

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 DAVID GROSSMAN IN OPPOSITION
TO MOTION FOR PROTECTIVE ORDER**

I, DAVID GROSSMAN, declare as follows:

1. I am a partner in the law firm of Loeb & Loeb LLP (“Loeb & Loeb”), one of the counsel of record for defendants DreamWorks Animation SKG, Inc., DreamWorks Animation LLC and Paramount Pictures Corp. (collectively, “Defendants”). I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would testify competently to such facts under oath. I respectfully submit this declaration in support of Defendants’ Opposition to Plaintiff’s Motion for Protective Order.

**DEFENDANTS HAVE PROVIDED PLAINTIFF WITH AN
OVERWHELMING AMOUNT OF DOCUMENTATION
EVIDENCING THE INDEPENDENT CREATION OF *KUNG FU PANDA*.**

2. This case was filed in February of 2011. The film, *Kung Fu Panda*, was widely released in theaters in the United States in June of 2008. This is the second claim that I have defended relating to assertions that the exact same elements of the film that Gordon claims were copied from him did not originate with DreamWorks Animation. I was counsel of record in

Dunn v. DreamWorks Animation et al., filed in Los Angeles Superior Court (BC 438833) in June of 2010. Judgment was entered in favor of DreamWorks in that case after a jury verdict was issued finding that DreamWorks did not use Mr. Dunn's alleged ideas in creating *Kung Fu Panda*. No mention of Mr. Gordon, or his work, was made by any witness in the trial as no one who worked on the film had heard of Mr. Gordon, or his work, until 2011 when he filed this lawsuit.

3. Prior to the initial Scheduling Conference in this matter, the parties each exchanged documents relevant to the claims and defenses in this action. Further, following those initial document productions, each side has produced further documents at the request of the other side, where the requesting party thought that some relevant documents may have been omitted from the initial production.

4. In this case, Defendants have already produced nearly 200,000 pages of documents from their files, evidencing the independent creation of *Kung Fu Panda* over a period of several years, and by an entire host of creative contributors. These documents that Plaintiff's counsel has received, and which I have reviewed, chronicle the organic development, over a period of many years, of *Kung Fu Panda*. These files even include audio tapes (and transcripts) of "pitch" meetings with third-party writers who developed various elements of the film's story. After reviewing these documents, no reasonable attorney could assert that *Kung Fu Panda* was copied from Plaintiff's various unpublished works.

5. On August 18, Defendants served a notice of deposition on Plaintiff, in which his deposition was noticed for September 22, more than one month in advance. Plaintiff's counsel then contacted Defendants' counsel and, despite the fact that Plaintiff had eight lawyers of record, informed Defendants that the earliest that the Plaintiff's deposition could be scheduled was October 19. On this basis, the deposition was set for that date. In August, the Plaintiff's

counsel had notice, and agreed, that the deposition of Plaintiff Gordon would be taking place on October 19.

PLAINTIFF FAILED TO PRODUCE THE PACKAGE WHICH HE HAS REPEATEDLY ALLEGED WAS SENT TO DREAMWORKS.

6. Included within both the Complaint and the Amended Complaint is a specific allegation stating that, in 1999, Plaintiff submitted an unsolicited package to DreamWorks that contained “a number of his illustrated works, including [his] Kung Fu Panda Power Work,” which apparently included the “drawings, illustrations, characters, character attributes, literary text, and artistic expression embodied within” his purported work entitled Kung Fu Panda Power. After reviewing Plaintiff’s documents produced in this action, no such package was located. Further, no letter to DreamWorks was produced.

