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## Introduction

Plaintiff Jayme Gordon has deliberately and without any proper justification refused to appear for his long-scheduled deposition in this case and, pursuant to Federal Rule of Civil Procedure 37(d), Defendants hereby move to dismiss his Complaint. In the alternative, Defendants seek an order requiring Plaintiff to appear for his deposition within two weeks of the Court's ruling on this motion. Defendants further request that the Plaintiff and his counsel be ordered to pay for the costs and expenses incurred in delaying his deposition, and in making the present motion.

This is a copyright infringement case in which Defendants have been accused of stealing Plaintiff's purported characters and story elements in creating the commercially and critically successful 2008 animated motion picture *Kung Fu Panda*. As set forth below in more detail, Plaintiff's testimony regarding his works, his alleged interaction with Defendants, his attorneys' inconsistent representations regarding his records and his apparent intentional destruction of material evidence are of paramount importance to the defense of this case and cannot be obtained from any other source or individual. By intentionally refusing to appear for his deposition, Plaintiff and his counsel have deprived Defendants of this crucial and likely dispositive testimony.

There is no emergency or other good faith basis to justify or excuse Plaintiff's refusal to appear for his deposition. The deposition was set for October 19, 2011 at the request of Plaintiff's counsel, even though it was noticed for a date a month earlier by Defendants.<sup>1</sup> Plaintiff's counsel has now deliberately refused to go forward with this deposition in order to

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<sup>1</sup>On August 18, 2011, Defendants served a notice of deposition on Plaintiff, noticing his deposition for September 22. Despite the fact that Defendant is represented by eight counsel of record, Plaintiff's counsel informed Defendants that they could not be available to defend this deposition until October 19, at the earliest. Plaintiff's counsel thus delayed the deposition by a month, and the date of the deposition was set for October 19.

make a bad-faith application to the Court, seeking a protective order with respect to issues that have absolutely no bearing on Plaintiff's deposition.

Plaintiff filed this action without notice to Defendants more than three years after Defendants began widely exploiting *Kung Fu Panda*. In his lawsuit, Plaintiff claims that the scores of professionals, including independent writers and artists who created the different elements of *Kung Fu Panda*, all conspired to steal these elements from his amateurish drawings and stories, which he claims he created in the early 1990s (but which he didn't try to register for copyright until 2008 and 2011, after he was aware of *Kung Fu Panda*, and which the Defendants, and to which the scores of persons who actually created the different elements in the film, could not have possibly had access).<sup>2</sup>

With regard to his purported works, when Defendants inquired about the computers and underlying files associated with Plaintiff's electronically created records contained in the 2008 and 2011 registrations that are the core of this lawsuit, Plaintiff's counsel provided inconsistent answers and ultimately asserted that Plaintiff threw away the computer that he used to create the electronic art and story files, and destroyed all of these electronic files shortly before he filed this lawsuit.

Because the Plaintiff's claim in this matter has all of the appearances of a scam, in anticipation of Plaintiff's deposition, Defendants conducted a routine background investigation

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<sup>2</sup> Another claimant recently filed suit against DreamWorks Animation, claiming that *he*, in fact, had come up with the idea for the film *Kung Fu Panda*. In connection with that prior claim, Defendants successfully litigated the issue of their independent creation of the film in another jurisdiction earlier this year, and the documents and sworn testimony of numerous witnesses in that case incontrovertibly establish that Plaintiff's works played no role in the creation, development or production of *Kung Fu Panda*. Mr. Gordon and his works were nowhere to be found in that case's tens of thousands of documents, numerous declarations and weeks of sworn testimony because the creators of *Kung Fu Panda* had never heard of Mr. Gordon, never had access to his purported works, and independently created the story and characters that he now claims were stolen from him by Defendants.

