

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
JAYME GORDON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:11-cv-10255-JLT
)	
DREAMWORKS ANIMATION SKG,)	
INC., DREAMWORKS ANIMATION)	
LLC, and PARAMOUNT PICTURES)	
CORP.,)	
)	
Defendants.)	
)	
_____)	

AFFIDAVIT OF JOHN A. SHOPE

John A. Shope hereby deposes and says as follows:

1. I am a partner of Foley Hoag LLP and one of the attorneys representing the defendants in this action and make this affidavit based on my personal knowledge and in order to respond to the plaintiff’s allegations that the actions of my colleagues and myself in this case have been “at best...in violation of Massachusetts Rules of Professional Conduct 4.4 and 8.4 (d) and at worst...felonious.” “Emergency Motion for Protective Order and Sanctions” (Dkt. No. 34), at p. 7. These allegations are not only unsupported by any affidavit or other purported evidence but also are simply false.

2. I graduated from the University of Chicago Law School and was admitted to the bar in 1991. Other than one year as a law clerk to a federal district judge and four months as a special assistant district attorney for Norfolk County, I have been engaged in the private practice of law, specializing in commercial litigation, in the ensuing two

decades. I joined my firm (then Foley, Hoag & Eliot) in 1992 and became an equity partner on January 1, 2001.

3. In the course of my practice, I have been involved in a broad range of commercial cases, including intellectual property cases, in which one or both sides engaged private investigators for such purposes as investigating potential fraud, investigating party and witness background and associates, locating potential witnesses, developing facts for impeachment of witnesses, verifying or contradicting witnesses' versions of events, locating assets, and other purposes, all of which bore upon the prosecution or defense of the case.

4. I am therefore very surprised to read in the plaintiff's motion (p. 5) the (unsworn) assertion that the attorneys at Fish & Richardson have "never encountered" surveillance of a party or interviews of a party's neighbors "in an intellectual property case." Indeed, my colleagues have quickly identified four reported decisions in cases – all intellectual property cases – in which the similar use of private investigators by Fish & Richardson or its client is discussed.¹

5. In this case, I believed that an investigation of plaintiff Jayme Gordon was not only appropriate, but even required as part of competent representation of the defendants.

¹ See Coach, Inc. v. Angela's Boutique, Civil No. H-10-1108, 2011 U.S. Dist. LEXIS 65876 (S.D. Tex. June 15, 2011) (investigator used pretext to detect sale of allegedly counterfeit handbags in trademark infringement suit); Bose Corp. v. Neher, Civil No. 09-11479-PBS, U.S. Dist. LEXIS 143644 (D. Mass. July 13, 2010) (private investigator used to identify sellers of headphones allegedly infringing plaintiff's trademarks); Power-One, Inc. v. Artesyn Technologies, Inc., Civil No. 2:05-CV-463, 2007 U.S. Dist. LEXIS 75685 (E.D. Tex. October 11, 2007) (private investigator used in patent infringement case to track down former employees of alleged infringer); Dimension One Spas, Inc. v. Coverplay, Inc., Civil No. 03cv1099-L (CAB), 2006 U.S. Dist. LEXIS 90838 (S.D. Colo. December 15, 2006) (use of private investigator to locate inventors of preceding patent in infringement case).

Mr. Gordon's claim, which was filed without warning and three years after the allegedly infringing film, *Kung Fu Panda*, had been released in theaters nationwide in 2008, was implausible on its face, and the critical allegations of access by the DreamWorks defendants to Mr. Gordon's supposed creative work – a necessary element of his claim – were made on mere “information and belief.” See Cmplt. ¶¶ 51, 53-57. Furthermore, I learned from our co-counsel, Loeb & Loeb LLP, that in the course of successfully defending a case in California by another claimant who also asserted that he, not DreamWorks, had created the *Kung Fu Panda* story, DreamWorks had encountered no evidence whatsoever of any contribution by Jayme Gordon. To the contrary, numerous witnesses had testified to independent creation by the DreamWorks staff.

6. Mr. Gordon's claim became even more dubious when his attorneys admitted that he had no record of the materials that he purportedly had submitted to DreamWorks in 1999 and on which he bases his claim.

7. The documents that Mr. Gordon had produced following this Court's Modified Discovery Order of June 30, 2011 also revealed numerous inconsistencies in the style, story line, and other critical elements in Mr. Gordon's purported creative works. These inconsistencies strongly suggested and still suggest that some or all of the documents – including those pictured on page 2 of the present motion for protective order – might have been fabricated after the fact for purposes of filing a copyright infringement lawsuit. Mr. Gordon's attorneys admitted that he had not filed the relevant materials for his case with Copyright Office until 2008, many years after their supposed creation but shortly after Mr. Gordon had seen a movie trailer for the then-forthcoming DreamWorks *Kung Fu Panda* film.

