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

CODE-TO-LEARN FOUNDATION D/B/A SCRATCH FOUNDATION, Plaintiff, v. SCRATCH.ORG, an Internet domain name, Defendant.	Civil Action No. 1:19-cv-67-LO-MSN

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

Plaintiff Code-To-Learn Foundation d/b/a Scratch Foundation ("Plaintiff" or "Scratch Foundation") hereby moves to compel responses to its discovery propounded upon Defendant Scratch.org ("Defendant"), which were due July 3, 2019.

The parties entered into a settlement resolving the above-captioned matter on June 25, 2019. However, on September 4, 2019, just over a month before discovery was set to close, Defendant relayed an intention to breach that agreement—despite the fact that Plaintiff had already partially performed its obligations. Plaintiff believes that the settlement agreement is binding and enforceable, and will likely be seeking Court intervention to enforce the agreement. However, because Defendant chose to breach this agreement shortly before the close of discovery, Plaintiff must, out of an abundance of caution, pursue the discovery that it served before the settlement was reached. Plaintiff therefore respectfully requests that the Court, pursuant to Local Rule 37(C), compel Defendant to provide complete responses to Plaintiff's first sets of requests for production and interrogatories and produce the documents sought by Plaintiff's requests within eleven (11) days of entry.

I. FACTUAL BACKGROUND

Following a protracted jurisdictional dispute stemming from Defendant's strategic disclosure of its registrant in the hopes of disrupting *in rem* jurisdiction, the Court issued a Scheduling Order opening discovery on May 30, 2019, and setting its close for October 11, 2019. Dkt. No. 35.

Plaintiff promptly served its first sets of interrogatories and requests for production on June 3, 2019, by hand delivery. *See* Ex. A (Plaintiff's First Set of Interrogatories); Ex. B (Plaintiff's First Set of Requests for Documents and Things). Plaintiff's requests included an interrogatory and request for production seeking information regarding the revenue that Defendant's registrant had collected through his practice of registering domain names, including cybersquatted or otherwise misleading domains. *See* Ex. A at Interrogatory No. 10; Ex. B at Request No. 26. These discovery requests relate to Defendant's pattern of bad faith registration of domain names with the intent to profit off others' marks—a statutory indicium of bad faith.

On June 18, 2019, Defendant served objections to the discovery. Among other objections, Defendant refused to produce information reflecting how the registrant used the domain names in his significant portfolio and the revenues collected therefrom. *See* Ex. C (Defendant's Objections to Plaintiff's First Set of Requests for Production) at Request No. 26; Ex. D (Defendant's Objections to Plaintiff's First Set of Interrogatories) at Interrogatory No. 10.

Throughout the case, Plaintiff attempted to reach an amicable resolution with Defendant. On April 17, 2019, Plaintiff offered to resolve the litigation by transfer of Scratch.org domain name in exchange for payment of $20,000 and dismissal of the lawsuit. Ex. E (Apr. 17, 2019 email from D. Weslow to J. McDannell). On June 25, 2019, Defendant's counsel "convey[ed] my client's intent to accept the offer below in principle to resolve this matter and transfer the domain name." *Id.* (June 25, 2019 email from J. McDannell to D. Weslow). As partial consideration for

the agreement, Defendant demanded that Plaintiff halt production under third-party subpoenas that would disclose information regarding Defendant's registrant Ravi Lahoti. *See* Ex. F (Declaration of David Weslow, describing a verbal negotiation in which Defendant's counsel indicated that instructing third-party subpoena recipients to not move forward with their productions was a condition for settlement) ("Weslow Decl."). Indeed, in accepting the settlement offer, Defendant's counsel sought confirmation that "subject to this settlement in principle you are willing to email the records custodians at issue to extend the deadline of subpoenas and hold off production while we hash out the formal settlement that will moot any need for that information." Ex. E. The parties reached a settlement agreement on June 25, 2019. Weslow Decl. ¶ 6.