relating to Mr. Gordon, including but not limited to any criminal record, his prior lawsuits and his past and current employment.<sup>3</sup> There was nothing illegal or improper about this investigation and the results of any work performed in this regard are unquestionably protected by the work product doctrine. Further, because of Plaintiff's apparent lack of employment, his criminal record, the spurious nature of his claims, and the apparent intentional destruction of evidence in this case, this background check included minimal legal and non-intrusive observation of Plaintiff. Mr. Gordon's lawyer, Gregory Madera, became aware of this routine investigation and demanded that the results of this investigation be turned over to Plaintiff. There is, of course, no legal basis for such a demand – and Mr. Madera has refused to provide any such justification. Mr. Madera was also informed that any observation of Mr. Gordon had concluded weeks ago, that no illegal activities occurred (which Mr. Madera did not dispute), and that there was no present intention on the part of Defendants to further observe Plaintiff or to conduct interviews with Plaintiff's neighbors. Despite this, Mr. Madera unilaterally canceled the Plaintiff's deposition so that he can raise the completely unrelated issue of this investigation with the Court. There is absolutely no legal justification for this refusal to proceed, nor has Plaintiff's counsel cited to any legal grounds for this extreme action.

Plaintiff's contemplated motion is not made in good faith, has no legal basis, and is nothing more than a transparent attempt to further delay Mr. Gordon's deposition in the hopes that he can prejudice the Court before Defendants have an opportunity to present the Court with the facts relating to Mr. Gordon's bad-faith maintenance of this lawsuit.

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<sup>3</sup> The Plaintiff appears to have a criminal record, and has had a restraining order entered against him. In addition, Plaintiff's counsel, in the Complaint, alleged that Jayme Gordon is an artist and writer residing in Randolph. Complaint, ¶6. However, Gordon's lawyers then disclosed that Gordon had destroyed all of his electronic art files which were created in connection with his cartoon characters, characters that he had been working on for over a decade, and had displayed on the internet, leaving significant questions about Gordon's current vocation.

Plaintiff, having deliberately failed and refused to appear for his scheduled deposition, is subject to the sanction of dismissal, as specifically provided for in the Federal Rules. As set forth in Rule 37(b)(2)(c), the failure of a party to appear for a scheduled deposition, especially when there is no claim that the testimony sought in the deposition is objectionable, is grounds for sanctions, including dismissal of this action.

Plaintiff Gordon had a clear choice in this case – he brought this suit and he has a legal obligation to appear and testify at deposition. His refusal to do so is an obvious and intentional violation of the Federal Rules of Civil Procedure and should be treated as such. Defendants therefore request that the Court order that this case be dismissed based on Mr. Gordon’s unequivocal, and unjustified refusal to appear for his deposition.

### **Factual Background**

#### **I. THE CREATION OF KUNG FU PANDA**

The film *Kung Fu Panda* was developed independently by defendant DreamWorks Animation LLC over the course of more than seven years, and with the creative input of hundreds of individuals. Specifically, the idea for *Kung Fu Panda* was developed between 2000 and 2002 by internal development executives and by highly-accomplished third party writers. Years later, the art and visual representations of the characters in *Kung Fu Panda* and additional characters and storylines were developed by other DreamWorks’ employees. At no time was any of Plaintiff’s supposed work used to create any part of the film, *Kung Fu Panda*.

Indeed, in this case, Defendants have already produced nearly 200,000 pages of documents relating to the creation and development of *Kung Fu Panda*. *Zavin Aff.*, ¶3. In those documents, there is not a single page that supports the idea that DreamWorks used any works created by Mr. Gordon to create its film or any of its characters or storylines. In fact, the only communication between Plaintiff and Defendants consists of a single standard rejection letter

sent to Gordon in October of 1999, telling him that DreamWorks does not accept unsolicited materials and was declining his request to submit something to DreamWorks. *Zavin Aff.*, Ex. A. Although Gordon retained this rejection letter, he has not produced the outgoing letter that he sent to DreamWorks nor has he provided any evidence of what ideas, art or stories he supposedly sent, if any, that resulted in his receipt of the rejection letter. *Id.*, ¶4 (This failure is striking because Gordon has produced outgoing letters from the same time period that he sent to other companies in failed attempts to sell his works.) Indeed, although Plaintiff’s counsel alleged in the Complaint that a package of work containing Gordon’s panda art was sent to DreamWorks, ***no such package exists***, so it is unclear on what basis this allegation was made.