7. The only document relating to this crucial allegation made in the Complaint and the Amended Complaint is a rejection letter sent to Plaintiff in October of 1999. The rejection letter clearly informed Gordon that DreamWorks does not accept unsolicited materials and was declining his request “to submit” something to DreamWorks. Attached hereto as Exhibit “A” is a true and correct copy of the rejection letter that was sent by DreamWorks to Plaintiff Gordon, which he produced in this action. The letter itself does not indicate that any material was actually sent to DreamWorks, only that Plaintiff had requested the opportunity to submit an undescribed project: “Although we appreciate your interest, our company policy strictly prohibits our consideration of any unsolicited material. We generate our projects internally, and therefore we must decline your request to submit your proposed project.”

8. Plaintiff received many other rejection letters during the 1990’s from companies that he wrote to or submitted his work to, including Disney, Houghton-Mifflin, and others. Plaintiff retained, and produced, some of his outgoing letters in connection with some of these

submissions, but Plaintiff never produced the outgoing letter he purports to have sent to DreamWorks.

PLAINTIFF FAILED TO PRODUCE THE ELECTRONIC FILES REFERENCED IN THE COMPLAINT AND NOW CLAIMS THAT HIS COMPUTER FILES CONTAINING CRITICAL EVIDENCE WERE THROWN AWAY.

9. Plaintiff failed to produce the electronic files referenced in the Complaint – specifically, the “Kung Fu Panda Power” art Plaintiff alleges that he created using Microsoft Photoshop. Plaintiff also failed to produce a single email relating to this case, or to the creation of his artwork or stories. Based on this failure to produce evidence, prior to the initial Scheduling Conference in this matter, 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. Attached hereto as Exhibit “B” is a true and correct copy of a letter dated August 11, 2011 sent to Plaintiff’s counsel and requesting the forensic review of Plaintiff Gordon’s computers and files.

10. On August 15, 2011, Kristen McCallion, Plaintiff’s counsel, agreed to make Plaintiff’s computers and electronic files available for forensic examination. Ms. McCallion did not state or imply in any way that Mr. Gordon did not have electronic files relevant to this case, or that Plaintiff did not have a computer. To the contrary, the August 15 letter, attached hereto as Exhibit “C”, gave Defendants the clear impression that such files existed, and would be made available.

11. That same week, on August 17, 2011, at the Scheduling Conference on this matter, Plaintiff’s counsel stated that Mr. Gordon did not have a computer, rendering any search of his electronic data moot. Upon being advised of this dubious statement by Plaintiff’s counsel, I drafted a letter to Ms. McCallion, noting that the Plaintiff maintains a website, has maintained multiple websites during the last decade, has used multiple email addresses during that time period, and is specifically alleged to have created his electronic art using Microsoft Photoshop.

Attached hereto as Exhibit “D” is a true and correct copy of my letter to Plaintiff’s counsel on this issue.

12. I participated in a conference call to discuss discovery issues with Plaintiff’s counsel, including Gregory Madera and Kristen McCallion, on September 9, 2011. On that call, Mr. Madera stated that Plaintiff currently has two computers. Mr. Madera did not explain why Plaintiff’s counsel had previously represented that Plaintiff did not have a computer. Mr. Madera also asserted that there was no relevant data on Plaintiff’s computers because the computer that Plaintiff was using in 2008 to create at least some of the documents that he deposited with the Copyright Office in 2008 and 2001 had been thrown away. Mr. Madera stated that he did not know when the relevant computer files had been destroyed, and would only say that it was sometime between 2008 and the present.

13. After hearing this news from Mr. Madera, I sent another letter reiterating Defendants’ request that Plaintiff permit his computers to be the subject of a forensic examination. Even though Plaintiff’s counsel had agreed to this request on August 15, 2011, Plaintiff’s counsel responded to my letter stating that Mr. Gordon’s computer(s) would not be made available for examination. Attached hereto as Exhibits E and F are true and correct copies of my letter to Plaintiff’s counsel of September 29, 2011, and Plaintiff’s counsel’s October 6, 2011 response.

PLAINTIFF’S COUNSEL BELATEDLY PRODUCES THE IMAGE THAT PLAINTIFF DOCTORED TO CREATE THE “COMPARISON” OF WORKS INCLUDING IN THE COMPLAINT, AMENDED COMPLAINT, AND THIS MOTION.

