs, if it does at all, Mr. Thompson has an interest in the www.nnn.com domain name—*i.e.*, the ability to consummate an agreed-upon purchase of the domain name that will ripen once the domain name is rightfully restored to owner—that would be harmed if Mr. Thompson were not able to intervene.

Argument

I. Mr. Thompson may intervene as of right in this case.

Mr. Thompson may intervene as of right in this case. Federal Rule of Civil Procedure 24(a)(2) provides that, on timely motion, the court "must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."[1] The Fourth Circuit has held "that liberal intervention is desirable to dispose of as much of a controversy 'involving as many concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Upon timely motion, the movant is entitled to intervention as of right if it demonstrates: "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's

[1] Rule 24(c) requires service of the motion in accordance with Rule 5, which states that service is not required "on a party who is in default for failing to appear." Fed. R. Civ. P. 5(a)(2). Therefore, Mr. Thompson is only required to serve olp.com. The only exception to this rule is for a pleading that asserts a new claim for relief, which is not the case here. Rule 24(c) also requires a copy of the pleading setting out the claims or defenses for which intervention is sought. Mr. Thompson's pleading under Rule 24(c) accompanies this motion. (Declaration of

interest is not adequately represented by existing parties to the litigation." *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991); *see also Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). The Court is "entitled to the full range of reasonable discretion in determining whether these requirements are met." *Nisch and Goodwill Services, Inc. v. Cohen*, 191 F.R.D. 94, 96 (E.D. Va. 2000).

A. Mr. Thompson's motion is timely.

The "timeliness of a motion to intervene must be determined 'in light of all the circumstances,' not just the passage of time. *Midgett, Trustee of Hardcastle Charitable Remainder Annuity Trust U/A August 6, 2007 v. Hardcastle*, Case No. 2:17cv663, 2018 WL 4365580, at *3 (E.D. Va. July 19, 2018) (quoting *Spring Constr. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). The Fourth Circuit considers three factors: "first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014). Under these factors, Mr. Thompson's motion is timely.

First, this suit is still in its early stages. No defendant has answered the complaint, and Plaintiffs have obtained default against all the defendants. Only one defendant, the alleged owner of the domain name www.opl.com, has sought to set aside the default. *See Midgett*, 2018 WL 4365580, at *5 (finding motion timely where "the underlying suit [had] not progressed past the discovery stage"). Second, the other parties are not prejudiced by any delay resulting from Mr. Thompson intervening in this matter: the suit is, for all purposes, still in its early stages and intervention will not cause prejudicial delay. *See id*. Third, Mr. Thompson was justified in the timing of this filing. He had agreed with Mr. Okada that Mr. Okada would prosecute this

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William Atkins ("Atkins Decl."), ¶ 2, Ex. A.)

case while Mr. Thompson financed it. (Thompson Decl., ¶ 7, Ex. A.) Mr. Thompson is only moving to intervene now because he learned on June 20, 2019—the day before the hearing on this Court's order to show cause—that Mr. Okada no longer intended to prosecute his claims further and that the claims were at risk of being dismissed with prejudice, jeopardizing Mr. Thompson's rights to purchase the www.nnn.com for an already-agreed-upon price once the domain has been restored to Plaintiffs. (Thompson Decl., ¶ 7.)

B. Mr. Thompson has a sufficient interest to merit intervention as of right.

Mr. Thompson has a sufficient interest to merit intervention as of right. The "claim must bear a close relationship to the dispute between the existing litigants." *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993). A sufficient interest is a "significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 542 (1971). A "significantly protectable interest" is one "where the intervenor stands 'to gain or lose by the direct legal operation of the district court's judgment' on the plaintiff's complaint." *Cooper Technologies, Co. v. Dudas*, 247 F.R.D. 510, 515 (E.D. Va. 2007) (quoting *Teague*, 931 F.2d at 261.) Here, Mr. Thompson's interest in one of the disputed domain names, www.nnn.com, in exchange for financing the costs of this litigation is sufficient. (*See* Thompson Decl., ¶ 7.) In addition, Mr. Thompson is currently exploring a broader deal under which he would be assigned all rights to the domain names at issue (*see* Thompson Decl., ¶ 11), at which point he would substitute in as Plaintiff. Though that deal is still being negotiated, it constitutes an independently sufficient interest.

C. Without intervention, Mr. Thompson's interest will be impaired.

Without intervention, Mr. Thompson's interest will be impaired. A putative

intervenor's interest "is plainly impaired if disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue its interest." *Cooper Techs., Co.*, 247 F.R.D. at 515. The Court is permitted to consider "practical impairments" beyond res judicata or collateral estoppel. *Midgett*, 2018 WL 4365580, at *4 (citing *Spring Constr. Co.*, 614 F.2d at 377). Absent intervention by Mr. Thompson, the Court has indicated it will enter a dismissal of the action with prejudice against Mr. Okada, who is unrepresented and has failed to appear for the pretrial conference set by the Court. (Dkt. No. 48.) If the case is dismissed with prejudice, then Mr. Okada will lose his right to establish his ownership over the disputed domain names. And if Mr. Okada cannot establish ownership over the disputed domain names, then Mr. Thompson, despite significant investment into this case, cannot complete the purchase of the www.nnn.com domain name that he negotiated with Mr. Okada he would be able to close once the domain name was returned to Mr. Okada through this action.

D. Mr. Okada does not adequately represent Mr. Thompson's interest.

Mr. Okada does not adequately represent Mr. Thompson's interest. "The requirement of [] Rule [24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). Where, as here, a party seeking intervention is pursuing the same "ultimate objective" as an existing party to the suit, "a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Commonwealth of Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). Here, Mr. Thompson is able to overcome the presumption due to Mr. Okada's nonfeasance. Mr. Okada's counsel withdrew in

May 2019 and since then Mr. Okada failed to appear at the pretrial conference and prosecute this case further. Moreover, Mr. Thompson believes that Mr. Okada has not hired counsel and does not intend to appear at the OSC Hearing. This satisfies the "minimal" showing required to establish that Mr. Okada does not adequately represent Mr. Thompson's interest.

Accordingly, Intervenor Mr. Thompson respectfully requests that this Court grant this motion for leave to intervene in this action.

Dated: June 21, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed on June 21, 2019, with the Clerk of the Court for the Eastern District of Virginia via the CM/ECF system. This system will send notice of filing to:

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