## **II. PLAINTIFF JAYME GORDON**

Plaintiff claims to be an artist who developed dozens of characters and story ideas in the 1990’s. Complaint, ¶¶6, 14-22. Plaintiff briefly placed his art and stories on websites that he created in or about 1999/2000. *Id.* However, even if the creators of *Kung Fu Panda* had accessed these websites – which they did not – none of the material that he placed online at that time, including his “Panda Power” art and story, could possibly serve as the basis for a claim for copyright infringement.

It was not until 2008, after Gordon had viewed a trailer for *Kung Fu Panda* and after he had read articles that detailed the movie’s story and art (and only a few days before the film was widely released in theaters), that Gordon filed with the Copyright Office, for the first time, art and stories entitled “Kung Fu Panda Power.” Gordon’s 2008 and 2011 registrations also contain characters called the “Five Fists of Fury” – a group of kung fu fighting animals (a tiger, monkey-type-animal, snake, crane and a mantis) that supposedly fight crime with the protagonist pandas. Complaint, ¶¶19-20. The “Five Fists of Fury” were never included on Gordon’s websites, nor does it appear that these characters were ever publicly displayed or published anywhere. Gordon

claims that the “Furious Five,” a kung-fu fighting group of superhero animals in the film *Kung Fu Panda*, were taken from his “Five Fists of Fury” characters. Complaint, ¶¶40-41. Gordon also claims that the art (which is amateurish and even childish) included in his 2008 and 2011 registrations dates back to 1992, although he does not disclose what portions of these recent copyright registrations were created in the 1990’s, or what portion was created in 2008 in anticipation of this lawsuit. *Id.*, ¶¶65-67, Exs. C-E.

Plaintiff has never published any of his works (other than allegedly briefly on his own web site on the internet) and does not appear to have ever licensed any art or stories to anyone. Plaintiff has a criminal record, is the subject of at least one restraining order, and has no apparent employment, although he has received proceeds from suits claiming injury to his person and property. No one at DreamWorks had ever heard of Gordon or his unpublished works until, without warning and without any evidence of what was purportedly sent to DreamWorks (if anything) in 1999, his counsel filed this lawsuit in 2011 – almost three years after the theatrical release of *Kung Fu Panda*.

### **III. PLAINTIFF’S FAILURE TO PRODUCE FILES AND APPARENT DESTRUCTION OF EVIDENCE**

Plaintiff’s counsel, Fish & Richardson, alleged in the Complaint in this action that Gordon created his “Kung Fu Panda Power” works on a computer software program called Microsoft Photoshop.<sup>4</sup> Complaint, ¶68.

Therefore, shortly after the exchange of initial disclosures, and in part to investigate whether Gordon’s purported works were a fabrication created in order to file this lawsuit,

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<sup>4</sup> These files have not been produced in spite of Defendants’ repeated requests for all electronic files in Gordon’s possession or control. Indeed, aside from files that relate to the electronic information that was included on Gordon’s websites in or about 1999/2000, which files have no bearing on the claim that Plaintiff ever created either “Kung Fu Panda Power” or the “Five Fists of Fury”, none of Plaintiff’s electronic files containing his artwork or stories were turned over in this lawsuit. *Zavin Aff.*, ¶5.

Defendants requested that Mr. Gordon turn over his computer for forensic examination so that they could review the original electronic files, including the Microsoft Photoshop files alleged in the Complaint, that were created by Mr. Gordon. Zavin Aff., Ex. B. By letter dated August 15, 2011, Plaintiff's counsel agreed to make all of Mr. Gordon's computers and electronic files available for forensic examination. Id., Ex. C.

However, just two days later, on August 17, 2011, at the Scheduling Conference on this matter, Plaintiff's counsel, Mr. Gregory Madera, **stated that Mr. Gordon did not have a computer.** Zavin Aff., ¶8. This statement strained credulity, as Plaintiff Gordon has operated multiple websites, and continues to operate at least one of them, is specifically alleged to have used Microsoft Photoshop to create his artwork, and has used multiple email addresses over the course of the last decade.

