

Exhibit B

October 21, 2010

VIA EMAIL AND US MAIL

William A. Delgado
Willenken Wilson Loh & Lieb LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017

Re: Deposition of Chris Pirrone

Dear Will:

Your client has asserted attorney-client privilege with respect to a number of items of correspondence from house counsel Chris Pirrone (and other in house attorneys) relating this matter. It is evident from testimony that Mr. Pirrone was instrumental in the decision making concerning whether to register, discard or transfer domains based on trademark infringement and/or ACPA matters. I have highlighted the following sampling of testimony taken thus far concerning Mr. Pirrone's extensive participation and decision making in this process:

Deposition of Lily Stevenson:

Q So let's focus on the cease and desist letters.

10 What is the substances of those cease and
11 desist letters that you're responsible for handling
12 right now?

13 A The ones that I'm handling right now is "Stop
14 infringing on our trademark." They ask to transfer the
15 domain.

16 Q And do you always transfer the domain?

17 A Yes.

18 Q 100 percent of the time you transfer the
19 domain?

20 A To the best of my knowledge, yes.

21 Q And who makes the ultimate decision whether or
22 not to transfer the domain?

October 21, 2010

Page 2 of 10

23 A General counsel and president of Firstlook.

24 Q Who's the general counsel?

25 A As of today it's David Graff.

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1 Q Who in the past has been general counsel making
2 that decision?

3 A Chris Pirrone, Julia Feldman. And there's one
4 other. I can't remember his name.

Q The fourth bullet point says:

17 "This blacklist is regularly
18 updated by our compliance staff as
19 described in the processes below."

20 Do you know who the compliance staff would be?

21 A Myself.

22 Q Anyone else?

23 A Compliance can fall under general counsel also.

24 So it depends.

25 Q Who would that be?

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1 A David Graff.

2 Q Before him, would it have been Chris Pirrone?

3 A Yes.

4 Q And before him, Lisa -- what was the name that
5 you told me before who was general counsel before Chris
6 Pirrone?

Q Who instructs you what to do with a domain
19 that's part of a cease and desist or UDRP?

20 A General counsel.

21 Q And what are the things that they tell you to
22 do?

23 For example, do they tell you to delete the
24 domain?

25 A No.

0118

1 Q Do they tell you to transfer the domain?

2 A Yes. If that's the case, yes.

3 Q Do you always do what they tell you to do in
4 those situations?

5 A Yes.

6 Q And are you the one that's told what to do with

October 21, 2010

Page 3 of 10

7 a domain because you access it through the CMS?

8 A I don't understand your last question.

9 Q If a domain is in a UDRP and Chris Pirrone
10 tells you to transfer the domain, are you the one that's
11 responsible for that because you have access to it via
12 the CMS?

13 A Yes.

1 Q What year did you create this document?

2 A 2008.

3 Q Did anybody help you in creating this document?

4 A Yes.

5 Q Who?

6 A General counsel.

7 Q Who?

8 A Chris Pirrone.

9 Q Who actually drafted the language in this
10 agreement -- or excuse me -- in this document?

11 A Chris Pirrone

* * *

11 A This was for the trademark scrub of the
12 portfolio, when we scrubbed the portfolio back in 2008.

13 Q Scrubbed whose portfolio?

14 A Navigation Catalyst's.

15 Q So they had already registered the domains when
16 the portfolio was scrubbed?

17 A Yes.

18 Q So they were the owner of the domains already?

19 A Yes.

20 Q So this was an attempt after registration to
21 identify trademark domains?

22 A Yes.

P. 126

Q So you only search the Google results against
3 what company name or trademark is returned by the
4 trademark tool?

5 A Yes.

6 Q What if some other company name or trademark
7 appears? What do you do then?

8 A They would trigger the levels, the trademark

October 21, 2010

Page 4 of 10

9 levels below.

10 And if we felt -- if I felt like it was high
11 and enough -- you know, in enough sense where it's like
12 yes, it's a company, I will send it over to Seth Jacoby
13 and Chris Pirrone to make the final decision.
14 I just compile the list as a -- as a list was
15 pulled.

7 A They would scrub the portfolio. I reviewed
8 their work.

9 Q Okay.

10 A So that was the second level review.

11 After my reviews, I still send Seth and Chris
12 the domains, saying, "Here, this is what they thought
13 was low. This is what's medium and high."

14 Q To your knowledge, did Chris Pirrone go through
15 every single domain?

16 A Yeah, yes.

p. 179

Q You say you have no control, but aren't you the
9 one that decides whether to delete a particular domain
10 name?

11 A No.

12 Q Aren't you the one that is responsible for
13 making a recommendation regarding which domain name to
14 delete?

15 A Yes.

16 Q So when you look at the domain names that are
17 subject of the cease and desist letter, do you believe
18 that your decisions were accurate?