8. The suspicion of fabrication was further strengthened by the fact that Mr. Gordon's attorneys made a subsequent filing with the Copyright Office admitting that drawings on which he bases his claim were not completed in 1999, as previously represented, but instead were not completed until 2008 – and thus after DreamWorks had created and began publicizing its film. In other words, Mr. Gordon had previously falsely stated the date of creation, and I believe that he likely did so intentionally given the critical importance of that date to his claim in this case. See Ex. A hereto.

9. The suspicions of fabrication were further heightened by shifting representations of Mr. Gordon's attorneys on related critical matters. To help determine whether Mr. Gordon had fabricated his drawings, by letter dated August 11, 2011, I requested a forensic examination of Mr. Gordon's computers, since it was clear that at least some of the material had been created on a computer, and Mr. Gordon affirmatively alleged (Cmplt. ¶ 68) that he had used a computer program, Photoshop, for some of his drawings. At first Mr. Gordon's attorneys agreed to such a forensic examination, but then categorically represented to me, just before the initial status conference in this Court on August 17, 2011, that Mr. Gordon did not have any computer to be examined.

10. Mr. Gordon's attorneys later represented to my co-counsel in writing that Mr. Gordon did have a computer, but that it supposedly had not been used for relevant work. This was so because, as Gordon's attorneys represented to me in writing, after having used a computer to create his application for copyright protection in 2008 (admittedly after having viewed a trailer for the DreamWorks film and doubtless in anticipation of an infringement suit), Mr. Gordon discarded the computer and all of the relevant electronic

files on it. See letter dated August 30, 2011 from Kristen McCallion to John A. Shope, attached as Ex. B.

11. These shifting representations and now admitted facts strongly suggested, and continue to suggest, that Mr. Gordon fraudulently fabricated the drawings on which he bases his copyright infringement claims and then discarded the computer used for that purpose in order to conceal the fabrication.

12. In the meantime, a review of public records showed, among other things, that Mr. Gordon had a criminal conviction for assault; that he had been the subject of a restraining order; that he had been sued for failure to pay credit card debt; and that he had made claims for a personal injury (loss of hearing) but resisted an independent medical examination, with a Superior Court judge ruling that his case was not likely to succeed on the merits; and that he had made a claim for accidental damage to his vehicle for which he lacked documentation and that an adjustor considered inflated by a factor of almost ten. Furthermore, while the complaint (¶ 2) alleges that Mr. Gordon is an artist by profession, there was no evidence of any licensure of any work that he may have created.

13. Taken together, the foregoing facts and others certainly suggested, and continue to suggest, the possibility that some or all of Mr. Gordon's allegations are fraudulent, and that my colleagues and I would be remiss if we did not investigate.

14. To that end, I took charge of supervising the investigation. We retained the investigative division of Marcum LLP, an international accounting firm and licensed detective agency that my co-counsel and law partner, Julia Huston, indicated had successfully been used in a previous intellectual property case, and in particular a lead

investigator whose credentials include a law degree and service in the Federal Bureau of Investigation.

15. I specifically instructed Marcum to conduct surveillance and otherwise obtain information by lawful means only. I further instructed Marcum not to make any misrepresentations.

16. To the best of my knowledge and belief, no interviews were conducted of Mr. Gordon's relatives. Contrary to the unsupported assertions in the plaintiff's motion, there was no intent of "overt" surveillance.

17. There was no intent to harass or harm Mr. Gordon, but only to seek the truth as it bears on this case. I am not aware of any conceivable basis whatever for the unsworn assertion in the plaintiff's brief that Mr. Gordon feared for the safety of his 16 year-old son.

18. Mr. Gordon's attorneys did not explain why they waited almost two weeks after Mr. Gordon's discovery that he was being observed to make this complaint. Only two days before his long-scheduled deposition they did, however, announce that Mr. Gordon would not appear for his deposition, which had been originally scheduled for September 22, 2011 and then rescheduled to October 19, 2011 at their specific request. The plaintiff's attorneys asserted that the fact of the investigation was the reason for Mr. Gordon's refusal to appear but did not explain the supposed connection between those two points. Nor did they change their position after being advised in writing that observation of Mr. Gordon had concluded weeks earlier.

19. The present motion for a protective order was filed at 7:03 p.m. on October 18, 2011, the day before Mr. Gordon's scheduled deposition, without evidentiary support,

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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 (NEF) and paper copies will be sent to those indicated as non-registered participants on the above date.

/s/ David A. Kluff