Defendants pointed out these glaring inconsistencies to Fish & Richardson and, then, on a September 9, 2011 conference call, Mr. Madera stated that, **contrary to his prior representations, Mr. Gordon currently has two computers.** Zavin Aff., ¶8. Mr. Madera, however, stated that these computers do not contain any discoverable information, that Gordon had discarded the computer that he used between 2008 and 2011 to create his electronic "Kung Fu Panda Power," and the files that were on that computer – including the electronic files that were used to print out the works that were submitted to the Copyright Office in 2008 ***and*** 2011 – no longer exist. Id.

Thus, after creating electronic files relating to his panda and other characters and his purported "Kung Fu Panda Power" work, and after filing those documents with the Copyright Office in 2008 and 2011 in anticipation of filing this lawsuit, Mr. Gordon destroyed ***all*** of the electronic files relating to this lawsuit that were maintained on his computer. Mr. Gordon now claims he spent almost two decades toiling away on his "Kung Fu Panda Power" work,

registered copies with the Copyright Office to perfect his ability to sue Defendants and then, just before filing his Complaint, he threw away his entire body of work (with the exception of some paper drawings and notebook sketches that he claims date back to the early 1990's).<sup>5</sup>

#### **IV. THE SCHEDULING OF MR. GORDON'S DEPOSITION AND PLAINTIFF'S COUNSEL'S UNILATERAL AND IMPROPER CANCELLATION OF PLAINTIFF'S OCTOBER 19<sup>TH</sup> DEPOSITION**

On August 17, 2011 after the Court's Scheduling Conference, Defendants noticed Plaintiff Gordon's deposition for September 22, 2011. Zavin Aff., ¶11. Defendants noticed this deposition *over one month in advance*, and agreed to work with Plaintiff's counsel to coordinate the deposition on another date during that same week if the chosen date was inconvenient. Even though Plaintiff is represented by no less than eight counsel of record, his attorneys responded that the deposition could not take place during the week of September 22<sup>nd</sup>, and could not take place until October 19<sup>th</sup>, at the earliest. Zavin Aff., Ex. F. Thus, the first possible date Plaintiff's counsel gave for him to sit for his deposition was over 60 days after he was served with the notice of deposition. In order to avoid motion practice, Defendants agreed to take Mr. Gordon's deposition on October 19<sup>th</sup>, and confirmed that date with Plaintiff's counsel. *Id.*, Ex. G.

Five days before Mr. Gordon's deposition, Mr. Madera sent a letter stating that Mr. Gordon believed that investigators had been in contact with his neighbors and had been observing Mr. Gordon himself. Mr. Madera made no mention of Mr. Gordon's upcoming deposition, and no such mention was appropriate because the subject matter of his letter had nothing whatsoever to do with the Plaintiff's long-scheduled October 19<sup>th</sup> deposition. Zavin Aff., Ex. H. Mr. Madera demanded that any report conducted of Mr. Gordon's investigation be

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<sup>5</sup> Gordon's sketches which supposedly document the creation of "Kung Fu Panda Power" artwork contain numerous, and inconsistent, internal dates. For example, some are marked "1990-1993" and some are marked with two different dates on the same sketch. *See, e.g.*, Complaint, ¶26 (showing sketch containing dates of 1990 and 1992 on the same piece of paper).

produced to him. Mr. Madera did not cite to any legal basis for this demand and did not explain, in any way, why work product should be produced to opposing counsel.

Defendants declined to produce any such information, and specifically explained that the results of an investigation were work-product and were protected from disclosure. *Zavin Aff.*, Ex. I. Defendants further explained that no illegal conduct took place, and that none was claimed to have transpired. Thereafter, on Monday October 17<sup>th</sup>, less than 48 hours before Mr. Gordon's October 19<sup>th</sup> deposition, Mr. Madera wrote another letter, claiming that Mr. Gordon's deposition would not be going forward, and that he was dissatisfied with Defendants' refusal to turn over attorney work-product. *Zavin Aff.*, Ex. J. Again, Mr. Madera provided no legal basis for his demands or assertions, and made no attempt to meet and confer over the legal issues he believed supported his client's refusal to appear for his deposition.