19 A For a cease and desist letter, I don't make the
20 decision. Seth Jacoby and Chris Pirrone makes the
21 decision

Deposition of Donald Misino:

20 Q Okay. So you're saying that the rationale
21 as to NCS's portfolio of domain names would have
22 occurred with counsel?

23 That is to say -- I -- I appreciate what

October 21, 2010

Page 5 of 10

24 counsel is saying here. I just need to know, you
25 know, if -- "There were conversations, but I can't
0130

1 tell you what they were because they were with
2 counsel" or "There were no conversations -- even
3 though we had general conversations with counsel,
4 there were no conversations about protecting NCS and
5 the related entities from potential liability and
6 discovery."

7 A Right. There were discussions along the
8 lines of preventing spam and being able to offer
9 that as a general service. Other registrars do.
10 Should we choose to?

11 Anything related to trademarks was only
12 discussed with counsel.

Deposition of Mavi Llamas:

Q Who besides you and Lily Stevenson would
14 have performed the process that goes along with
15 reviewing this list?

16 A We also had some assistance from our legal
17 counsel at some times.

18 There have also been different temps that
19 have come in that we were trying to hire that may
20 have -- may have performed this task.

21 Q When you say assistance from legal counsel,
22 would they tell you which domains to register?

23 A We would review the list with them and say,
24 "This is what I am excluding," send it to our legal
25 counsel, and they would send back their note so that
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1 we would be better trained and better...

2 Q And who was that legal counsel?

3 A There was -- Rohit Shenrikar is one of
4 them. That's the one I remember working with most.

5 Q Did you ever work with Mr. Delgado?

6 A No.

7 Q Do you know of anybody else that worked
8 with Mr. Delgado?

9 A No.

10 Q What about Chris Pirrone?

October 21, 2010

Page 6 of 10

11 A Chris Pirrone. He worked -- Lily used to
12 report to him when she was in the legal department.
13 I believe they worked together on this.

Q Do you know if anybody reviewed domain
0086

1 names after you reviewed them?

2 A Yes, they were reviewed occasionally by --
3 as I stated, we had our legal counsel who helped us
4 with domain lists for a period of time.

5 And also sometimes Seth Jacoby would review
6 the lists.

7 Q So is it your understanding that Seth
8 Jacoby would make a determination as to whether to
9 keep or delete a domain name?

10 A He could make a determination, yes.

11 Q What about your legal counsel? Would they
12 make the same --

13 (Speaking simultaneously.)

14 THE WITNESS: They could also --

15 BY MR. HALL:

16 Q -- determination?

17 A Yes.

Deposition of Seth Jacoby:

P.39

A. He provided legal advice.

3 Q. Would he have provided advice as to
4 whether or not to register certain domains?

5 A. Chris provided legal advice on where
6 there was risk in the business. That may have
7 included whether a domain name was of high risk or
8 low risk.

9 Q. Okay. I'm not asking about risk.
10 I'm asking you whether or not he provided advice
11 as to whether or not domains should, in some
12 instances, be registered?

13 MR. DELGADO: Same objection. At
14 this point, he's answered the question.

15 MR. SCHAEFER: He has not. It's a

October 21, 2010

Page 7 of 10

16 yes-or-no response.

17 A. It's not a yes-or-no response.

P. 41

Q. Any advice, any input.

13 Did he ever provide any advice?

14 A. He provided legal advice, yes.

15 Q. As to whether or not to register
16 certain domains?

17 A. Whether or not to register a domain
18 name? I mean, legal advice, whether or not to
19 register a domain name? If a domain name was a
20 risk that our company should not have had, Chris
21 would provide legal advice that this domain name
22 should be disposed of, yes.

23 Q. Okay. And so maybe we're getting
24 caught up in semantics here, because the next
25 question is going to be: Did Chris Pirrone ever
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1 provide any advice, input, as to whether or not a
2 domain should be deleted?

3 A. Yes.

P. 42

Q. With regards to trademark issues,
23 whether or not a domain may be a trademark risk,
24 I understand Chris Pirrone is sometimes involved
25 in that discussion, I understand you're sometimes
0043

1 involved in that discussion.

2 Who else, through the years, has been
3 a person who would have been involved in
4 discussion as to whether or not to keep a domain
5 that may or may not be a trademark risk?

6 A. Primarily, that conversation would
7 happen between me, and Chris would advise me on
8 that. I mean, how far back do you want to go?

Whether NCS is a bad faith cybersquatter or a willful infringer of trademarks is necessarily dependent upon Chris Pirrone's determinations made concerning both the process and the

October 21, 2010

Page 8 of 10

handling of individual domain registrations and disputes while employed with NCS and the competency of advice relied on by others in the company.