Because the parties had agreed to a settlement, and Plaintiff had already fulfilled a condition of that settlement, Plaintiff understood this matter to be resolved and did not seek further discovery. Indeed, Defendant implicitly confirmed that the matter was resolved, as the due date for responses to Plaintiff's discovery (July 3, 2019) came and went with no responses or production or request for an extension of the deadline by Defendant.

Suddenly, on September 4, 2019, Defendant's counsel informed Plaintiff that Defendant intended to renege on the settlement agreement. Defendant's counsel wrote:

> David,
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> I spoke with Ravi [Lahoti, purported registrant of Scratch.org] last night. He has asked me to revise the agreement with some additional changes. Before spending time on a redline, I wanted to run these by you conceptually to see if they would even be considered by your client. First and foremost, he proposes to remove both the domain transfer and $20,000 payment (basically changing the settlement to a walk-away). He has also rejected the non-disparagement clause. If your client would like to discuss this version further, I can prepare a redline. And I apologize for the sudden turn of events. This just came up last night, and I was as surprised as I assume you may be.
>
> Best regards,

David Ludwig – Partner

Ex. G (Sept. 4, 2019 email from D. Ludwig to D. Weslow). Plaintiff promptly responded, reminding Defendant that the settlement had already been reached and Plaintiff had partially performed under the parties' agreement. *Id.* (Sept. 4, 2019 email from D. Weslow to D. Ludwig). While reserving its rights under the agreement in place, Plaintiff informed Defendant that it had no choice but to resume the litigation, as Defendant's delay tactics had left the parties with only a month to pursue discovery. *See id.*; Dkt. No. 35.

II. STATEMENT OF GOOD FAITH EFFORT TO RESOLVE DISPUTE

Pursuant to Local Rule 37(E), on June 21, 2019, undersigned counsel for Plaintiff sent a letter to Defendant's then counsel, Jay McDannell, raising a number of concerns regarding the objections served by Defendant two days earlier and requesting counsel's availability to discuss Defendant's responses. Defendant's counsel did not respond to the request before the parties entered into a settlement agreement on June 25, 2019.

Upon learning on September 4, 2019, that Defendant was reneging on the settlement agreement, Plaintiff's counsel immediately requested a time to meet-and-confer regarding Defendant's failure to respond to Plaintiff's discovery requests and Defendant's improper objections thereto. On September 6, 2019, Ari Meltzer of our firm conferred with Defendant's new counsel, David Ludwig. Although the parties were able to narrow the items in dispute, Defendant's counsel could not agree to a date certain to respond to Plaintiff's discovery requests, and the parties were unable to agree regarding Defendant's improper objections to one interrogatory and one document request, which are the subject of the instant Motion.

III. ARGUMENT

Defendant has failed to provide any responses or make any production related to Plaintiff's first sets of interrogatories and requests for production. Plaintiff requests that the Court order

prompt responses, including complete information regarding the use of domain names in the registrant's domain portfolio and the revenue derived therefrom.

A. Defendant Must Respond to Plaintiff's First Sets of Requests for Production and Interrogatories.

Federal Rules of Civil Procedure 33 and 34 provide that, unless otherwise stipulated or ordered, interrogatories and requests for production must be responded to within 30 days. A party may enforce these rules through a motion to compel pursuant to Rule 37(B).

Plaintiff served its first sets of interrogatories and requests for production on Defendant by hand on June 3, 2019. Responses were thus due on July 3, 2019, yet Defendant has made no productions and has provided no written response. Nor has Defendant obtained an order from the Court or consent from Plaintiff to delay its responses. Defendant's delay is contrary to the Federal Rules of Civil Procedure and must be rectified as soon as possible.