Defendants responded and explained that Gordon had a clear obligation to appear for his scheduled deposition, and further warned that they would seek termination of this action if Gordon refused to appear and provide testimony in his own case. *Zavin Aff.*, Ex. K. Defendants further noted that any observation of Mr. Gordon had concluded weeks earlier and reiterated there was no illegal conduct or improper motive. Mr. Madera responded by confirming that no deposition would occur on October 19<sup>th</sup>, but, once again, did not provide any basis for objecting to the testimony sought at the October 19<sup>th</sup> deposition. *Id.*, Ex. L.

### **Argument**

Federal Rule of Civil Procedure 37 provides that sanctions, including dismissal are available for the failure of a party to appear for his deposition. There is "nothing in the rule that states or suggests that the sanction of dismissal can be used only after all the other sanctions [available under Rule 37] have been considered or tried." *Guex v. Allmerica Financial Life Ins.*

& Annuity Co., 146 F.3d 40, 42 (1<sup>st</sup> Cir. 1998) (plaintiff's failure to appear at his deposition justified dismissal of his lawsuit).

Specifically, Rule 37(d) provides as follows:

“Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party...fails, after being served with proper notice, to appear for that person's deposition...”

Pursuant to Rule 37(d)(3), sanctions for failure to appear for deposition include dismissal of the complaint, striking pleadings and entering a default judgment against the disobedient party. Under circumstances such as these, dismissal is warranted. See, e.g., Securities and Exchange Commission v. Lydia Capital, LLC, 2008 WL 5273313, Civil Action No. 07-10712-RGS (D. Mass. Dec. 19, 2008) (entering order of default against defendant for failure to appear at his properly noticed deposition).

Neither Mr. Madera, or any of Plaintiff's lawyers, asserted that the long-scheduled deposition date was impossible for scheduling reasons, or even inconvenient. There is no emergency justifying this last-minute refusal to appear – Plaintiff's counsel is simply interested in using the issue of Plaintiff's background investigation as a pretext for cancelling this deposition. Defendants have been attempting for months to obtain discovery from Plaintiff, only to be given false statements and dubious explanations for the lack of documentation for Plaintiff's claims, or for the assertions made by Plaintiff's counsel in the complaint.

Plaintiff's latest maneuver constitutes a clear abuse of the discovery process and is unacceptable conduct from the party who brought this case in the first place. Dismissal is clearly warranted.

In the alternative, Defendants request that Plaintiff be ordered to appear for his deposition within two weeks of the Court's Order on the present motion, at a date to be set by Defendants at their convenience, and subject to dismissal for any repeated failure to appear and testify.

Defendants further request an order that all fees and costs incurred with the present motion be paid by the Plaintiff and his counsel, as authorized by Fed. R. Civ. P.37(d).

### **Conclusion**

Defendants request that the Complaint be dismissed based on Plaintiff's deliberate and inexcusable failure and refusal to appear for his deposition. In the alternative, Defendants respectfully request that Plaintiff be ordered to appear within two weeks of the order on this motion, at a date to be set a Defendant's convenience, or at such other time as is convenient for the Defendants, under penalty of dismissal for his repeated failure to appear. Further, Defendants request that the Court order Plaintiff and his counsel to pay the costs and attorneys' fees incurred by the Defendants in bringing this motion pursuant to Fed. R. Civ. P. 37(d), the amount of such fees to be submitted within ten (10) days of the Court's order.

Dated: October 19, 2011

Respectfully submitted,

DREAMWORKS ANIMATION SKG, INC.,  
DREAMWORKS ANIMATION, LLC, and  
PARAMOUNT PICTURES CORP.,

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and a paper copy was sent to those indicated as non-registered participants on October 19, 2011.

/s/ Julia Huston  
Julia Huston