We will be relying on a number of cases dealing with reliance of the advice of counsel defense in the intellectual property area to assert entitlement to fully depose and examine Chris Pirrone relative to the screening and advice provided concerning whether domain registrations violated trademarks or the ACPA. There are a multitude of case in the patent arena within the Sixth Circuit and several trademark cases in other circuits which discuss waiver of attorney-client privilege in defense of claims of trademark infringement. Several of those cases are outlined below including one by our Magistrate Virginia Morgan in the patent context.

1. *Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, L.P.*, 210 F.R.D. 673 (D. Minn. 2002).

Food producer using the MINNESOTA WILD mark and logo brought trademark infringement case against professional hockey franchise that had subsequently named its team "Minnesota Wild." On plaintiff's motion to compel discovery, the District Court, Erickson, United States Magistrate Judge, held that waiver of attorney-client and work product privileges arising from assertion of advice-of-counsel defense to trademark infringement claim extended to any documents related to the substance of that defense, and was not limited merely to the specific opinion letter upon which defendants allegedly relied. Motion granted.

2. *Adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1047-48 (D. Or. 2008)

The court likened the patent analysis of "advice of counsel" defense to that in a trademark action. However, this analysis did not consider the attorney-client privilege waiver as a result of asserting that defense. Instead, it looked at the "advice of counsel" defense to determine whether the relied-upon advice was actually **competent** advice in which the court indicated:

A defendant's reliance on the advice of counsel is relevant to the question of willfulness. *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham*, 259 F.3d 1186, 1196 (9th Cir.2001). Generally, obtaining the advice of counsel generally negates a finding of willfulness unless the advice is ignored or is found to be incompetent. *Chiron Corp. v. Genentech, Inc.* 268 F.Supp.2d 1117, 1121 (E.D.Cal.2002) (citing *Comark Comm., Inc. v. Harris Corp.*, 156 F.3d 1182, 1191 (Fed.Cir.1998)). Before a court will consider the exculpatory value of an opinion of counsel, however, "the legal advice contained therein must be found on the totality of the circumstances to be competent such that the client was reasonable in relying upon it." *Comark*, 156 F.3d at 1191. If the opinion is not competent, then it is of little value in showing the good faith belief of the infringer. *Id.*

Whether advice is competent, and whether it was reasonable to rely on the advice, depends on several factors, including: (1) the background research performed by the attorney; (2) whether the opinions were written or oral; (3) the objectivity of the opinions; (4) whether the attorneys rendering the opinions were trademark lawyers; (5) whether the opinions were detailed or merely conclusory; and (6) whether material information was withheld from the attorney. *Chiron*, 268 F.Supp.2d at 1121.

Our magistrate in this case Virginia Morgan has also evaluated the assertion of attorney-client privilege in a willful infringement claim in a patent case. In ordering the depositions of both trial counsel and the production of documents which were claimed privileged Magistrate Morgan stated:

Where the patent holder alleges wilful infringement, the alleged infringer's mind is a matter of consequence. *Thorn EMI North America, Inc. v. Micron Technology, Inc.*, 837 F.Supp. 616, 621 (D.Del.1993). Proof of reliance on competent legal advice is an important defense to a claim for willful infringement. *Key Technology Inc. v. Simco/Ramic Corp.*, 137 F.R.D. 322, 325 (D.Or.1991). When such reliance is pleaded, there is a waiver of the attorney-client privilege and work product protection, at least to the extent of all information respecting communications between the client and attorney up until the time the opinion is rendered. *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929-33 (N.D.Cal.1976). At a minimum, the plaintiff patent holder should be entitled to discover facts relating to when defendant sought the advice, what defendant knew about defense counsel's independence, skill, and competence to provide the opinion, what defendant knew about the nature and extent of analysis performed by defense counsel, and what defendant knew or had concluded about the credibility, value, and reasonableness of the opinion. *Micron*, 159 F.R.D. at 362.

Michlin v Canon, Inc, 208 FRD 172 (E.D. Mich 2002).


Utilizing in house counsel Chris Pirrone for making determinations, advice, and final review of domains prior to and after registration as a defense to willful infringement and absence of bad faith registration under the ACPA waives any privilege or work product argument which may otherwise attach to Mr. Pirrone's communications and determinations.

October 21, 2010
Page 10 of 10

Please contact me to resolve these issues and to schedule the deposition of Chris Pirrone.

Sincerely,

TRAVERSE LEGAL, PLC

A handwritten signature in black ink, appearing to read 'ES', with a long, sweeping underline that extends to the right.

Enrico Schaefer
enrico@traverselegal.com

ES/cad

Cc: All counsel of record