14. Plaintiff’s counsel has included an image of the characters “Po” and “Shifu” from the film, *Kung Fu Panda*, in the Complaint, in the Amended Complaint, and in this Motion. This image has repeatedly been juxtaposed by Plaintiff’s counsel with an unpublished sketch purported to have been made by the Plaintiff in an attempt to create the impression that DreamWorks copied Plaintiff’s work in creating *Kung Fu Panda*. The image used by Plaintiff’s

counsel of DreamWorks' characters was not produced in connection with Plaintiff's initial disclosures.

15. I called Plaintiff's counsel Kristen McCallion on October 24, 2011 to request the original image that was used to create the photo that was embedded in Plaintiff's pleadings. I received no response. I called Ms. McCallion again the following day and left her a detailed message explaining that I had reviewed Plaintiff's document production, and that the image included in Plaintiff's pleading was not there, and requesting that Plaintiff produce a copy of this document. Ms. McCallion left me a voicemail the following day stating that she was likely to be out of the office for the rest of the week, but not addressing my request for the image she had included in the Complaint, Amended Complaint and in this Motion.

16. I called Plaintiff's counsel, Greg Madera, on October 27 to request a copy of the original image that Plaintiff's counsel had used to create the photo at issue. Mr. Madera never returned my phone call. On October 28, 2011, I left a detailed message for Plaintiff's counsel Juanita Brooks explaining that I had called her colleagues and was requesting that the image that is included in Plaintiff's Complaint, Amended Complaint and Motion has not yet been produced. I asked Ms. Brooks to produce that document as soon as possible, and that same day if possible. Ms. Brooks did no return my phone call.

17. On October 31, 2011, I called Ms. Brooks again and she informed me that Ms. McCallion would be responding to my inquiry and that she believed that the image at issue was located on the internet. That same day, Ms. McCallion sent me an email containing the original image, purportedly located by Plaintiff's counsel on the internet, which was digitally altered in order to create the "comparison" used in Plaintiff's pleadings in this case. Attached hereto as Exhibit "G" is a true and correct copy of Mr. McCallion's email and the original version of the

image that was manipulated to create the impression that Defendants copied Plaintiff's unpublished sketch.

**PLAINTIFF'S COUNSEL PRODUCED KEY EVIDENCE SHOWING THAT
PLAINTIFF'S SUBMISSIONS TO DISNEY WERE REJECTED –
AFTER THE DATE OF HIS PREVIOUSLY-SCHEDULED DEPOSITION.**

18. On October 20, 2011, I received a letter from a paralegal at Fish & Richardson, enclosing three letters from Disney to Plaintiff Gordon. These three letters were unequivocal rejections of Mr. Gordon's attempts to submit his work to Disney. Even though Plaintiff alleged in his Complaint and Amended Complaint, that "access" to Jeffrey Katzenberg was made via Plaintiff's various submissions to Disney, these rejection letters were not produced until the day after Gordon's long-scheduled deposition, and just after Plaintiff filed this Motion to delay his deposition. Plaintiff's counsel has not offered any explanation for why these documents were not produced earlier.

19. Five days prior to Mr. Gordon's deposition, Plaintiff's counsel, 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 in his letter. Attached hereto as Exhibit "H" is a true and correct copy of Mr. Madera's October 14, 2011 letter. Mr. Madera demanded the work product investigation files and Defendants declined to produce any such information. In response, Mr. Madera, on October 17, 2011, and without any prior statement or suggestion that this investigation had any bearing on Plaintiff's ability to provide sworn testimony, stated that, based on Defendants' refusal to turn over their privileged work product, he was unilaterally cancelling the Plaintiff's deposition. Attached hereto as Exhibit "I" is a true and correct copy of Mr. Madera's October 17, 2011 letter.

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

/s/ David A. Kluft