In view of the circumstances, Plaintiff requests that Defendant provide written responses and produce documents within eleven (11) days of an order on this motion. *See* Local Rule 37(C). This amount of time is more than sufficient to craft responses and collect documents, as Defendant has been in possession of Plaintiff's discovery for the past three months. Defendant is apparently now denying that settlement was ever reached—a point Plaintiff strongly disagrees with. But if it were correct, Defendant has absolutely no explanation for its failure to provide discovery responses. Furthermore, Defendant was in possession of Plaintiff's discovery for three weeks before settlement was reached, and had already provided objections to the discovery. Presumably, during this time Defendant began, or at least contemplated, providing the required responses, and therefore should be able to turn responses and production around quickly.

B. Defendant Must Produce Information Regarding Registrant's Use of Domain Names in Its Portfolio, Which Is Relevant to Bad Faith.

In the parties' meet and confer on this motion, Defendant's counsel represented that Defendant will stand on its relevance objections to discovery requests seeking information on how the purported registrant, Ravi Lahoti, used the domain names in his portfolio, including the revenues derived therefrom. Defendant's relevance objections lack merit because these requests go to Defendant's bad faith intent to profit off Plaintiff's mark, by establishing Mr. Lahoti's practice of registering cybersquatting domains as a means of collecting revenue. Indeed, Plaintiff has reason to believe that Mr. Lahoti has a long history of registering domains, including domains that abuse trademarks or mislead consumers, for his own financial gain. *See, e.g.*, Dkt. No. 34 (Order on Motion to Transfer Venue) (finding that Mr. Lahoti is "a notorious cybersquatter"); *TrafficSchool.com, Inc. v. Edriver, Inc*., 633 F. Supp. 2d 1063, 1081 (C.D. Cal. 2008), *aff'd in part, rev'd in part and remanded*, 653 F.3d 820 (9th Cir. 2011) ("Defendant SeriousNet, and by extension its owner Ravi Lahoti, have displayed a pattern of registering misleading domain names such as 'lasuperiorcourts.org,' 'USTREASURY.ORG' and 'USDEPARTMENTOFHOMELAND SECURITY.ORG,' that redirect visitors to Defendants' own websites, including DMV.ORG, and other affiliates.").

The use and revenue information is relevant to Defendant's registrant's "registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties." 15 U.S.C. § 1125 (d)(1)(B)(viii) (stating factors to be considered in an ACPA bad faith analysis). Mr. Lahoti's history of profiting off websites that are identical or confusingly similar to others' marks is evidence that he knows these domains are

similar to marks and in fact targets such domains. Moreover, his pattern of profiting from cybersquatting in general sheds light on whether his registration and use of the Defendant domain was in bad faith. *See Lahoti v. Vericheck, Inc*., 586 F.3d 1190, 1194 n.2 (9th Cir. 2009) ("[W]e would be remiss if we did not note Lahoti's cybersquatting activities, because they are relevant under the ACPA to whether a person acted in bad faith."); *Lucas Nursery and Landscaping, Inc. v. Grosse*, 359 F.3d 806, 811 (6th Cir. 2004) (explaining that "[t]he factors are given to courts as a guide, not as a substitute for careful thinking about whether the conduct at issue is motivated by a bad faith intent to profit"); *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 213 F.Supp.2d 612, 626 (2002) ("It is important to pursue the analysis of the issue of bad faith factor-by-factor, and it is significant that when this is done here, the factors on balance point persuasively to a finding of bad faith. It is equally important, however, to step back and examine the larger picture to determine whether it is consistent with a finding of bad faith.").

Plaintiff therefore asks that Defendant be directed to fully respond to Interrogatory No. 10 and Request for Production No. 26, as the information sought therein is relevant to the issues of this case.

IV. CONCLUSION

For the reasons stated herein, Plaintiff asks that the Court issue an order compelling Defendant to provide complete responses to all of Plaintiff's pending discovery requests and produce all responsive documents within eleven (11) days of its order.

Dated: September 6, 2019

By: /s/ Attison L. Barnes, III /s/

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CERTIFICATE OF SERVICE

I, Attison L. Barnes, III, hereby certify that on September 6, 2019, I electronically served the foregoing on all counsel of record via the Court's CM/ECF system.

/s/ Attison L. Barnes, III /s/
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